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Bad lawyering

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Those of us who study what lawyers actually do know that most of them help resolve conflicts. They help clients to vent their anger-and realize that they do not have a case. They work out differences among contending parties, whether individuals, corporations or nations. In the public eye, though, lawyers are all from television's *Boston Legal*, fierce advocates of one side or the other, manipulating the evidence and pushing emotional buttons to win the day. Unfortunately, too many of our elected officials have adopted this kind of advocacy. Rarely has a confrontation in Congress been more overdrawn than in the debates surrounding the renewal of the USA Patriot Act.

The Patriot Act, which contains a bunch of new security measures, was enacted in a hurry in the weeks after Sept. 11, 2001, when the nation was deeply concerned about more attacks. Critics have argued that the fact that the bill was not subject to proper hearings proves, on the face of it, that the act is faulty.

It has also been noted that the U.S. Department of Justice used the opportunity of the act to institute measures it had long favored but previously been unable to make the law of the land. So? Take the roving wiretaps. Until the Patriot Act was passed, if the authorities got the permission of a court to tap a phone, the permission was "particularized" to a given phone, reflecting the days in which people had one phone and one line.

Technological developments made this form of particularization highly obsolete, yet it remained the law. Drug lords, aware of this fact, had long used pockets full of cell phones among which they switched. The Patriot Act changed the particularization of taps to a person rather than to one instrument, something the Justice Department had long sought. What is wrong with that?

Roundly ignored by both sides is that a full 90% of the act's clauses are not contested by anyone, left, right or center! Critics have particularly been outraged by two clauses. One concerns the right of the government to search the computers of public libraries. Actually the term "library" is mentioned in the act as often as privacy is mentioned in the Constitution and its Bill of Rights-not once. The bill does authorize searches of "books, records, papers, documents, and other items . . . for an investigation to protect against international terrorism or clandestine intelligence activities." However, singling out libraries as a possible target has evoked much more public outrage than if one would have simply referred to the actual wording of the bill.

Particularly telling is the way the "sneak and peak" clause has been raked over the coals. The act gives the authorities the right to search someone's home and not to notify him or her that a search has been conducted. When the Patriot Act came up for renewal in 2005, civil libertarians argued that this is an outrage, while conservatives maintained that it was necessary for national security. Soon it turned out that the two sides were down to haggling over how many days the authorities needed before they were required to notify the suspect, with Senator Russ Feingold, D-Wis., arguing that seven days was the most that civil rights could tolerate, and the majority of the House members holding that half a year was barely enough!

There was little discussion of the grubby details involved: How long does it take to de-encrypt a computer base? How long does it take to translate messages found, assuming that the National Security Agency and FBI will not drop all other work, to focus on the specific search at hand? And to find and surveil the collaborators whose names appear in the documents found? Instead, all we have gotten are outraged histrionics on both sides.

Troubling measures outside act

The Patriot Act has become a sort of symbol for all new security measures, although many of the truly troubling ones are not part of the act. Torture, which is widely opposed as both a gross violation of human rights and as a very unreliable tool for interrogation, has been justified by in-house memos prepared by White House staff, but has not been approved by Congress, let alone incorporated into the Patriot Act. The same holds for trying civilians in military tribunals and for the Operation TIPS program, which encourage Americans to spy on one another.

In short what our legislators most need is to be reminded that we are all better off when they act most times not as caricatures of trial lawyers, but as those lawyers who work out differences, carefully attending to the legitimate needs of both sides-in this case, national security and civil rights.

Amitai Etzioni's most recent book is How Patriotic Is the Patriot Act: Freedom Versus Security in the Age of Terrorism (Routledge, 2004). An NLJ columnist, he teaches sociology at George Washington University.