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goes without saying that the existing basis for obtaining prior judicial authorization to intercept an attorney-client communication requires a much higher standard than a "reasonable suspicion" that a person "may" use communications with an attorney to further or facilitate an illegal act. According to a Justice Department representative, this frontal attack on the right to counsel is only a small "procedural" change, and besides, the attorney general intends to monitor (for now) only a "small number" of people in custody and their lawyers.

Search and destroy

Everyone from the president of the American Bar Association to the head of the Senate Judiciary Committee has publicly denounced the attorney general's granting to himself the power to search and destroy the attorney-client relationship. These are not knee-jerk reactions. Nor is this simply about some further esoteric (albeit here a nonjudicial and nonstatutory) restriction of the attorney-client privilege. At stake here is an attempt by the executive branch to justify fighting terrorism at the expense of maintaining the Fourth and Sixth amendments' protection from unreasonable searches—i.e., interception of privileged communications—and the right to assistance of counsel.

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As a former federal prosecutor and seasoned criminal defense lawyer, let me put this in unequivocal terms: No criminal defense lawyer can provide adequate assistance of counsel if the attorney and his or her client know the adversary (the Justice Department) is monitoring every word that they say or write to each other. There is ample judicial precedent for this proposition, and every practicing lawyer knows it's just that simple. I seriously doubt whether an attorney could even ethically undertake to represent someone with these restrictions in place.

One can only hope that the ongoing public comment called for by the new rule will cause the attorney general to withdraw tactically and gracefully. If not, proposed congressional hearings and the inevitable court challenges will unfortunately be necessary to remind the Justice Department that the ends cannot always justify the means.

The detention of Japanese-Americans in World War II, and the Vietnam era's unauthorized wiretaps and FBI "black bag jobs" should have taught all of us by now: You don't take away our constitutional rights and liberties in order to defend us from foreign and domestic enemies who seek to do the same thing. NLJ

Correction

DUE TO AN editing error, part of the Opinion article "Throwing in the towel" [NLJ, Nov. 19-26] was garbled. The final sentence of the first paragraph should read: "The latter defect is so glaring as to suggest that the administration has no intent of ever enforcing the feeble provisions it 'won' at the bargaining table because the terms do not even allow the court to independently monitor Microsoft's compliance."

■ CIVIL LIBERTIES

First: casualty of war

By Harvey A. Silverglate SPECIAL TO THE NATIONAL LAW JOURNAL

BOTH CRITICS AND supporters of the constriction in civil liberties since Sept. 11 have generated much heat but little light. This can be attributed to a failure to consult our most important guide—the Bill of Rights itself. Despite some startling moves in all areas—privacy, due process, assistance of counsel and free speech/free press—by the Department of Justice, it is in the last—free speech and press—that the storm clouds are most disturbing over the long haul and require the most uncompromising vigilance.

The First Amendment sets the rules under which the national debate must take place as to whether other rights are being protected or violated and how the nation should defend itself. And this debate, on which the vitality of all other rights depends, is supposed to take place with virtually no governmental constraints, since the First Amendment—unlike the Fourth (unreasonable searches and seizures), Fifth (due process of law), Sixth (assistance of counsel) and Eighth (cruel and unusual punishments)—provides in absolute terms that "Congress shall make no law...abridging the freedom of speech, or of the press." As libertarians are wont to ask, Is there some part of "no" that is hard to understand?

Yet early indications are that First Amendment rights are under considerable pressure, despite the fact that constriction of debate will do little other than allow government errors and incompetence to go undetected and government overreaching to go unredressed. In short, restrictions on speech threaten to lessen national security.

Amending the rules of debate.

■ Commenting on the suicide attacks on the Pentagon and the World Trade Center on Sept. 17, *Politically Incorrect* host Bill Maher said: "We have been the cowards, lobbing cruise missiles from 2,000 miles away. That's cowardly. Staying in the airplane when it hits the building—say what you want about that, it's not cowardly." Presidential press secretary Ari Fleischer subsequently warned Maher and news organizations that "people have to watch what they say and watch what they do."

■ National Security Adviser Condoleezza Rice asked TV networks to be "sensitive" about airing "raw," unedited versions of Osama bin Laden's periodically released propaganda videos because, she claimed, the clips may contain coded messages or signals to his terrorist supporters to carry out further attacks. While many saw through this thinly disguised plea to give the terrorists less free air-time, the networks nonetheless acquiesced.

■ Lawmakers, taking advantage of the appropriately heightened sense of patriotic fervor in the country, are now proposing statutes and ordinances that would make saluting the flag and reciting the Pledge of Allegiance mandatory for public school students. Happily, most of these bills would exempt children who profess religious or political objections. Not all lawmakers are happy with exemptions.

■ In the world of higher education, where academic freedom is supposed to provide for the freest discourse, scores of incidents arose within weeks of Sept. 11, where all sides of the national debate found themselves censored by feckless campus administrators:

At private Duke University, the administration shut down Professor Gary Hull's Web site for posting an article entitled "Terrorism and Its Appeasement" that called for a strong military response to the attacks on the Pentagon and the World Trade Center. After a strong response by civil liberties groups led by the Foundation for Individual Rights in Education—of which I am a director—Duke's administration reinstated the Web page, but only after requiring Hull to post an unprecedented disclaimer stating that the views expressed did not reflect those of the university.

Professor Richard Berthold of the University of New Mexico—a state school bound by the First Amendment—in commenting on his reaction to the terrorist attacks to his morning class on Western civilization, remarked, "Anyone who can bomb the Pentagon has my vote." He subsequently apologized for what he termed an ill-conceived attempt at a joke. University President William C. Gordon announced that he would "vigorously pursue" disciplinary action against Berthold.

Yet the constitutional precedents governing official efforts to control speech and mandate patriotism—even during wartime—do not give state and federal governments much comfort in justifying censorship purportedly in the name of national security.

In 1943, with World War II raging, *West Virginia Board of Education v. Barnette* prohibited public schools from forcing Jehovah's Witness children to pledge allegiance to the flag. The court held that "individual freedom of mind" was more essential to American strength and unity than "officially disciplined uniformity for which history indicates a disappointing and disastrous end." During the Communist scare of the 1950s, the court in *Sweezy v. New Hampshire* (1957) interfered with a state legislature's investigation into the "subversive" views of a professor at a state university. Justice Felix Frankfurter lectured that imposing ideological requirements on our teachers, far from enhancing safety, "would imperil the future of our Nation." In 1971, the court in *Cohen v. California* assured the right of a young man to enter a courthouse with the slogan "fuck the draft" emblazoned on his jacket, thus protecting even vehement and vulgar dissent.

In short, while recent decades have seen some liberties constricted during wars and periods of panic, modern courts generally have insisted that the government "make no law...abridging the freedom of speech, or of the press." Our survival as a free society, and perhaps even our survival at all, depends upon a free marketplace of ideas where not only dissent may be aired, but error uncovered and corrected. NLJ

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