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Covering a multitude of sins:

In its unprecedented drive for greater government secrecy, the Bush administration is hiding vital information under the cloak of national security — leaving the nation stumbling in the dark

BY HARVEY A. SILVERGLATE AND CARL TAKEI
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JOHN F. KENNEDY once recounted a revealing joke told by Nikita Khrushchev, the Soviet premier during the 1950s and '60s, in response to Kennedy's complaints about the uncontrollable Washington press corps: a Russian ran through the Kremlin shouting, "Khrushchev is a fool! Khrushchev is a fool!" For this outburst, the man was sentenced to 23 years in prison. When Kennedy retorted that in the United States it was impossible to imprison a newsman for insulting the nation's leader, Khrushchev explained that only three years of the sentence were for insulting the premier — the remaining 20 were for "revealing a state secret."

Government officials too often avoid accountability by sweeping incompetence and dishonesty under the rug of "national security." Yet our country — unlike Khrushchev's Soviet Union — has a tradition of counterbalancing such secrecy by protecting a free press, allowing citizens to converse without risk, and honoring the efforts of brave whistle blowers — those who defy the culture of secrecy and leak information to the press to inform the public of governmental wrongdoing, mistakes, and deceptions. The Bush administration, however, is aggressively working to prevent such public scrutiny in four distinct ways: it has widened the range of classified and otherwise confidential (but non-classified) materials. It has expanded its ability to criminally prosecute government employees who leak such materials. It has signaled a willingness to move against reporters who publish those leaks. And, most significantly, it is using new "material support" statutes to do an end run around the First Amendment and criminalize many forms of political advocacy.

The Bush administration's assault on free speech, free press, and free association threatens to constrict our "threshold" liberties. This category of liberty, which also includes the right to be free from arbitrary arrest and indefinite detention (see "Crossing the Threshold," News and Features, March 5), lies at the heart of what it means to live in a free society and is essential for

our other institutions to function as intended. If the press is free, if open elections are held, and if the courts are performing their sworn duty, even a president who tries to assume the powers of an emperor can be dealt with. But the more the press, the public, and the courts allow a president to chip away at the threshold rights that restrain his or her powers, the less democratic, free, and safe the nation becomes.

Overclassifying documents

The Bush administration's push for greater government secrecy began as soon as the president took office. Between March and August 2001, for instance, the White House issued three successive orders to the National Archives to postpone the scheduled public release of some 68,000 pages of Reagan-era documents. But in the wake of the September 11 terrorist attacks, Bush took advantage of the confusion and fear to accelerate his restrictive agenda. On October 15, 2001, the Justice Department issued new rules for how agencies should handle Freedom of Information Act requests, reversing the Clinton administration's policy of making files available by default if there was no apparent reason to keep them classified. The new policy required an affirmativereason to declassify the files. Then, on November 1, 2001, the White House added Executive Order 13233, allowing the sitting president to block disclosure of past presidential records even when past presidents want records disclosed.

The information blackout cast by this preference for secrecy makes it nearly impossible for citizens to judge for themselves whether their government is using effective and appropriate means to, among other things, combat terrorism. Yet just how essential it is for citizens to be able to assess our leaders' performance has been made clearer than ever by the proceedings of the 9/11 commission. A policy of excessive secrecy, it appears, served largely to conceal enormous incompetence at the top, bureaucratic bungling throughout the national-security apparatus, and inconvenient facts about the way the Bush White House does business.

One particularly stunning example of how secrecy can interfere with accountability was the White House's attempt last year to retroactively classify parts of the Joint Congressional Intelligence Committee's report on its inquiry into 9/11, including excerpts from the FBI's July 2001 Phoenix flight-school memo (which had already been published elsewhere), the names of senior administration officials, and information on anti-terror intelligence that had been aired in public testimony. The administration also sought to block the report's release. When the document finally became public in July 2003 — after much wrangling between the committee and the Bush administration — 28 of its 832 pages were redacted. The section not made public dealt mostly with alleged Saudi involvement in the 9/11 terrorist attacks. In explaining the redactions — which had been made over the objections of committee co-chairs Senator Bob Graham (D-FL) and Representative Porter Goss (R-FL), and even of Saudi ambassador Prince

Bandar bin Sultan — Bush said that declassifying the information would "help the enemy" by revealing intelligence sources and methods.

This overclassification seems, like Khrushchev's joke, to be driven less by true national-security concerns than by a desire to bury inconvenient facts. Bush, after all, has made exceptions to his closed-mouth policy in order to declassify material embarrassing to his political opponents. Shortly after he took office, he allowed the declassification of *partial* transcripts of phone calls between former president Bill Clinton and Israeli prime minister Ehud Barak, dealing with Clinton's controversial last-minute pardon of fugitive financier Marc Rich, who had been convicted of tax-evasion, among other things. When Clinton requested that the full transcripts be released, Bush refused. And in April, the Bush administration allowed Jamie Gorelick's 1995 national-security memo, authored when she was a deputy attorney general in the Clinton administration, to be declassified solely so that Ashcroft could use it to take potshots at Gorelick, now a member of the 9/11 commission, during his testimony before that body.

Not content with overclassifying documents, the Bush administration is also seeking the courts' assistance in restricting information. In *Center for National Security Studies v. Department of Justice*, the Justice Department argued — and, on June 17, 2003, the DC Circuit Court of Appeals agreed — that it could withhold from the public vital information about post-9/11 detainees, including their names, arrest dates, locations of arrest and detention, dates of release, and even the names of the lawyers representing them. On January 12, the US Supreme Court denied review, letting the secrecy surrounding the detentions stand.

The case of Mohamed K. Bellahouel, an Algerian student who overstayed his visa and was detained after September 11, perhaps best illustrates this trend. Bellahouel was a waiter at the Kef Room, a Middle Eastern restaurant in Boca Raton, Florida, where, FBI investigators testified in a sealed statement to the court, he "likely" served food to two of the 9/11 hijackers, one of whom was Mohammed Atta. FBI investigators also told the court of an uncorroborated report, given by an unidentified movie-theater ticket agent, that Bellahouel once went to the movies with another of the hijackers. These fleeting contacts caught the FBI's attention, and Bellahouel was detained one month after the 9/11 attacks for having violated his student visa. When Bellahouel filed a habeas corpuspetition seeking to be released from custody, his entire case was, for reasons that remain unclear, put under unusually tight seal: *nothing* about this case is available for public inspection.

Although court cases involving secret evidence and documents often include individual sealed items that are noted as such on the docket — such as the name of an intelligence operative or a secret intelligence report — the docket itself (that is, the list of items on file in the case and of the actions taken and hearings held) is almost always public. In Bellahouel's case, his identity —

indeed, his very existence and that of his case — was withheld from public disclosure. Interestingly, however, Bellahouel was allowed to post a $10,000 bond for his release while the secret case was still pending; the courts apparently felt that disclosing any information about Bellahouel's case was dangerous, but that letting him walk the streets was perfectly fine. The case came to light when, more than a year after proceedings had begun, a court clerk erred and inadvertently published Bellahouel's initials (M.K.B.) and the case number on the electronic argument calendar for the 11th Circuit Court of Appeals. A sharp-eyed reporter from the *Miami Daily Business Review* noticed the anomaly and broke the story of the "super-sealed" case. Although a range of media outlets and organizations — from CNN to the Association of Alternative Newsweeklies — sought to intervene in the case of *M.K.B. v. Warden* and have the docket unsealed, it remains cloaked in mystery because the US Supreme Court denied review on February 23. Indeed, the secrecy perpetuated itself even during this final stage of the process, when Solicitor General Theodore Olson filed a sealed brief with the Supreme Court. This brief remained sealed even after the court denied review.

What's particularly disturbing about the Supreme Court's refusal to intervene in *M.K.B.*is that it goes against a long tradition of openness in the courts. In 1948, the Supreme Court reviewed and ruled unconstitutional the first secret criminal case documented in American judicial history. A Michigan judge had convicted and sentenced a man for criminal contempt of court in a secret session. The accused had no access to counsel and no opportunity to call witnesses in his defense. In that case, *In re Oliver*, the Supreme Court emphasized that the trial's secrecy made it inherently unjust and unacceptable. From the English Star Chamber to the Spanish Inquisition, the court wrote, secret trials throughout history have posed "a menace to liberty." In invalidating the secret trial, the court emphasized "this nation's historic distrust of secret proceedings" and asserted, "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."

In 1980, the Supreme Court frowned on another secret trial in *Richmond Newspapers v. Virginia*. In that case, a Virginia judge — at the request of the defendant — closed the trial to press and spectators, ostensibly to avoid distracting the jury. Once in closed session, the judge excluded all the prosecution's evidence, removed the case from the hands of the jury, and acquitted the defendant. Although the defendant was understandably happy with this turn of events, the local news media were not, and they filed suit to prevent such closed trials from occurring in the future. The Supreme Court ruled in favor of the newspapers, holding that under the First Amendment, the public and the media have a constitutional right of access to the trial courtroom, even if the defendant, prosecutor, judge, or any other party has reason to prefer secrecy.

It's not just the high court's refusal to hear the *M.K.B.* case, however, that suggests this tradition of judicial openness may be falling victim to the administration's cries of "national security." In June 2003, the Supreme Court refused to reopen an old case in which the federal government had improperly used the national-security justification to mislead the high court and shield itself from liability. The case began in 1948, when a B-29 bomber carrying experimental radar equipment crashed, killing most on board. The widows of the dead radar engineers filed suit for negligence. In 1953, the military successfully argued to the Supreme Court that the accident report from the crash should not be released to the plaintiffs or even to the trial judge, because to do so might expose information about the radar technology and thereby endanger national security. But 50 years later, in 2003, the newly declassified accident report revealed the truth: the report disclosed nothing about experimental radars, but described how improper aircraft maintenance, insufficient training, and a series of human errors — in other words, government negligence — had caused the accident. To use the Khrushchev analogy, the foolishness of the government turned out to be the state secret under protection. Yet on June 23, 2003, the Supreme Court denied, without comment, the families' petition to reopen the case.

Gagging government workers

Attorney General John Ashcroft's Justice Department has been working overtime to choke off the flow of sensitive information to the press. He's done so by creating an environment hostile to disclosure, with severe penalties for officials who defy the drive to keep more and more aspects of government operation under wraps. Ultimately, Ashcroft's strategy is likely to have a profound impact on the people's ability to discuss a vast array of subjects related to the government's war on terrorism by making government employees afraid to provide useful information to the press and public.

On December 6, 2001, during an appearance before the Senate Judiciary Committee to defend the Justice Department's response to the 9/11 attacks, Ashcroft told senators that his department wanted a "comprehensive, coordinated, government-wide, aggressive, properly resourced, and sustained effort" to combat what he termed "the problem of unauthorized disclosures." The tip-off that Ashcroft was talking about expanding the breadth of government secrecy, rather than merely stiffening penalties for leaks of *classified* information, was that he spoke of "unauthorized disclosures" of classified *and* "sensitive" information — a much broader category.

Significantly, Ashcroft cobbled together new interpretations of existing statutes rather than pushing for new laws to make non-classified disclosures illegal. To seek legislative approval for broader legislation would have prompted a debate on where to draw the proper line between

the government's legitimate secrecy requirements and the public's need and right to know. Had he ignited such a debate, Ashcroft would have had to explain why it is in the public interest to criminalize the release of non-classified information whose disclosure can be embarrassing but rarely has any real implications for national security. And if he lost that debate, it would be very difficult for the Justice Department to go against the Congress's expressed view by prosecuting people under expanded interpretations of existing statutes. Hence, Ashcroft chose simply to leave lawmakers out of the process.

Since that 2001 appearance before the Senate Judiciary Committee, Ashcroft's Justice Department has been quite creative in the use of existing laws to punish whistle blowers and others whose disclosures benefit the public. (He is able to do this partly because the Whistleblower Protection Act offers few obstacles. While the act does offer generous protections for those who fit the legal definition of "whistle blower," a series of court decisions has made it extraordinarily difficult to meet that definition. For example, disclosures to a co-worker or other person not directly in a position to take corrective action are not protected. And to receive anti-harassment protections, a whistle blower must present "irrefragable proof" that the government is not acting correctly, fairly, lawfully, and in good faith.)

In February 2002, the Justice Department indicted Jonathan Randel, an intelligence researcher with the Drug Enforcement Agency, for leaking secret but unclassified DEA investigative information to a freelance investigative reporter writing a series for the London *Times* on drug trafficking in Belize. Based on Randel's leak, the reporter published a controversial article detailing the DEA's money-laundering probe of a Belize-based bank owned by one of the Tory Party's biggest donors, British businessman Lord Michael Ashcroft (no relation to our attorney general). The indictment was based upon two statutes — one criminalized improper access to a government computer, and the other made it a federal crime to use any of the modalities of interstate communication to effectuate a fraud or other crime (the two are linked together: by using the Internet to transmit the leak, he committed both the crime of improper access and the crime of using interstate communication to further that improper access). Neither statute was written with leaks to the public in mind, but with a stretch here and a stretch there, they could have supported the indictment. Randel chose to accept a one-year prison sentence rather than risk a trial and face the theoretical statutory maximum of 580 years in prison. Though the Randel case hails from the "war on drugs" rather than the "war on terrorism," this new prosecutorial tool — like so many others — will likely be used against those who disclose information relating to the war on terror. Indeed, it is quite clear that one of the DOJ's major reasons for pursuing this minor case of an unimportant government official who leaked reputational information about a foreign businessman was that it helped establish a broader

sweep for federal criminal statutes that, until now, would not have been assumed to cover such conduct.

Subsequent statements from various Justice Department officials make clear that the Randel prosecution was intended as a shot across the bow of potential whistle blowers in possession of information more embarrassing to the government than the DEA files disclosed by Randel. US Attorney William Duffy Jr., Ashcroft's man on the Randel case, was very pleased with the outcome, telling the *New York Times* that the case served as a warning to other government workers. In October 2002, Ashcroft submitted a written report to Congress that made clear that Randel-style prosecutions are now the official policy of the Justice Department. Making no distinction between whistle blowers and spies, Ashcroft stated the need for "aggressive investigations of unauthorized disclosures of classified information utilizing all appropriate and available investigative tools and techniques to identify the perpetrators." He then described his recommendations for an interagency anti-leak plan — the Justice Department and other agencies will pursue all applicable administrative, civil, and criminal penalties against anyone who disseminates confidential documents — and noted that the steps he described were all "within the existing authorities of the Executive Branch and do not require additional legislation." In other words, the administration does not need congressional cooperation to shut off the flow of information to the press, the public, or even to the Congress itself.

It is true that Ashcroft is not the first attorney general who has made creative use of existing laws to advance government secrecy. The Nixon administration, after all, tried to suppress publication of the classified Pentagon Papers, a secret government study containing information about US involvement in Vietnam, by seeking a court injunction against the major national newspapers that possessed copies — an attempt that the Supreme Court struck down on First Amendment grounds. And in 1986, the Reagan Justice Department brought a first-of-its-kind prosecution against Samuel Morison, a Navy Department analyst who provided the British intelligence-analysis publication*Jane's Defence Weekly* with classified satellite photos of a Soviet ship. No one suggested that Morison harbored ill-will toward his country; nor was there a suggestion that Britain was a hostile power. Nonetheless, Morison was convicted under both the Espionage Act and a statute covering theft of government property. He was sentenced to two years in prison.

But there is something new about Ashcroft's approach. The Pentagon Papers case and the Morison prosecution both dealt with the release of *classified* documents as opposed to those that are merely "confidential." This crucial distinction seems lost on Ashcroft, however, who has made clear in actions as well as words that his intention is to punish the disclosure of any information government officials might want kept secret, whether it is classified or not, and regardless of whether the disclosure actually harms national security.

Muzzling the press

Last October, in response to an inquiry by the Institute of Electrical and Electronics Engineers (IEEE) requesting a clarification of US trade regulations, the US Treasury Department's Office of Foreign Assets Control (OFAC) stated that editing scientific papers — "substantive or artistic alterations or enhancements" to a manuscript, including "the reordering of paragraphs or sentences, correction of syntax, grammar, and replacement of inappropriate words" — authored by scientists from foreign countries facing a US trade embargo (*e.g.*, Iran, Cuba, Libya, and North Korea) constituted a violation of federal trade regulations. Anyone committing such violations would face fines of up to $500,000 and a sentence of up to 10 years in prison. In early April, after months of intense controversy — including a promise of civil disobedience by the American Chemical Society, whose head of publications called the ban "inimical to the spirit of science" — OFAC revised its interpretation of the guidelines to permit IEEE to edit the foreign manuscripts without fear of prosecution (see "The Enemy of Ideas," Editorial, March 12).

The flap was a quick win against an odious attempt to muzzle the scientific press and thereby stunt the advance of science and technology, which is one of our major national strengths and sources of security. But the Bush administration is sure to try to muzzle the press, scientific or otherwise, again, and next time it may succeed. After all, how many other professional organizations would match the guts shown by the American Chemical Society and threaten civil disobedience to protect liberty? And would Ashcroft's Justice Department back down as quickly as OFAC? Probably not.

Indeed, what we're likely to see next is a direct assault by the Bush administration on the Fourth Estate itself in a bid to squelch "national security" stories. A largely unheralded but unforgotten aspect of the Vietnam-era Pentagon Papers imbroglio gives us a hint of how the past may indeed be prologue. The 1971 publication of the Pentagon Papers by the *New York Times*, the *Washington Post*, and the *Boston Globe* is perhaps the best-known example of how disclosing overclassified material can benefit a free people. The Supreme Court case that quashed the government's resulting attempts at censorship, *New York Times v. United States*, is often seen as a vindication of newspapers' mission to inform the public. However, the Supreme Court's ruling in that case — prohibiting "prior restraint," the use of court injunctions to prevent, in advance, the publication of even classified material — left a dangerous opening that the Bush administration may seek to exploit.

That's because although the Supreme Court struck down prior restraint of the newspapers, it explicitly left the door open for *post-publication* criminal prosecutions of reporters and publishers. Concurring opinions from Justices White, Stewart, Burger, Blackmun, and Marshall (a majority of the justices then sitting) noted the possibility of, and in some cases came close to

endorsing, criminal prosecution of the newspapers.Justice White's concurring opinion was the most explicit — and menacing. "[T]hat the Government mistakenly chose to proceed by injunction," he wrote, "does not mean that it could not successfully proceed in another way." He then laid out a road map for how to use the Espionage Act to prosecute journalists who obtain and publish classified material.

For reasons that remain unclear (some believe it was the onset of the Watergate scandal), the Nixon administration did not pursue such a prosecution. Since then, the government generally has not threatened the press with criminal prosecutions for publishing leaked classified material, choosing instead to go after individual leakers. But this may soon change.

Recently, the CIA published an unclassified memorandum advocating such prosecutions. Written by senior intelligence official James B. Bruce and titled "The Consequences of Permissive Neglect," the memorandum suggests a new statute that would "hold uncleared publicists — *i.e.*, journalists, writers, publishing companies, media networks, and Web sites that traffic in classified information — accountable for intelligence disclosures." Bruce writes: "Any journalist's First Amendment right to publish information does not appear to — and should not — extend to disclosing lawfully classified intelligence information." If the Bush administration acts on this recommendation, either by stretching existing law or introducing new legislation to make such executive authority explicit, it could have a seriously chilling effect on investigative reporting. And media life could become particularly dangerous if the administration then took aim at disclosure of confidential but *unclassified* material, and in other ways sought to criminalize the dissemination of words. This can be accomplished without new legislation. Remember that the Justice Department's policy, as a result of the Randel prosecution, is to treat any disclosure of non-classified information as a crime; under this theory, any recipient of those leaks can be treated as a co-conspirator of the leaker — essentially, a recipient of stolen goods — rather than as a constitutionally protected publisher of news. It is not clear whether the courts would approve such an expansion of current laws, but the mere existence of this threat is likely to have a deterring effect on aggressive reporters.

Doing an end run around the First Amendment

The First Amendment (and the body of case law that surrounds it) prohibits the Department of Justice from using mere association with Islamist fundamentalists or advocacy of their views as grounds for arrest. In the McCarthy era of the 1950s, for example, when a legislative "subversive activities" committee demanded that a professor discuss his political associations and views (including his reported assertion that the capitalist society would collapse in violence), the Supreme Court ruled their questioning unconstitutional. In 1969, the high court ruled that a Ku Klux Klansman's speech advocating "revengeance" against the government was

constitutionally protected. While one cannot use speech to incite *imminent* lawless action (such as exhorting an angry crowd to burn down a local building), the court ruled, merely *advocating* violence in less specific terms (such as saying the building deserves to burn) is protected. And in a 1987 case, a county clerical employee won the right to tell a co-worker that if assassins "go for [President Reagan] again, I hope they get him."

However, the Bush administration is doing an end run around the First Amendment and successfully attacking dissident political advocacy through aggressive application of the rapidly expanding "material support" laws. Traditionally, a law that bars material support would prohibit aiding and abetting others in committing or planning a crime. But the Anti-Terrorism and Effective Death Penalty Act (AEDPA), passed by Congress and signed into law by President Clinton in 1996, created a broader definition of material support, making it a crime to donate money and material items to political groups deemed to be "foreign terrorist organizations." In 2001, the Patriot Act further expanded the definition of material support to include offering "expert advice and assistance" to terrorist organizations. The end result is that the material-support laws, as outlined in the AEDPA and especially the Patriot Act, provide Ashcroft with a potent weapon to squeeze First Amendment rights to free association and speech.

Take the case of Sami Omar al-Hussayen, a graduate student in computer science at the University of Idaho. The leader of the school's Muslim Student Association, al-Hussayen assisted various organizations and individuals in establishing and maintaining Web sites that allegedly promoted terrorism. He also acted as the moderator for a 2400 member e-mail discussion group supposedly devoted to supporters of violent jihad. According to Ashcroft's March 4 press statement announcing the indictment against al-Hussayen, by maintaining the Web sites and the discussion group, "Al-Hussayen knew and intended that his computer services and expertise would be used to recruit and raise funds for violent jihad around the world."

Prosecutors have used the Patriot Act's prohibition against providing "expert advice and assistance" to go after al-Hussayen. If they succeed, the line between constitutionally protected advocacy and illegal material assistance will be virtually eradicated, as will the line that had been drawn — until now — between one who moderates an online discussion group and those who post messages. Worse, the *Wall Street Journal* reported earlier this month that prosecutors in the case plan to call defendants who pleaded guilty in other material-assistance terrorism cases as witnesses against al-Hussayen. They will tell the jury that they were influenced to commit their crimes partly by al-Hussayen's Web site and discussion group. That a moderator of a Web site or online discussion group can be held criminally responsible for acts committed by his readers and words written by his subscribers is an innovation with staggering implications for free speech and free press. If successful, al-Hussayen's prosecution will have a

profound chilling effect not just on authors, but on those who publish, edit, and promote discussions of controversial topics.

The "expert advice and assistance" provision of the Patriot Act has recently come under fire. In *Humanitarian Law Project v. Ashcroft*, the restriction was challenged by a variety of groups that provide humanitarian and legal assistance — as well as perform political advocacy for — organizations ranging from Sinn Fein and the Tamil Tigers to Palestinian humanitarian-relief foundations. The plaintiffs in that lawsuit, whose actions have been curtailed by the new law, charged that it unconstitutionally infringes on their freedom of speech. California federal district-court judge Audrey Collins ruled in favor of the plaintiffs and enjoined Ashcroft from enforcing the provision within the district. (Collins elected not to issue a national injunction.) It remains to be seen, however, how the Court of Appeals for the Ninth Circuit (which includes California) will rule on this issue. The case may end up before the Supreme Court.

Ashcroft, meanwhile, is seeking to expand these material-support laws even further. In testimony before the House Judiciary Committee on June 5, 2003, the attorney general said that anti-terrorism laws must be "clarified" so the government can charge people who provide any kind of assistance, no matter how innocuous, to terrorist groups as "material supporters" of terrorism. "[W]e need for the law to make it clear that it's just as much a conspiracy to aid and assist the terrorists, to join them for fighting purposes, as it is to carry them a lunch," Ashcroft said. (Apparently this may already be a crime and we just don't know it — recall, after all, that Mohamed K. Bellahouel reportedly first came to the government's attention because he had served food to two of the 9/11 hijackers.)

Ashcroft's proposed "clarification" of the material-support laws would allow him to cast a much wider net, potentially ensnaring anyone who has spent a significant amount of time with a "terrorist." To be effective, such vague and expansive laws need not even be tested in the courts; their very existence would serve as a deterrent to all but the most brave (or foolish, as the case may be). The Supreme Court has, in the past, struck down vague and overly broad laws that impinge on First Amendment rights because even when rarely enforced, such statutes impose a "chilling effect" on free speech and its close relative, free association. But it is hardly clear that courts will do so again, given the countervailing pressures of the war on terror and Ashcroft's national-security claims.

While we wait to see whether the high court will protect the First Amendment, the Justice Department continues to test the boundaries of the Patriot Act's material-support statute. Take the case of Lynne Stewart, a radical and outspoken attorney for accused terrorist Sheikh Abdel Rahman. Last year, Stewart was indicted for "material support" of terrorism because she organized conference calls for her client; according to the Justice Department, this constituted

the providing of "communications equipment" to a terrorist group. Stewart is further alleged to have served Rahman's organization in a "quasi-employee" capacity. Judge John Koeltl of the federal district court in New York dismissed the charges on July 22, 2003, as a vague and overbroad application of the statute: "[B]y criminalizing the mere use of phones and other means of communication, the statute provides neither notice nor standards for its application." Moreover, he wrote, "the Government fails to explain how a lawyer, acting as an agent of her client, an alleged leader of an FTO [foreign terrorist organization], could avoid being subject to criminal prosecution as a 'quasi-employee' allegedly covered by the statute."

Judge Koeltl clearly realized the level of discretionary power the "quasi-employee" label puts in the hands of prosecutors. "[W]hen asked at oral argument how to distinguish being a member of an organization from being a quasi-employee, the government [prosecutor] initially responded, 'You know it when you see it,'" Koeltl observed. The chilling effect on both speech and effective legal representation is obvious.

Prosecutors responded to Koeltl's ruling by reframing the indictment, charging Stewart under a different provision of the "material support" statute. According to the new indictment, the fact that Stewart read correspondence to her client and released press statements on his behalf constituted provision of personnel to a terrorist conspiracy. It remains to be seen whether the revised indictment will stand.

A LONG AND complex assault on liberty is under way — an assault aimed not at the fringes of liberty, but at its core: the rights that form the threshold between freedom and tyranny, the rights that allow citizens to push back against government excess. And if we let that assault push us across this threshold, we will find it very difficult to return, for we will have lost the essential tools that free people have historically wielded.

Even those who shrug at lost liberties — who believe that it's worth paying the price of core freedoms to defeat terrorism — would be wise to worry about these developments. After all, one consequence of free speech is that it makes it easier to detect and reverse grave errors. If the head of state is indeed a fool, to use Nikita Khrushchev's worrisome but instructive joke, national security is hardly enhanced by hiding his mistakes.

Harvey A. Silverglate is a regular Phoenix *"Freedom Watch" contributor, an attorney with Boston's Good & Cormier, and co-author of* The Shadow University *(HarperPerennial, 1999). Carl Takei is a writer, paralegal, and soon-to-be law student at Boston College Law School.*