



Congressional-Executive Commission on China

*There is no news censorship in China . . . **

State Council Information Office, People's Republic of China

*[P]ress activities that are designed to change the socialist system shall not only not be given freedom, but shall also be struck down in accordance with the law. ***

Jiang Zemin

*Non-news publishing organs may not engage in news activities without permission from the national agency administering news and publishing. ****

Notice Regarding Prohibiting Non-News Publishing Organs from Engaging in Activities Relating to Newspapers and Periodicals

Information Control and Self-Censorship in the PRC and the Spread of SARS

1. EXECUTIVE SUMMARY

The government of the People's Republic of China ("PRC") employs an extensive and burdensome licensing system to restrict publication of news and opinions on matters of public concern. Those who are allowed to publish confront a legal system that obscures the boundaries of freedom of expression and discourages communications with foreigners, so that most Chinese are too wary to publish information that authorities might deem critical or embarrassing. Anyone wanting to publish such information can do so only if they enjoy the patronage of a member of the PRC's "free speech elite" - someone whose political status provides a degree of safety from prosecution. The global spread of Severe Acute Respiratory Syndrome ("SARS") is a direct product of these systemic restrictions on freedom of expression, in particular:

- Under PRC law, "freedom of expression" is not an individual liberty, but rather a tool to serve the interests of the socialist state;
- The PRC legal system discourages the free flow of information, not only by erecting barriers to non-government-controlled institutions, but also by encouraging individual self-censorship by not clearly defining what constitutes protected speech; and
- The PRC government has transformed the constitutional right of free speech into a political privilege of "freer" speech for the PRC ideological elite.

The impact of SARS has put PRC leaders on notice that, although this system allows them to control criticism, it also prevents the establishment of private institutions with the capacity and willingness to investigate and report on matters of public concern. This impedes the free flow of information in a way that threatens the well-being of PRC citizens and, as the PRC has chosen to increasingly participate in global affairs (as with the Women's World Cup and the Olympics), everyone with whom they interact. PRC authorities should eliminate these systemic restraints on freedom of expression to ensure that in the future people do not needlessly suffer through a crisis whose impact could have been lessened through greater public scrutiny and awareness.

* From a report by the PRC government entitled "Human Rights in China," November, 1991.

** "Regarding Several Problems with the Party's News Work," November 28, 1989.

*** Article 1, General Administration of Press and Publication, August 16, 1999.

2. INTRODUCTION

On February 11, 2003 the official People's Daily website published an article stating that five people in Guangzhou had died of what it termed "atypical pneumonia." The article's headline proclaimed "Guangzhou Atypical Pneumonia Already Effectively Controlled." In the months since the PRC government made this promise the number of reported cases of, and deaths from, SARS in the PRC has grown over 1,000%, and SARS has become a global health and economic crisis. Although PRC officials have apologized and several have been fired or demoted, it would be wrong to view the situation as merely the result of administrative error on the part of a few people or departments. Rather, the current situation is primarily the product of systemic restraints on freedom of expression that prevented PRC citizens from talking more openly about SARS when it first appeared. This paper will discuss three aspects of this system:

- **Controlling the Means of Publication:** The PRC government has imposed an extensive and burdensome licensing scheme over all media that bars those without money and political connections from establishing publishing enterprises. The result is that there are few who have both access to the means of publication and a willingness to publish information that might be deemed critical of, or embarrassing to, the government.
- **Self-Censorship and the Fog of PRC Law:** The PRC legal system fails to clearly define the boundaries of free expression, and this has resulted in a *de facto* self-censorship regime, as people are too wary of the potential penalties to write about anything that might be construed as destabilizing, insulting, or a matter of state secrets or national security.
- **The Need for Patronage from the Free Speech Elite:** The PRC government has transformed the right of free speech into a political privilege of "freer" speech for the ideological elite, composed of senior government and party officials and academics. Only this "free speech elite" may write about sensitive topics, and then only with the approval of, and in the manner directed by, the senior leadership in Beijing.

The Constitution of the People's Republic of China is the supreme law of that nation,¹ and guarantees that all of China's citizens enjoy the rights of freedom speech and freedom of the press.² However, while people in the PRC are generally free to speak their minds, PRC law discourages them from publishing their opinions. In the PRC everyone from farmers to taxi drivers to restaurant owners will, with little or no prompting, freely express their discontent with their government. But only insubstantial criticism is permissible, and anyone wishing to publish sensitive information or ideas faces significant legal and economic barriers.

In the PRC, the government restricts access to the means of publication to those institutions over which it can easily exert political and economic control. Even for those who have been granted permission to publish, the PRC legal system acts to obscure the boundaries of freedom of expression and discourage communications with foreigners. Ordinary citizens are able to publish information only if they enjoy the patronage of someone whose political status provides a degree of safety from prosecution – a member of the PRC's free speech elite. These restrictions prevent the establishment of private commercial and civil institutions with the capacity and willingness to investigate and report on matters of public concern.

The global spread of SARS is a direct product of these systemic problems. According to

¹ Article 5.

² Article 35.

reports in PRC government newspapers, health care workers in Guangdong province began noticing people coming in with “atypical pneumonia” in mid-November, and by early January people were already engaged in panic buying at drug stores because of rumors of the spread of a “mystery epidemic.”³ But the same government-controlled newspapers that first broke the story in early January devoted most of their coverage to stories with headlines telling people that “The Appearance of an Unknown Virus in He Yuan is a Rumor” and articles quoting government claims that “there is no epidemic” and that illnesses were “the result of changes in the weather leading to a decline in people’s immune systems.”⁴ The people of the PRC (and the world) would not learn the truth until the disease began killing people in Hong Kong, where government restraints on the free flow of information are not as severe as in mainland China. Only then would the PRC’s central government acknowledge the disease’s existence. Even then, the government-controlled media continued to insist that everything was under control.

The point is not to question either the abilities or motivations of PRC health workers or reporters. Events have shown, however, that by allowing only a state-controlled media to report on the government, the PRC’s legal system inhibits the free flow of any information that the government may deem sensitive.

3. CONTROLLING THE MEANS OF PUBLICATION

The PRC government exerts explicit control over the editorial policies of all publishers in the PRC through two means, direct instruction and licensing, both of which prevented thorough media coverage of SARS when it first appeared in Guangdong province. This paper focuses on the latter method.⁵

The PRC Constitution notwithstanding, PRC law stipulates that the right to freedom of the press is not an individual liberty, but a tool to serve the interests of the socialist state:

Publishing businesses shall adhere to the path of serving the people and serving socialism, adhere to the guidance of Marxism, Leninism, Mao Zedong Thought and Deng Xiaoping Theory, promulgate and accumulate scientific technology and cultural knowledge that is advantageous to economic development and social progress⁶

In order to enforce this restriction the PRC government has erected administrative barriers to entry for those wishing to disseminate their opinions any further than their unaided voice can carry. PRC law states that the government directly controls the amount, structure, distribution

³ “Incident Resulting from Rumors of an Unknown Virus, He Yuan City Citizens Fight to Buy Antibiotics,” Huang Liqi, *Jinyang Net* (the online version of the *Yangcheng Evening News*), January 3, 2003; “What Can We Do to Defeat SARS?” *Southern Weekend*, April 23, 2003.

⁴ “Incident Resulting from Rumors of an Unknown Virus, He Yuan City Citizens Fight to Buy Antibiotics,” Huang Liqi, *Jinyang Net*, January 3, 2003; “He Yuan City Citizens go to Guangzhou in Panic Buying of Antibiotics,” *Jinyang Net*, January 5, 2003; “The Appearance of an Unknown Virus in He Yuan is a Rumor” *Jinyang Net*, January 9, 2003.

⁵ For a discussion of how the PRC government exerts control over editors by instructing them as to what topics may or may not be discussed, see “Turning Everyone Into a Censor: The Chinese Communist Party’s All-Encompassing Control over the Media,” (*Rang Meige Ren Dou Biancheng Jianchayuan: Zhongguo Gongchandang Dui Meiti de Quanfangwei Kongzhi*) Wu Xuecan, March 12, 2002.

⁶ Regulations on the Administration of Publishing (2001), Article 3. See also Regulations on the Administration of Audio/Visual Productions (2002), Article 3; Interim Provisions on the Administration of Newspapers (1990), Article 7.

and coordination of all publishing in the country.⁷ Authorities implement this control through a licensing scheme, which ensures that the government can maintain direct editorial management over all media outlets in the country.

PRC law makes it illegal to publish a newspaper without explicit permission from, and sponsorship by, the government,⁸ and anyone wishing to operate a commercial news website must in addition acquire a Telecommunications Business Operating License and an Internet Content Provider license.⁹ PRC law does allow citizens to establish non-commercial Internet websites (i.e., ones that are not supported by advertising, subscription, etc.) without having to be licensed. However, all Internet publishers (both commercial and non-commercial) must have government authorization to publish.¹⁰ Furthermore, private companies and individuals may not independently report original news items, but instead are restricted to licensing news from government sources.¹¹

PRC law also requires all publishers to record with the government any articles that might relate to national security or social stability, or which could significantly influence the nation's government, economy, culture or military, and to wait for 30 days before publishing such pieces.¹² PRC authorities also recently announced that they are considering instituting a national licensing system for reporters,¹³ and Shanghai has already put such a licensing system in place.¹⁴

There are situations where media licensing schemes are appropriate; most countries, for example, allow licensing of the medium of expression where it is a limited resource (i.e., the radio spectrum), and where failure to limit access would make it impossible for any expression to take place at all.¹⁵ This justification does not apply, however, to media such as newspapers or the Internet. Nor is the PRC licensing scheme merely an administrative inconvenience. For example, anyone wanting to establish a commercial news website would have to raise over US\$100,000 in registered capital.¹⁶ Assuming one does have enough capital, the law does not restrict the government's discretion to reject license applications.¹⁷ Furthermore, certain

⁷ Regulations on the Administration of Publishing (2001), Article 10.

⁸ Regulations on the Administration of Publishing (2001), Chapter 2; Notice Regarding Prohibiting the Transmission of Harmful Information and Further Standardizing Publishing Order (2001), Paragraph 2.

⁹ Telecommunication Regulations (2000), Measures for the Administration of Internet Information Services (2001) and Measures for the Administration of Telecommunication Business Licensing (2001).

¹⁰ Interim Provisions on the Administration of Internet Publication (2002), Article 6.

¹¹ Interim Provisions on the Administration of Internet Websites Engaged in News Posting Operations (2000), Articles 4 – 11. A complete discussion of the legal barriers to publishing erected by the PRC government is beyond the scope of this paper. A partial list of related regulations can be found in "CECC: Selected Legal Provisions of the People's Republic of China Affecting the Free Flow of Information," available at www.cecc.gov.

¹² Measures on the Recording of Important Topics of Books, Periodicals, Audio/Visual Productions and Electronic Publications (1997), Articles 5 and 61.

¹³ "Can Licensing Reporters Solve Practical Problems?" *China News Research Center*, February 12, 2003.

¹⁴ "Shanghai Holds the First Journalist Qualification Examination, Questions may Stymie Older Journalists," Cai Yan, *China Youth Online*, December 23, 2002.

¹⁵ See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969): "Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos."

¹⁶ Measures for the Administration of Telecommunication Business Licenses (2001), Article 6.

¹⁷ When rejecting an application, the only requirement is that the reason for the rejection be provided in writing. See, e.g., Measures for the Administration of Internet Information Services (2001), Article 7. Recently the Ministry for Information Industry established an appeals process (Ministry for Information Industry Administrative Review

conditions, such as insufficient staff, could act as an absolute bar to getting a license to publish.¹⁸

Licensing systems such as those imposed by the PRC government are not only unnecessary and burdensome, but they also significantly impede the free flow of information. The necessity of obtaining and maintaining a license creates barriers to entry, and means that the PRC government may not only silence people before they even speak (by refusing to grant the license), but also control an administrative “on-off switch” with respect to an entire publication (by suspending or revoking the license and shutting down the publisher completely). It is because of these hazards that U.S. law generally recognizes judicial injunction as the only permitted form of prior restraint on print media.¹⁹ Karl Marx recognized the distinction between judicial injunction and a licensing system, and the dangers inherent in the latter:

The censor has no law but his superiors. The judge has no superiors but the law. The judge, however, has the duty of interpreting the law, as he understands it after conscientious examination, in order to apply it in a particular case. The censor’s duty is to understand the law as officially interpreted for him in a particular case. The independent judge belongs neither to me nor to the government. The dependent censor is himself a government organ. In the case of the judge, there is involved at most the unreliability of an individual intellect, in the case of the censor the unreliability of an individual character.²⁰

Disregarding Marx’s advice, PRC authorities rationalize their administrative restraints over the means of publication by claiming that “the ‘freedom of the press’ that Western countries boast of is in fact only press freedom for the capitalist class, and serves to protect the interests of the capitalist class and the capitalist system.”²¹ The irony of this accusation is twofold. First, the Communist Party officially embraced capitalists (what it refers to as “entrepreneurs”) at its Sixteenth Party Congress last November, and news publishing in the PRC has become a decidedly profit-oriented endeavor, even for Communist Party publications. Furthermore, PRC authorities have already opened up the means of publication to members of the capitalist class for non-journalistic endeavors, and are allowing them to profit from it.²² Second, by imposing

Implementation Procedures (2002)), but again, these regulations do not require that a license be granted if certain conditions are met.

¹⁸ See, e.g., Interim Provisions on the Administration of Internet Websites Engaged in News Posting Operations (2000), Article 9; Documents and Materials to be Submitted to Apply for an Internet Information Service Value Added Telecommunication Business (ICP) Operating License, Article 3 (Guangdong Communications Administration).

¹⁹ See, Grosjean v. American Press Co., 297 U.S. 233 (1936); Near v. State Of Minnesota Ex Rel. Olson, 283 U.S. 697 (1931): “[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.”

²⁰ “Debates on Freedom of the Press and Publication of the Proceedings of the Assembly of the Estates,” Karl Marx, *Rheinische Zeitung*, May, 1842 (emphasis in original).

²¹ Jiang Zemin, “Regarding Several Problems with the Party’s News Work,” November 28, 1989. See also, “A Timely Progress for Marxist News Studies – Study Jiang Zemin’s Thoughts on the News,” Zhang Shigang (Editor-in-Chief of the People’s Liberation Daily), *News Battle Front*, 2002, Vol. 5:

If the activities of personnel who work for the Western media contravene the will or interests of their syndicate or the government, they will be fired. Sometimes periodicals publish things about attacks or dissent between members of the capitalist class, which gives people the illusion of freedom of the press. But in fact this freedom will never take harming the interests of the capitalist class as its premise. As far as the laboring masses are concerned, even though the law on the books stipulates that there is freedom of the press, in fact it is impossible for it to be realized.

²² See, e.g., “Foreign Capital to Gain Greater Access to Chinese Media,” *Xinhuanet* April 4, 2003; “Fox Affiliate Star TV Set to Air in Guangdong,” PRC New York Consulate website, December 21, 2001; “Time of Prosperity for

registered capital prerequisites for publishing licenses and prohibiting printers from providing services to anyone except government authorized publishers,²³ PRC authorities have ensured that the group they refer to as the proletariat will be unable to engage in organized publishing activities.

The PRC's publication licensing scheme embodies the evils which that country's leaders ascribe to Western societies: allowing only those with capital and political patronage access to the means of publication, and keeping those granted access under constant intimidation. The perennial threat of having one's license suspended, and the economic hardship that would follow, provides the government the leverage necessary to control editorial and personnel decisions in every media outlet in the PRC.²⁴ This is a form of coercion which ensures that it is unlikely that anyone will investigate, much less report, information that senior government officials might deem inappropriate for public consumption. Given these circumstances, it is not reasonable to expect those people in the PRC who have been allowed to publish to take any risks when reporting information of national or international importance, such as the existence of a possible epidemic.

4. SELF-CENSORSHIP AND THE FOG OF PRC LAW

The PRC legal system discourages the free flow of information not only by erecting barriers to participation by non-government-controlled institutions, but also by encouraging individual self-censorship. The PRC's laws restricting freedom of expression do not clearly define, and therefore do not adequately protect, the scope of that freedom. Broad, vague, and conflicting legislation hangs over PRC citizens like a fog, obscuring the boundaries of free speech to such a degree that most people are too wary to approach them for fear of overstepping them. The pervasive threat of arrest is generally sufficient to cause people to censor themselves.

As one jurist phrased the issue: "the value of a sword of Damocles is that it hangs - not that it drops. For every [person who tests] the limits of the statute, many more will choose the cautious path and not speak at all."²⁵ It is likely that many of the government officials, reporters and even average people in Guangdong who were aware of the potential threat posed by SARS in December and January kept quiet because they were also aware of the fate of the last person who spoke out about a health crises in the PRC: Dr. Wan Yanhai, who was detained in late August 2002 for disclosing a government report documenting the spread of AIDS in Henan province through contaminated blood. Authorities released Dr. Wan almost a month later after an enormous international outcry, but only after Dr. Wan signed a confession admitting he was guilty of revealing state secrets. According to some reports on the case, the information Dr. Wan published was indeed classified.²⁶ Similarly, PRC law could be interpreted as deeming certain

Young Entrepreneur," Michael Jen-Siu, *South China Morning Post*, March 3, 2003 (discussing the plans of one wealthy and successful Chinese publisher to become the Rupert Murdoch of China); "Media group pushes Deeper into China," *China Daily*, April 8, 2003 (discussing new deals signed with Viacom to bring MTV and Nickelodeon to more viewers in China).

²³ Regulations on the Administration of Printing Enterprises (2001), Article 15.

²⁴ See, e.g., "Two Chinese Editors Sacked Over Confidential Sars Document," April 29, 2003, *South China Morning Post*; "China Moves To Control Liberal Paper," Richard McGregor, *Financial Times*, May 4 2003.

²⁵ *Arnette v. Kennedy*, 416 U.S. 134 (1974) (Justice Marshall, dissenting).

²⁶ See, e.g., "China Now Set to Make Copies of AIDS Drugs," Elisabeth Rosenthal, *New York Times*, September 6, 2002.

aspects of the spread of SARS to be a state secret.²⁷ As the discussion of the state secret and national security laws below demonstrates, however, even assuming information regarding the SARS outbreak was not classified, this would certainly not have been enough to reassure a person of average caution that it would be safe to publish information or speak with foreign organizations about it.

A statement by Jiang Zemin provides an example of how the PRC government obscures the boundaries of freedom of expression: “all illegal press activities that are designed to change the socialist system shall not only not be given freedom, but shall also be struck down in accordance with the law.”²⁸ The use of the term “illegal” is a common rhetorical device employed by PRC authorities to imply that the government only suppresses actions that violate the law. Of course, it doesn’t seem likely that the government would give “illegal press activities” freedom, provided they are not designed to change the socialist system. Thus, Jiang Zemin’s statement makes sense only if one disregards the word “illegal.” The message therefore is: freedom of expression does not include the freedom to say something that the government believes was designed to change the socialist system.²⁹

What it means to “change the socialist system” is not made clear, so the people of the PRC are left to infer from Jiang Zemin’s statement what they will. They will only know they have made the wrong inference once they have been arrested, because this sort of rhetorical obfuscation is not limited to political speeches, it is also found throughout the PRC legal code. Two of the most problematic examples of this “fog of law” are the laws and regulations relating to state secrets and national security.

The PRC Constitution states that all Chinese citizens have an obligation to safeguard state secrets,³⁰ and the PRC Criminal Law makes it a criminal offense for anyone to disclose state secrets, even negligently.³¹ Anyone providing information to a news agency in the PRC must first receive government approval if it is unclear whether the information relates to state secrets, and anyone providing information to a foreign news agency must first receive government approval if the information relates to China’s government, economy, diplomacy, technology, or military.³² With respect to Internet publishers, PRC law is even more explicit about who is responsible for keeping state secrets, stating: “those who go online shall bear responsibility.”³³

PRC law provides a list of what may be deemed a state secret, but the list is so broad and vague as to encompass essentially any matters of public concern.³⁴ Although the State Secrecy

²⁷ See, e.g., Ministry of Health Explanation Regarding “Provisions on Health Work and PRC State Secrets and State Secret Classification,” (1991), Article 2(2)(11).

²⁸ Jiang Zemin, “Regarding Several Problems with the Party’s News Work,” November 28, 1989, quoted in “A Timely Study of Marxist Media – Study the Media Thoughts of Jiang Zemin,” Zhang Shigang, *Military Journalist*, 2002, Issue No. 4.

²⁹ An alternative translation for Jiang Zemin’s statement is “all press activities that are designed to change the socialist system (and are therefore illegal) shall not only not be given freedom, but shall also be struck down in accordance with the law,” which states the government’s position even more baldly.

³⁰ Article 53.

³¹ Article 398.

³² Regulations on the Protection of Secrets in News Publishing (1992), Articles 14 and 15.

³³ Provisions on the Administration of the Protection of Secrets on Internationally Networked Computer Information Systems (2000), Article 8.

³⁴ Law on the Protection of State Secrets (1988), Articles 2 and 8, Measures for the Implementation of the Law on

Bureau has worked with other PRC government agencies to pass dozens of agency-specific regulations defining the scope of state secrets, these regulations do little more than assign classifications of “top secret,” “secret,” and “classified” to broad categories of information that are deemed state secrets.³⁵ The municipal State Secret Office of Luo Shan (one of the cities in Guangdong where SARS first appeared) tells people visiting its website that:

State secrets are any matters relating to the security and interests of the nation, in accordance with procedures prescribed by law the knowledge of which has been limited to a defined scope of people for a defined period of time. “Relating to the security and interests of the nation,” means that, if a secret matter were known by people who do not currently know it, it would result in various kinds of harm to the security and interests of the nation.

As an example of the breadth of information that is covered by state secrets laws, visitors to the website are also informed that in 1999 two local people were found guilty of disclosing state secrets when they passed on test questions for high school entrance examinations.³⁶

Besides the difficulty in determining exactly what the law means by “state secrets,” those wishing to report on current events must also deal with the broad definition of what constitutes “intelligence,” the disclosure of which is a criminal act.³⁷ The Supreme People’s Court has defined “intelligence” as: “items which involve the security and interests of the nation, but which are not public or which, according to relevant regulations, should not be made public.”³⁸ Thus, before any person in the PRC speaks to the press or a foreigner, they have to feel confident that the information would not involve the security and interests of the PRC or, if it might, they must determine whether it is already public and, if so, whether there are any regulations under which it should not have been made public – an impossible task given the broad definition of what may constitute a state secret.

In addition to having to worry about violating state secret laws, anyone in the PRC who wishes to communicate with foreigners or to publish information regarding the PRC’s politics, society or economy, confronts the threat of subversion charges. Under PRC law anyone who engages in behavior that jeopardizes national security may be subject to legal investigation.³⁹ There is of course nothing objectionable about laws intended to protect national security,⁴⁰ but

the Protection of State Secrets (1990), Article 4 (included as [Appendix A](#) to this report). It is also worth noting that the Supreme People’s Court has defined state secrets to include all information “relating to security and interests of the nation,” even when they are not marked as being classified. See, Explanation of Certain Issues Regarding the Specific Laws to be Used in Adjudicating Cases of Stealing or Spying to Obtain, or Illegally Supplying, State Secrets or Intelligence for Foreigners (2000), Article 5.

³⁵ Agencies that have enacted such regulations include the State Administration of Chinese Medicine (1990), the Ministry of Health (1991), the State Environmental Protection Administration (1991), and the Ministry of Labor and Social Security (2000).

³⁶ <http://www.fsbmj.gov.cn>. See also “Two Teachers in Wuhan Sentenced as Criminals for Illegally Obtaining and Disclosing High School Art Entrance Examination Topics,” Xiao Liang, *China News Service*, October 10, 2002, describing how two people were found guilty of illegally obtaining state secrets after they bribed a school official to allow them to take pictures of charcoal drawings that were going to be used in test questions in an upcoming provincial school entrance examination.

³⁷ Criminal Law (1997), Article 111.

³⁸ Explanation of Certain Issues Regarding the Specific Laws to be Used in Adjudicating Cases of Stealing or Spying to Obtain, or Illegally Supplying, State Secrets for Foreigners (2000), Article 1.

³⁹ State Security Law (1993), Article 4.

⁴⁰ For example, the U.S. Supreme Court has acknowledged the necessity of restricting freedom of expression in

the vagueness of PRC laws in this regard, and the manner in which PRC authorities apply them, have produced an atmosphere that discourages people from publishing information regarding matters of concern to the general public.

Particularly stifling are the provisions of Article 105 of the Criminal Law prohibiting the use of defamation or rumor mongering to incite subversion.⁴¹ The problem is that exactly what constitutes “rumor mongering” is not defined in statute, case law, or Supreme People’s Court notices. Furthermore, PRC defamation law is still in the early stages of development, and provides very limited protection for those reporting on political figures.⁴² The public security authorities and the procuratorate have not provided any public guidance as to when they will or will not pursue criminal complaints in connection with these matters, and PRC courts conduct these trials in secret and do not issue instructive opinions.

A recent example of the application of Article 105 occurred in mid-February, 2003, when a court in Xinjiang province sentenced Tao Haidong to seven years imprisonment and three years deprivation of political rights for subverting the national regime. His crime was using the Internet to publicize “reactionary” essays that “willfully smeared and vilified the leaders of the party and the nation.”⁴³ Another example occurred when a PRC court sentenced a Mr. Liu to three years imprisonment for posting essays on various electronic bulletin boards “inciting subversion of the national regime and the overthrow of the social system.”⁴⁴

Mr. Tao’s crimes must have been greater than merely insulting political leaders, because that crime can result in a sentence of no more than five years imprisonment, and he received seven.⁴⁵ But reports in the PRC press regarding the case show no indication that he did anything other than write essays criticizing the PRC government and its leaders. In Mr. Liu’s case the court actually cited the portions of Article 105 of the Criminal Law and Article 2 of the Decision of the Standing Committee of the National People’s Congress Regarding Safeguarding Internet Safety regarding rumor mongering and defamation, but did not discuss what he had said.

More often, however, PRC authorities do not bother with the subtlety of a defamation claim and simply prosecute citizens for straightforward subversion. For example, Mr. Wang Jinbo is currently in prison for incitement to subvert state power for sending e-mails to foreign pro-democracy groups in which he said the government should release jailed dissidents and rehabilitate victims of the 1989 Tiananmen crackdown.⁴⁶

cases involving national security. *See, e.g., Dennis v. United States*, 341 U.S. 494 (1951).

⁴¹ Criminal Law (1997), Article 105.

⁴² *See, e.g., “Judicial Protection of News Freedoms,” He Weifang, Legal Daily, November 15, 2002:*

There exists a significant shortcoming in China’s laws and legal interpretations with respect to defamation regulation, and that is we have never done an in-depth treatment to consider and differentiate the types of defamation litigation that can be instituted . . . For example, it is necessary to further limit the qualification of state official employees to litigate.

See also “Freedom of Speech and Internet Defamation,” Wei Yongzheng, People’s Procuratorate Daily Online, October 25, 2002.

⁴³ “Xinjiang Hears Case of Subversion Against the State,” Wang Shulin, *China Court Web*, February 16, 2003.

⁴⁴ “The Case of Mr. Liu Utilizing the Internet to Subvert the National Regime,”

<http://lycos14894.w57.lycos.com.cn/zmal/al/d1/sddfzq001.htm>.

⁴⁵ Criminal Law (1997), Article 105.

⁴⁶ “Jailed Democracy E-mailer Goes on a Hunger Strike,” *South China Morning Post*, March 3, 2003. Lists of

It is inevitable that, as people in the PRC read about these cases, they will be left wondering: What did these people say that was such a threat to the national security of the PRC? What degree of criticism of a government official constitutes defamation? When does defamation constitute subversion? Is it subversive to communicate with any foreign organization that criticizes or embarrasses the government? PRC law does not provide sufficient guidance with respect to these questions. Furthermore, the PRC legal system is rife with other broad, vague, and conflicting regulations holding out the threat of sanctions for anyone who commits such breaches as spreading rumors, offending the honor of China or jeopardizing social stability.⁴⁷ This legal system effectively ensured that anyone who was aware of the existence of SARS in Guangdong during the early stages would not have been willing to publish such sensitive information or discuss it with foreign journalists or experts.

5. THE FREE SPEECH ELITE

Despite the barriers to access to the means of publication and the dangers inherent in publishing sensitive information, it is still possible that knowledge of the existence of SARS could have been disseminated more broadly earlier if the issue had been championed by members of the PRC's "free speech elite." This group is composed of senior government and Communist Party leaders, those with the patronage of these leaders and, to a lesser extent, academics. Although not immune to the vagaries of PRC law, members of this group are able to express concerns and criticism of the government with less fear of punishment than the average PRC citizen. The operative principle could be expressed as follows: the degree to which the government is willing to tolerate criticism of its leaders and policies is contingent upon the size and nature of the audience and the ideological credentials of the speaker. The PRC government has thus transformed the constitutional right of free speech for the people into a political privilege of freer speech for the ideological elite.

An example of this principle is Li Rui, a retired senior Communist Party official and former aide to Mao Zedong, who earlier this year published a letter in the Beijing magazine "China Chronicle" calling for greater democracy in China's government:

Only with democratization can there be modernization. This has been a global tide from the 20th century, especially the Second World War, onward, and those who join it will prosper while those who resist it will perish. The Constitution stipulates that the National People's Congress is the highest power in the country, and the relationship between the party and the NPC should be suspended, the NPC should not be led and directed in the name of the Party.

Government authorities would generally not tolerate the use of such blunt language and veiled threats, but Mr. Li's status seems to have allowed him to escape punishment.⁴⁸

dozens of individuals currently detained for publishing-related national security crimes are available from the Digital Freedom Network at <http://www.dfn.org/focus/china/chinanetreport.htm>.

⁴⁷ See, e.g., Constitution, Articles 33 and 54. For further examples, see [Appendix B](#), and "CECC: Selected Legal Provisions of the People's Republic of China Affecting the Free Flow of Information," available at www.cecc.gov.

⁴⁸ The text is from a speech Mr. Li gave at the Sixteenth Party Congress last November. It was subsequently published in the China Chronicle in January. The two month delay would indicate that its publication was vetted and approved by government authorities, so even this example of "free speech" is really nothing of the sort. For another example, see "Extended Detention, Forced Confession Still Salient in Chinese Judiciary: Report," *People's*

Academics are accorded somewhat less leeway than party and government leaders, but still more than the average PRC citizen. This group is allowed to criticize government policies, provided their tone is constructive and they do so only in government sponsored forums (such as government controlled newspapers) or to a limited audience (such as in professional journals with limited distribution, at academic and professional conferences that are closed to the public, etc.). For example, Chinese and Western academics convened last January in the PRC for a conference on the death penalty. There was also a debate in the Chinese media last July about the review and approval process for death penalty cases, with articles featuring analysis by legal experts from PRC universities.⁴⁹ However, these debates took place only in closed forums and in the state-controlled media. So while this kind of public debate is unprecedented and represents enormous progress for freedom of expression in the PRC, it is only a limited freedom for a few people with close ties to the government.

It is in this context that the recent expulsions of Zhang Wenkang (Minister of Health) and Meng Xuenong (Mayor of Beijing) from the Communist Party must be viewed. Their offense was not so much a dereliction of official duty, but rather a failure to observe the *noblesse oblige* inherent in their status as members of the free speech elite. The PRC government recognizes that its legal system discourages and inhibits freedom of expression for the average citizen to such an extent that, if the members of the free speech elite do not exercise their privilege of freer speech, it threatens the government's authority.⁵⁰ As the SARS crisis has shown, however, this system is not an effective substitute for a broader freedom of speech and freedom of the press for all PRC citizens.

And what of the PRC's billion-plus citizens who are not, or do not have access to, members of the free speech elite? Currently, if an average person in the PRC wants to publish their opinions to an audience broader than their voice can carry and they do not have a free speech elite patron, the safest mechanism is via Internet bulletin board systems run by the government. A good example of a system is the "*Qiangguo Luntan*" ("Strong Country Forum"), which is run by the People's Daily, the official newspaper of the Communist Party. PRC law requires all electronic bulletin board systems to be licensed, all posts to be constantly monitored, and any inappropriate posts to be taken down.⁵¹ One reason the Strong Country Forum became popular

Daily Online, English edition, December 28, 2000, where a senior PRC legislator criticized the government for the fact that "Three years after the new Criminal Procedure Law was implemented, over-extended detention of criminal suspects and forced confession is still a 'salient problem.'"

⁴⁹ For a summary of this discussion see the Congressional Executive Commission on China Topic Paper: "The Execution of Lobsang Dondrub and the Case Against Tenzin Deleg The Law, the Courts, and the Debate on Legality," February 10, 2003 at www.cecc.gov.

⁵⁰ This recognition is evidenced by PRC authorities' increasingly exhorting the government controlled media to undertake "consensus supervision" (*yulun jiandu*). For example, a recent search for the term "*yulun jiandu*" in the People's Daily online database turned up over 1,820 articles in the last three years, compared to only 361 for "freedom of the press" (*xinwen ziyou*) and 53 for "freedom of publication" (*chuban ziyou*). See also, "Report of the 16th Party Congress," Section 5, paragraph 8, stating that the Party needed to "bring about the fruits of consensus supervision" in order to strengthen the control and supervision of power. "Consensus supervision" involves "the masses of people going through the news media to publicly implement democratic supervision of the Party and the government with Party and government personnel, including all leadership personnel at all levels of the Party and government," Notice Regarding the Publication of the 'Summary Findings of the Propaganda Department's News Research Group,' March 6, 1989. Such a state-sponsored system would not be necessary, of course, if people were able to make their consensus known through outlets of their own creation.

⁵¹ Provisions on the Administration of Internet Electronic Bulletin Services (2000), Articles 8 and 11.

was that its affiliation with (and therefore protection by) the Communist Party enabled its censors (whose identity, affiliation and background is not made known to users) to adopt a more liberal approach to what could and could not be posted. Therefore, although the forum does not provide anonymity, users can at least be assured that anything that does get posted has been pre-screened by the government.

It is possible to watch as users on the Strong Country Forum debate with the censor about whether or not a given post should be allowed.⁵² In one case, a poster was able to persuade the censor to allow his post because, even though the title sounded like it was praising the U.S. multi-party system, in fact it was a long essay about the dangers inherent in such a system. One can also see the censor remove posts which are either too critical of the government, or which might be acceptable by themselves but have generated too many responses critical of the government.⁵³

As one PRC government agency put it: “[the Strong Country Forum] represents the degree of freedom of expression the people of China have.”⁵⁴ This kind of freedom can hardly be deemed conducive to the free flow of information.

6. CONCLUSION

One newspaper publisher in the PRC summed up the priorities of the government-controlled media as follows:

Social stability is more important than anything else. Without a stable social environment, nothing else we do can succeed. Therefore, whatever project we undertake, it must be beneficial to social stability⁵⁵

The spread of SARS and its global health and economic impact should serve as a warning to the PRC government that, while its current system of restrictions on freedom of expression may be helpful in maintaining the stability of its authority in the short term, it also serves to blind it to matters that have a profound impact on the well-being of the people it governs, as well as everyone with whom they interact. This warning is nothing new:

The free press is the ubiquitous vigilant eye of a people’s soul, the embodiment of a people’s faith in itself, the eloquent link that connects the individual with the state and the world, the embodied culture that transforms material struggles into intellectual struggles and idealizes their crude material form. . . . It is the censored press that has a demoralizing effect. . . . The government hears only its own voice, it knows that it hears only its own voice, yet it harbors the illusion that it hears the voice of the people, and it demands that the people, too, should itself harbor this illusion. For its part, therefore, the people sinks partly into political superstition, partly into political disbelief, or, completely turning away from political life, becomes a rabble of private individuals.⁵⁶

⁵² See Appendix C, Screenshots 1 and 3.

⁵³ See Appendix C, compare Screenshots 1 and 2, 3 and 4.

⁵⁴ China Internet Network Information Center, <http://www.cnnic.net.cn/annual2002/42.shtml>.

⁵⁵ “Carry out the ‘Three Represents’ and Strengthen Consensus Supervision,” Xu Jigang, Editor-in-Chief, *Su Qian Daily*, October 15, 2002.

⁵⁶ “Debates on Freedom of the Press and Publication of the Proceedings of the Assembly of the Estates,” Karl Marx, *Rheinische Zeitung*, May, 1842 (emphasis in original).

This succinctly describes the situation in the PRC as it grapples with SARS: the government heard only its own voice in the state-controlled media, and now the people of the PRC have lost their faith in that media and are unwilling to believe anything it has to tell them, but are unable and too afraid to call for reforms in the system. Regardless of what the eventual death toll attributable to SARS may be, the responsibility for the current economic damage and social instability arising from this situation lies squarely on the shoulders of the PRC's most senior leaders who have put this system place.

A common PRC government response to criticism of its failure to respect the right to freedom of expression is that such matters are the internal affairs of China. Such claims ring hollow in light of the spread of SARS, the impact of which would most likely have been confined to the PRC had that country not chosen to participate more actively in the global community. This participation, such as winning the right to host the Olympics and joining the World Trade Organization, has brought benefits to the PRC in terms of its economy and stature. Those enjoying the benefits of being part of the global community also have an obligation to that community.

PRC leaders should move quickly to eliminate the barriers erected by the PRC legal system that impeded the free flow of information regarding SARS. They will not achieve this merely by punishing those within their ranks who failed to properly weigh their obligations as members of the free speech elite against the risks they faced in a murky and uncertain legal system. Instead of simply adopting punitive measures, the PRC government should enable its citizens to establish and develop private commercial and civil institutions that have the desire, the capability, and the right to investigate and report on matters of public concern. This can occur only if PRC leaders reform the way the government regulates freedom of expression by removing administrative restraints on publishing and providing clearer guidance on what constitutes constitutionally protected speech.

APPENDIX A

Law on the Protection of State Secrets

Article 2: State secrets are all issues relating to the security and interests of the nation, determined in accordance with legally defined procedures, the knowledge of which is restricted to a defined scope of personnel for a defined length of time.

Article 8: State secrets include the following secret issues which comply with prescriptions of Article 2 of this law:

- (i) secret issues in significant decisions in national affairs;
- (ii) secret issues in the activities of national defense building and the strength of the armed forces;
- (iii) secret issues in the activities of diplomacy and foreign affairs and issues of assuming secret duties with respect to the outside world;
- (iv) secret issues in the economic and social development of citizens;
- (v) secret issues in scientific technology;
- (vi) secret issues in activities of maintaining national security and the investigation of criminal activity; and
- (vii) any other state secret issues which the national secrecy protection work agencies determines should be preserved.

Anything which does not comply with prescriptions of Article 2 of this law shall not be considered state secrets.

All party matters which comply with prescriptions of Article 2 of this law shall be considered state secrets.

Measures for the Implementation of the Law on the Protection of State Secrets

Article 4: Any matter which would give rise to any of the following consequences if it were divulged, shall be brought within the scope of a state secret and a specific secrecy grade (hereinafter called the scope of secrecy protection):

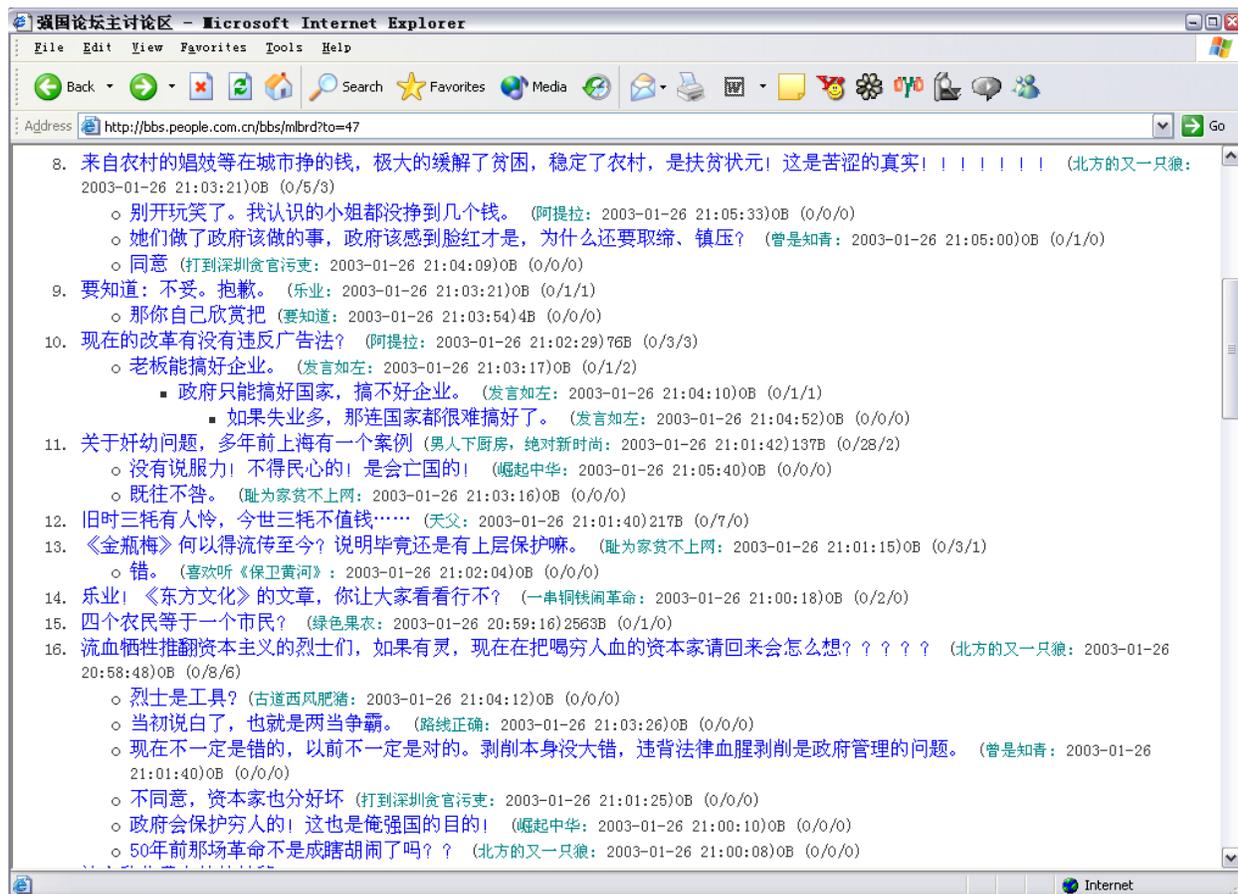
- (i) jeopardizes the ability of the national government to maintain stability and defend itself;
- (ii) affects the integrity of the nation's unity, solidarity among peoples or social stability;
- (iii) harms political or economic interests of the nation with respect to the outside world;
- (iv) affects the safety any national leader or foreign dignitary;
- (v) hinders important national safety or health work;
- (vi) causes a reduction in the effectiveness or reliability of any measures to protect state secrets;
- (vii) weakens the nation's economy or technological strength;
- (viii) causes any national organ to lose its ability to exercise its legal authority.

APPENDIX B

Examples of Broad and Vague Legislative Provisions in PRC Law

Legislation	Issuer	Selected Provisions
Measures Regarding the Administration of China Internet Domain Names (2002)	MII	Article 19: No domain name registered and used by any organization or individual may contain the following types of content: (iii) harming the honor or the interests of the nation; (vi) spreading rumors, disturbing social order or disrupting social stability.
Interim Provisions on the Administration of Internet Publication (2002)	MII GAPP	Article 17: Internet publications may not carry the following types of content: (iii) harming the honor or the interests of the nation; (vi) spreading rumors, disturbing social order, disrupting social stability.
Measures for the Administration of Telecommunication Business Licenses (2001)	MII	Appendix 2 (III)(iv): No operators or their employees shall utilize telecommunication networks to produce, copy, promulgate or transmit any information containing the following types of content: 3 harming the honor or the interests of the nation; 6 spreading rumors, disturbing social order or disrupting social stability.
Regulations on the Administration of Publishing (2001)	SC	Article 26: No publication may contain the following types of contents: (iii) harming the honor or the interests of the nation; (vi) disturbing social order, disrupting social stability.
Notice Regarding Further Strengthening the Administration of Periodicals Relating to Current Affairs and Politics, General Lifestyle, Information Tabloids and Scientific Theory (2000)	GAPP	2. It is strictly prohibited for publications to include any of the following contents: (1) gainsaying the leadership of Marxism, Mao Zedong Thought, Deng Xiaoping Theory; (3) . . . jeopardizing the interests of the nation; (4) . . . influencing social stability; (5) . . . propagating superstition, pseudo-science or incorrect teachings. (6) spreading rumors, producing and distributing false news, interfering in the broader work of the party or the nation; (7) otherwise violating the propaganda discipline of the party or violating the regulations administering the nation's publishing.
Notice Regarding the Further Strengthening the Administration of Selection of Articles for Newspapers and Periodicals (2000)	GAPP	1. . . . [Newspapers and periodicals] shall not select articles that contradict the guiding policies of the party and the nation. . . .
Provisions on the Administration of Internet Electronic Bulletin Services (2000)	MII	Article 9: No person may issue any information having the following types of content on an electronic bulletin service: (iii) harming the honor or the interests of the nation; (vi) spreading rumors, disturbing social order or disrupting social stability.
Notice Regarding the Work of Bringing the Periodical Industry Under Control (1997)	GAPP	2(6): In any of the following circumstances where administrative measures have been adopted but there has been no clear improvement, publication should be ceased: (1) Articles have been carried which have severe political errors;
Provisions on the Administration of Electronic Publications (1997)	GAPP	Article 6: No electronic publications may contain the following types of content: (iii) jeopardizing the nation's . . . honor or interests.
Measures on the Administration of Safeguarding the Safety of Internationally Networked Computer Information Networks (1997)	MPS	Article 5: No unit or individual may utilize the Internet to produce, copy, look up or transmit any of the following categories of information: (v) spreading rumors or disrupting social order; (viii) harming the credibility of a government agency.

Screenshot #4



Post 9 (which should now be post 16) has been deleted.