FEDERAL EMPLOYMENT AND THE FIRST AMENDMENT

The Summary Suspension Act[1] provides for dismissal of employees of certain federal agencies[2] in the "interest of national security."[3] While the Act sets forth procedures to be followed in determining whether the employee is a security risk and provides for appeal from decisions adverse to the employee, it does not establish standards for determining whether the individual is a security risk. Instead the Act authorizes each agency head to dismiss an employee "whenever he shall determine such termination necessary or advisable in the interest of the national security. . . ."[4] Prior to its passage President Truman issued Executive Order No. 9835,[5] instructing agency heads to dismiss when, "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal. . . ."[6] Since enactment of the Summary Suspension Act, the standard for dismissal has been altered.[7]

An employee who has been dismisssed as a security risk, can attack the dismissal by seeking an injunction ordering the agency head to reinstate him.[8] There are numerous grounds upon which a dismissal may be attacked. Several dismissals have been successfully attacked as violative of the statutory procedures.[9] This note, however, shall be confined to a discussion and analysis of the efficacy of the right to freedom of speech under the first amendment of the United

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1. 64 Stat. 476 (1950), 5 U.S.C. § 22-1 (1958).

2. Departments of State (including the Foreign Service), Commerce, Justice, Defense, Army, Navy, Air Force and Coast Guard; and the Atomic Energy Commission, National Security Resources Board and National Aeronautics and Space Administration.

3. 64 Stat. 476 (1950), 5 U.S.C. § 22-1 (1958).

4. *Ibid.*

5. 12 Fed. Reg. 1935 (1947).

6. Exec. Order No. 9835, 12 Fed. Reg. 1935 (1947).

7. The standard for dismissal was altered by Exec. Order No. 10241, 16 Fed. Reg. 3690 (1951).

> The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States.

The current standard requires that employment of the individual be "clearly consistent with the interests of the national security." Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953).

8. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); Cole v. Young, 351 U.S. 536 (1956); Peters v. Hobby, 349 U.S. 331 (1955); Bailey v. Richardson, 341 U.S. 918 (1950).

9. Vitarelli v. Seaton, *supra* note 8; Service v. Dulles, *supra* note 8; Cole v. Young, *supra* note 8; Peters v. Hobby, *supra* note 8.

States Constitution when argued as a ground for reinstating an employee discharged under the Summary Suspension Act. An analysis of the right to free speech and the application of that right to alleged security risks will be included in this discussion.

There is no doubt that Congress can impose reasonable restrictions on federal employment to ensure the integrity of federal personnel.[10] It is not at all clear, however, what constitutes proper grounds for dismissal. The opinion in *McAuliffe v. Mayor of New Bedford*,[11] written by Mr. Justice Holmes while a member of the Massachusetts bench, has contributed greatly to the confusion in this area. In that case a policeman was dismissed from his job under a statute authorizing such action for the making of political speeches. The petitioner argued that legislation prohibiting his participation in local politics infringed the right of free speech. Holmes held, however, that: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[12] No one can question the validity of either clause of the sentence—petitioner did have a constitutional right to freedom of speech and had no constitutional right to be a policeman. It is submitted, however, that the statement is an oversimplification of the problems involved in a dismissal case. It merely provides a glib rubric as a substitute for analysis of the issues. Surely Holmes did not mean that regardless of any rights petitioner might have, constitutional or otherwise, he was subject to dismissal at the whim of the legislature.[13] Legislative power to regulate government personnel does not include a corollarial power to infringe the Constitution. In *Slochower v. Board of Higher Education*,[14] a provision of the New York City municipal charter required the discharge, without notice or hearing, of employees interposing the privilege against self-incrimination. Slochower, a city college professor, was summarily dismissed when he refused to answer questions put to him by a congressional committee concerning past Communist Party affiliations. The Supreme Court held the dismissal improper. Mr. Justice Clark, speaking for five members of the Court, observed:

> To state that a person does not have a constitutional right to government employment is only to say that he must comply with *reasonable, lawful,* and *nondiscriminatory* terms laid down by the proper authorities. . . . This is not to say that Slochower has a constitutional right to be an associate professor of German at

10. United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

11. 155 Mass. 216, 29 N.E. 517 (1892).

12. *Id.* at 220, 29 N.E. at 517.

13. But, if he did mean that, his pronouncement was overruled by United States v. Lovett, 328 U.S. 303 (1946).

14. 350 U.S. 551 (1956).

> Brooklyn College. . . . We hold that the summary dismissal of appellant violates due process of law.[15]

It is a constitutional anomaly to assert that "proper authorities" are barred by due process, but licensed to disregard the first amendment. It is clear that all persons within the jurisdiction of the United States government, *even government employees*, are entitled to rights guaranteed by the Constitution, especially those embodied in the first amendment.

I. The Security Risk Cases

Five cases have reached the United States Supreme Court in which the petitioner has questioned the constitutionality of a dismissal under the Summary Suspension Act. In the first of these cases, *Bailey v. Richardson*,[16] petitioner sought reinstatement to her federal job by injunctive relief. An adverse trial court decision[17] was sustained by the circuit court for the District of Columbia over a vigorous dissent by Justice Edgerton.[18] The Supreme Court affirmed the order denying relief by a four to four *per curiam* decision. In *Peters v. Hobby*[19] the second case attacking the act, Chief Justice Warren, speaking for a majority, recognized that the affirmance by an evenly divided court provided no precedent and observed that the constitutional questions argued in *Bailey* were still unanswered. Peters, a Yale University professor of medicine and advisor to the Department of Health, Education and Welfare, had no access to classified material. In spite of clearance by the departmental loyalty board, the Loyalty Review Board, considering the case on its own motion, declared petitioner a security risk and ordered his dismissal. A majority of the Court held that the appellate board had no authority to review cases previously decided in an employee's favor. The ground upon which the majority decision was based was not argued by the petitioner. In *Cole v. Young*,[20] the Court interpreted the statute and relevant Executive Orders as covering only employees in "sensitive" positions. Petitioner was a drug inspector in the Department of Health, Education and Welfare. The court stated that in the absence of an express finding of "sensitivity" the contrary would be assumed and all ambiguities would be resolved against the government. The petitioner in *Service v. Dulles*[21] was a foreign service officer who had served in China during

15. *Id.* at 555, 559, (Emphasis added.) *But see* Nelson v. County of Los Angeles, 362 U.S. 1 (1960) (Mr. Justice Clark speaking for the Court.)

16. 341 U.S. 918 (1951).

17. Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950).

18. *Id.* at 66.

19. 349 U.S. 331 (1955).

20. 351 U.S. 536 (1956).

21. 354 U.S. 363 (1957).

World War II. He had been cleared by the State Department on three occasions, and twice by the Loyalty Security Board. A hearing before the Loyalty Review Board resulted in a finding that petitioner was a security risk. He was dismissed by the Secretary of State solely upon the decision of the review board in the absence of a reading of the evidence. Failure of the Secretary to make an independent finding that petitioner was a security risk constituted a violation of the secretary's regulations, and the Supreme Court unanimously held in favor of the petitioner on that ground. *Vitarelli v. Seaton*[22] involved an employee in a non-sensitive position without civil service status. For this reason he could have been summarily dismissed by the Secretary of the Interior. Dismissal, however, was accompanied by an express reason. Purporting to act under Executive Order No. 10450,[23] the Secretary dismissed the petitioner as a security risk for "sympathetic association" with Communists or Communist sympathizers. Vitarelli sought an injunction directing his reinstatement. While the suit was pending, petitioner was sent a second dismissal notice bearing the date of the first and reciting a dismissal without cause. It was held by a unanimous Court that, "Having chosen to proceed against petitioner on security grounds, the Secretary . . . was bound by the regulations which he himself had promulgated for dealing with such cases."[24] Since the procedures prescribed for security risk dismissals had been violated, the first dismissal was invalid. The Court disagreed as to the effect of the second dismissal, a majority deciding that it had no validity.

Summary of the Security Risk Cases

The affirmance of *Bailey* by an evenly divided court left the constitutional question unanswered. In each of the other four loyalty cases, the court decided favorably to the employees on rather narrow grounds. Consequently the loyalty cases are of no help in determining the degree of protection afforded federal employees by the first amendment. It is therefore necessary to read other first amendment cases and attempt to apply them to the peculiar circumstances of the federal employee.

II. The First Amendment

An analysis of a dismissed employee's right to reinstatement on the basis of the first amendment prohibition against abridging free speech requires a careful examination of the Court's interpretation of the amendment. While the language appears clear and unequivocal,

22. 359 U.S. 535 (1959).
23. 18 Fed. Reg. 2489 (1953).
24. Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959).

the decisions which have applied or refused to apply the amendment are difficult to reconcile. Indeed, Mr. Justice Frankfurter has called the analysis of first amendment cases an "ungrateful task."[25] It has been argued that the first amendment prohibition is absolute.[26] This interpretation, however, has never been adopted by a majority of the court.[27] Four "tests" have been applied by the majority of the Court to determine whether particular speech falls within the prohibition or is a proper subject for legislative control.

A. Bad Tendency Test

Perhaps the earliest concept for determination whether particular speech-infringing legislation was violative of the first amendment prohibition was the "bad tendency" test.[28] A summary of the rule is stated in *Gitlow v. New York*.[29] The majority opinion stated that an act was not violative of the first amendment if it merely prevented utterances which had a "natural tendency and probable effect . . . to bring about the substantive evil which the legislative body might prevent."[30] Petitioner Gitlow had sought reversal of a conviction under the New York criminal anarchy statute.[31] The advocacy for which he was convicted was the writing and publishing of an article. The majority opinion observed that "There was no evidence of any effect resulting from the publication. . . . "[32] The bad tendency test seems to have been applied in the form of a syllogism:

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25. Dennis v. United States, 341 U.S. 494, 539 (1951).

26. *E.g.*, Concurring opinion of Justices Black and Douglas to Wieman v. Updegraff, 344 U.S. 183, 192 (1952); dissents of Black and Douglas to Adler v. Board of Educ., 342 U.S. 485, 496 (1952); and Garner v. Los Angeles Board, 341 U.S. 716, 731 (1951); Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960).

27. See CORWIN, The Constitution of the United States of America 796-804 (1953).

28. There is authority for the proposition that the "Clear and Present Danger Doctrine" was the first test employed by the Court. 26 MO. L. REV. 471-72 (1961). It is this writer's view, however, that the "Clear and Present Danger" language enunciated in Schenck v. United States, 249 U.S. 47 (1919) can be attributed to no more than Holmes' dicta. Employment of the "Bad Tendency Test" in Gitlow v. New York, 268 U.S. 652 (1925) followed close on the heels of *Schenck*. Moreover, significant intervening cases (Abrams v. United States, 250 U.S. 616 (1919); Schaefer v. United States, 251 U.S. 466 (1920) relegated "Clear and Present Danger" language to dissenting opinions).

29. 268 U.S. 652 (1925).

30. *Id.* at 671. The majority opinion erroneously cites Schenck v. United States, 249 U.S. 47 (1919), discussed *infra* at text accompanying note 34, in support of the proposition.

31. NEW YORK PEN. LAWS §§ 160, 161 (1909).

32. Gitlow v. New York, 268 U.S. 652, 656 (1925).

Major premise: The first amendment forbids the legislature[33] to restrict conduct unless the conduct is undesirable.

Minor premise: Enactment of a statute which forbids the conduct proves that the conduct is undesirable.

Conclusion: The first amendment does not prevent conviction for violating the statute. Q.E.D.

The result of this line of reasoning is painfully obvious—the first admendment was effectively repealed by the bad tendency test.

It is submitted that there are two primary objections to the syllogistic bad tendency test. The major premise writes an exception into the first amendment which is wholly arbitrary and overly broad. Even if the first amendment does not really mean what it says, i.e., Congress shall pass *no* law . . . etc., an exception which effectively repeals the amendment does a grave injustice to the Bill of Rights.

Furthermore, the minor premise assumes *sub silentio* that the legislature is the proper body to determine whether particular utterances are undesirable. The amendment expressly forbids the legislature from exercising its judgment in this respect. One wonders why the Court so easily abandoned the function of determining constitutionality of legislation. Whatever the Court's reasons may have been for delegating the interpretation of the Constitution, Mr. Justice Holmes enunciated a doctrine which permitted the Court to exercise the function, at least for a time.

B. Clear and Present Danger Test

Mr. Justice Holmes, speaking for a unanimous Court in *Schenck v. United States*,[34] said of legislation which made certain conduct criminal, "The question in every case is whether the words are used in such circumstances and are of such nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent."[35] Schenck was convicted of conspiracy to violate the Espionage Act of June 15, 1917.[36] The act made it illegal to "cause or attempt to cause insubordination . . . in the military . . . or . . . obstruct the recruiting or enlistment service

33. The word "legislature" is used with full cognizance of the direct applicability of the first amendment to "Congress." When applied to state legislatures under the 14th amendment, however, it has been given a "preferred position." Indeed, Mr. Justice Jackson speaking for the Court in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943), has stated that "Much of the vagueness of the due process clause disappears when the specific prohibitions of the First [amendment] become its standard."

34. 249 U.S. 47 (1919).

35. *Id.* at 52. (Emphasis added.)

36. 40 Stat. 217 (1917).

of the United States. . . . "[37] Schenck's offense was the circulation of pamphlets to drafted men, during wartime, inveighing against participation in the war. The conviction was sustained. However, Justices Holmes and Brandeis applied the clear and present dicta[38] of *Schenck* in later opinions.[39]

In a subsequent dissenting opinion, *Abrams v. United States*,[40] Holmes said:

> [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[41]

Brandeis, in a concurring opinion in *Whitney v. California*,[42] stated:

> It is the function of speech to free men from the bondage of irrational fears. . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.[43]

The clear and present danger test is a rule of reason rather than a rigid formula. It gained majority approval in the early forties.[44] Philosophical purists may criticize the test. They argue that the purpose of the free speech guarantee is to permit the free flow of ideas, regardless of the consequences. The clear and present test permits the legislature to thwart the efforts of a revolutionary movement at the point when it seems to be gaining sufficient support to effect a significant political change.[45] The purists can argue that the first amendment guarantees the revolutionists' right to agitate and, in a

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37. 40 Stat. 217, 219 (1917).

38. See note 28, *supra*.

39. Whitney v. California, 274 U.S. 357, 372 (1937); Gitlow v. New York, 268 U.S. 652, 672 (1925); Schaefer v. United States, 251 U.S. 466, 482 (1920); Abrams v. United States, 250 U.S. 616, 624 (1919).

40. Abrams v. United States, *supra* note 39.

41. *Id.* at 630.

42. 274 U.S. 357, 372 (1937).

43. *Id.* at 376, 378-79.

44. Bridges v. California, 314 U.S. 252 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940). The clear and present test was approved *obiter dictum* in Herndon v. Lowry, 301 U.S. 242 (1937). *But see* concurring opinion of Mr. Justice Frankfurter in Pennekamp v. Florida, 328 U.S. 331 (1946).

45. *But see* dissent to Gitlow v. New York, 268 U.S. 652, 672 (1925).

democracy, the fact that revolutionary change becomes imminent is not adequate basis for abridging the right. However, the test purports only to restrict utterances which "will bring about . . . *substantive evils* that Congress has a right to prevent."[46] If the revolutionist confines himself to the advocacy of change by lawful means, his speech falls within the protected area. It is only the advocates of unlawful conduct whose advocacy is beyond the pale of the first amendment.

C. The Transition to Balancing

In *Dennis v. United States*,[47] Dennis and ten other admitted Communists were convicted under the Smith Act.[48] This much-discussed decision[49] was supported by three different opinions, none of which gained the approval of a majority of the justices.[50] It is indeed difficult to abstract a "rule" from such a complex decision. However, the statement of Chief Judge Learned Hand of the second circuit, which was approved by four justices, is predominant in the case: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[51] Able criticisms of the decision[52] leave little to be added. Suffice it to say that the Hand rule seems to supplant the clear and present test with a marginal coefficient of evil test. The phrasing suggests that cases are to be decided with the aid of a slide rule or calculator when, in fact, application of the rule rests

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46. Schenck v. United States, 249 U.S. 47, 52 (1918). (Emphasis added.)

47. 341 U.S. 494 (1951).

48. 54 Stat. 670 (1940), 18 U.S.C. § 2385 (1958).

49. 3 ALA. L. REV. 232 (1950); 37 A.B.A.J. 920 (1951); 31 B.U.L. REV. 544 (1951); Gorfinkel and Mack, *Dennis v. United States and the Clear and Present Danger Rule*, 39 CALIF. L. REV. 475 (1951); Fallon, *Two decisions of the United States Supreme Court on the Restraint of Communistic Activity*, 56 DICK. L. REV. 343 (1952); Note, 40 GEO. L.J. 304 (1952); 13 GA. B.J. 361 (1951); 26 IND. L.J. 70 (1950); 4 MIAMI L.Q. 238 (1950); Comment, 50 MICH. L. REV. 451 (1952); 36 MINN. L. REV. 96 (1951); 27 NOTRE DAME LAW. 124 (1951); 12 OHIO ST. L.J. 123 (1951); Schmandt, *The Clear and Present Danger Doctrine: A Reappraisal in the Light of Dennis v. United States*, 1 ST. LOUIS U.L.J. 265 (1951); 23 SO. CAL. L. REV. 640 (1950); 24 TEMP. L.Q. 241 (1950); Antieau, *Dennis v. United States—Precedent, Principle or Perversion?* 5 VAND. L. REV. 141 (1952); 37 VA. L. REV. 878 (1951); 8 WASH. & LEE L. REV. 99 (1951).

50. The opinion of the Court was given by Chief Justice Vinson, joined by Justices Reed, Burton, and Minton. Frankfurter and Jackson wrote separate concurring opinions; Black and Douglas issued dissenting opinions.

51. Dennis v. United States, 341 U.S. 494, 510 (1951), *affirming*, 183 F.2d 201, 212 (2d Cir. 1950).

52. Articles cited note 49 *supra*.

on subjective value judgments and visceral reactions. Perhaps the pamphleteer does not publish at his peril under this "test," but he certainly has no clear standard by which to decide when his utterances depart from the area of protected speech. Perhaps the real significance of *Dennis* is the fact that it provides the framework for the emergence of the "balancing interests" test in free speech cases.

D. Balancing the Interests

In *Beauharnais v. Illinois*,[53] a group libel statute was upheld upon the ground that the state had sufficient interest to protect. The statute was described as not "unrelated to the peace and well-being of the State."[54]

The rationale of the approach is as follows: the legislature has determined that certain conduct is injurious to the public welfare; such conduct must be suppressed by restricting to some degree the free exercise of first amendment rights; and the statute is presumed to be constitutional. The Court weighs the interest to be protected by the statute against the first amendment right "of the individual."[55] In some instances the Court has found that the statutorily protected interest weighs heavier in the scales[56] and in others the constitutional right has been sustained.[57]

Balancing the interests is a pragmatic *approach* rather than a test. Its application involves a recognition of the danger of subversive activity, the importance of individual freedom and the difficulty of reconciling the two in particular cases. Social and moral, rather than legal, standards are applied in deciding novel cases.

A major criticism of the balancing approach rests on its similarity to the bad tendency test. Once more, the Court has abandoned to the legislature, at least to some degree, the task of determining the constitutionality of statutes. Given the express prohibition against legislation abridging freedom of speech, it seems singularly improper to permit the legislature to determine, to any degree, what types of speech can be abridged.

The most serious criticism of the balancing approach is leveled at

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53. 343 U.S. 250 (1952).

54. *Id.* at 258.

55. *E.g.*, Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Butler v. Michigan, 352 U.S. 380 (1957); Beauharnais v. Illinois, 343 U.S. 250 (1952); Feiner v. New York, 340 U.S. 315 (1951); Winters v. New York, 333 U.S. 507 (1948).

56. *E.g.*, Times Film Corp. v. City of Chicago, *supra* note 55; Beauharnais v. Illinois, *supra* note 55; Feiner v. New York, *supra* note 55.

57. *E.g.*, Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Butler v. Michigan, 352 U.S. 380 (1957); Schneider v. State, 308 U.S. 147 (1939).

the fact that the Court has often balanced the "wrong" interests—or, at any rate, there is serious disagreement concerning what interests are involved. Members of the Court have disagreed on the point.[58] The interest in free speech is not merely an interest of the individual defendant. It is an interest of every person, both as individuals and as citizens of a democracy. Each individual has an interest in the preservation of his own right of self-expression. Furthermore, the preservation and progress of a democratic society depend upon the free exchange of ideas among all citizens.

It is submitted that the clear and present test is the most desirable test to be employed by the Court in cases involving application of the first amendment. Indeed, it is probably the only formula which can properly be termed a rule of law. The bad tendency "rule" and the currently popular balancing approach require the judge to weigh factors subjectively in novel cases, applying social and moral values inherently different among different individuals. The *Dennis* doctrine embodies the uncertainty of the balancing approach without the benefit of its pragmatism. The clear and present danger test provides both judge and citizen with a reasonably ascertainable standard by which to judge conduct.

CONCLUSION

The right to freedom of speech has not been a stable, well-settled right, but rather, has been altered by the Court with the passage of time. Moreover, the changes in the "meaning" attributed to the first amendment have followed no consistent pattern, leaving the efficacy of the prohibition in doubt to a greater or lesser extent at all points in history. The indefiniteness of the right is compounded when coupled with the confusion concerning the nature of government employee's rights to contest a dismissal. Little wonder that Justice Holmes took the easy way out in *McAuliffe*.[59] However, the majority opinion in *Slochower*[60] requires a reappraisal of the government employee's right to contest a dismissal which is based on an employee's utterances. Grounds for dismissal must be "reasonable, lawful, and nondiscriminatory."[61]

Government employees are subject to dismissal for conduct detrimental to the interests of their employer, just as are the employees of a business. However, an employee of *A* department store is not likely to be fired for making a purchase at *B* department store. Grounds

58. *E.g.*, Beauharnais v. Illinois, 343 U.S. 250, 287 (1952) (Jackson J., dissenting).

59. McAuliffe v. Mayor, 155 Mass. 216, 29 N.E. 517 (1892).

60. Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

61. *Id.* at 555.

for dismissal should be real, not merely illusory. On the other hand, the department store clerk need not be criminally punishable for larceny before he can be fired; no one would suggest that the federal employee must be guilty of treason before he can be dismissed as a security risk. What conduct constitutes proper ground for dismissal as a security risk? What meetings may a federal employee attend without fear of losing his job? What magazines and newspapers may he read? With whom may he associate? Obviously, specific answers can be found only from the decisions of specific cases. However, some standard of conduct should be available for those who wish to join groups other than the Rotary Club without losing their jobs. A reasonable definition of what constitutes "safe" conduct is essential unless all federal employees are to forego reading only the most orthodox of writings and espousing only the classical theories of economics.

The balancing test does not provide a standard by which individuals may securely decide upon a course of conduct. Consider the plight of a criminal defendant who has been indicted for committing common law larceny. If he had no intent to deprive the owner of the property permanently, he is not guilty. He need not fear that the court will "balance the interests" to determine if his conduct was punishable. It may not be clear in every case what will constitute "intent." However, at least there are *some* cases in which it is clear that a distinct element of guilt is absent. There are no necessary elements of guilt when the court has decided that punishment will be determined by the balance of interests.

It is submitted that the Holmes-Brandeis clear and present danger test will safely preserve the interests of the nation—the interest in self-preservation and the interest in speech-preservation. The employee could be dismissed if, but only if, his conduct created a clear and present danger of some substantive evil that Congress can forbid.