Clear and Present Danger Revised: Dennis.—In *Dennis v. United States*,[496] the Court sustained the constitutionality of the Smith Act,[497] which proscribed advocacy of the overthrow by force and violence of the government of the United States, and upheld convictions under it. *Dennis*' importance here is in the rewriting of the clear and present danger test. For a plurality of four, Chief Justice Vinson acknowledged that the Court had in recent years relied on the Holmes-Brandeis formulation of clear and present danger without actually overruling the older cases that had rejected the test; but while clear and present danger was the proper constitutional test, that "shorthand phrase should [not] be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case." It was a relative concept. Many of the cases in which it had been used to reverse convictions had turned "on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech."[498]

Here, by contrast, "[o]verthrow of the government by force and violence is certainly a substantial enough interest for the government to limit speech."[499] And in combating that threat, the government need not wait to act until the putsch is about to be executed and the plans are set for action. "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the government is required."[500] Therefore, what does the phrase "clear and present danger" import for judgment? "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: '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.' 183 F.2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words."[501]

---

[496] 341 U.S. 494 (1951).

[497] 54 Stat. 670 (1940), 18 U.S.C. § 2385.

[498] Dennis v. United States, 341 U.S. 494, 508 (1951).

[499] 341 U.S. at 509.

[500] 341 U.S. at 508, 509.

[501] 341 U.S. at 510. Justice Frankfurter, concurring, adopted a balancing test, id. at 517, discussed in the next topic. Justice Jackson appeared to proceed on a conspiracy approach rather than one depending on advocacy. Id. at 561. Justices Black and Douglas dissented, reasserting clear and present danger as the standard. Id. at 579, 581. Note the recurrence to the Learned Hand formulation in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976), although the Court appeared in fact to apply balancing.