

The Balancing of Self-Preservation Against Political Freedom[†]

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SOME THIRTY or forty citizens, pleading that authority is granted to them by the first amendment, have recently refused to submit to compulsory questioning by legislative committees concerning their political beliefs or associations. On that ground they have been "cited for contempt of Congress." Several of them have already been imprisoned. The cases of the others are still under adjudication, at various stages along the road toward final decision. In its consideration of the constitutional principles here involved, the Supreme Court handed down the *Barenblatt* opinion, rendered in June 1959.¹ It is the purpose of this paper to examine, with respect to its constitutionality, that opinion. As we do so, it will be necessary to refer in part to the closely related concurring opinion of Mr. Justice Frankfurter in the *Dennis* case.²

I

The *Barenblatt* argument, in affirming the judgment of the lower court, rejects the claims of "vagueness" and "lack of pertinency" in the procedures of Congress or of its committees. It then proceeds to discuss the primary issue, under the heading "Constitutional Contentions." That issue, in its bearing upon the first amendment, is stated as follows:

The precise constitutional issue confronting us is whether the Subcommittee's inquiry into petitioner's past or present membership in the Communist Party transgressed the provisions of the First Amendment, which of course reach and limit congressional investigations.³

The question thus stated is answered, at the close of the argument, by the words:

We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter and that therefore the provisions of the First Amendment have not been offended.⁴

† Two earlier papers bearing upon the balancing principle were published in the *University of Chicago Law Review*. See Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461 (1953); Meiklejohn, *The Barenblatt Opinion*, 27 U. CHI. L. REV. 329 (1960). With them should be mentioned Kalven, *Mr. Alexander Meiklejohn and the Barenblatt Opinion*, 27 U. CHI. L. REV. 315 (1960).

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¹ *Barenblatt v. United States*, 360 U.S. 109 (1959).

² *Dennis v. United States*, 341 U.S. 494 (1950).

³ 360 U.S. at 126.

⁴ *Id.* at 134.

The argument which leads from the question to its answer can be summed up in two relatively brief passages. It proceeds:

Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.⁵

And this is soon followed by the words:

That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court, and it is sufficient to say, without particularization, that Congress has enacted or considered in this field a wide range of legislative measures, not a few of which have stemmed from recommendations of the very Committee whose actions have been drawn in question here. In the last analysis this power rests on the right of self-preservation, "the ultimate value of any society."⁶

Two passages taken from the more intricate argument of Justice Frankfurter's *Dennis* opinion express the same contention. He says:

Our whole history proves even more decisively than the course of decisions in this Court that the United States has the powers inseparable from a sovereign nation. "America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent." The right of a government to maintain its existence—self-preservation—is the most pervasive aspect of sovereignty. "Security against foreign danger," wrote Madison, "is one of the primitive objects of civil society." The constitutional power to act upon this basic principle has been recognized by this Court at different periods and under diverse circumstances. "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain those ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come. . . . The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be brought forth. . . ."⁷

And, as the Justice explains how and why the interest in political freedom must, on occasion, be subordinated to the interest in national self-preservation, he says:

⁵ *Id.* at 126.

⁶ *Id.* at 127–28.

⁷ 341 U.S. at 519.

The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved.⁸

II

The issue thus argued in general is given more concrete expression in the text of the specific legislation under which Mr. Barenblatt was accused and convicted and punished for treating with legal "contempt" the authority of Congress. The legislation which authorizes the activities of the committee reads as follows:

The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.⁹

The statute which implements that rule reads as follows:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.¹⁰

Under the authorization of that statute witnesses have been subpoenaed to appear before the House Committee on Un-American Activities and to answer the question, "Are you, or have you ever been, a member of the Communist Party?" And many of them have refused to do so. In the main, they have justified that refusal by appeal either to the first amendment or to the shall-not-be-required-to-testify-against-himself clause of the fifth amendment.

III

A strange but illuminating feature of the *Barenblatt* opinion is that, while denying the general constitutional validity of an appeal to the first

⁸ *Id.* at 523.

⁹ H.R. Res. 5, 83d Cong., 1st Sess. (1953).

¹⁰ 52 Stat. 942 (1938), 2 U.S.C. § 192 (1958).

amendment, it recognizes the general validity of an appeal to the fifth amendment. In words already quoted above,¹¹ it says:

However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances.

And the procedure of the investigating committees has conformed to that ruling. In a word, the witness who seeks to avoid his own "self-incrimination" may constitutionally defy the claims of national self-preservation. But a man who, in the same situation, pleads the cause of political freedom for all self-governing citizens is fined and sent to jail.¹²

IV

As we now proceed to challenge the assertion that, under the Constitution, the national interest in political freedom may be subordinated to the national interest in self-preservation, two lines of argumentation are open to us. We may defend the first amendment or we may attack the asserted ultimacy of the "right of national self-preservation." The dissenting opinion of Mr. Justice Black, in the *Barenblatt* case, has brilliantly and cogently followed the line of freedom's defense. This paper, on the other hand, intends to carry as far as it can the attack upon the claims of self-preservation, as presented by the argument which we are considering. We shall try to show (1) that the Constitution gives no such status to "the right of self-preservation" as the opinion claims for it and (2) that the theory which asserts that constitutional values may be "balanced" by the appellate courts is radically hostile, not only to the first amendment, but also to the intent and provisions of the Constitution as a whole.

¹¹ See text at note 5 *supra*.

¹² It should, perhaps, be noted in passing that Justice Harlan's *Barenblatt* contention, approved by Justice Frankfurter, that the fifth amendment "afford[s] a witness the right to resist inquiry in all circumstances" seems to be a direct denial of Justice Frankfurter's concurring opinion in the *Dennis* case, since the latter finds that all constitutional provisions, including that of self-preservation, are subject to balancing. "Absolute rules," that opinion says, "would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules." *Dennis v. United States*, 341 U.S. 494, 525 (1950). This seeming discrepancy is mentioned here, not for immediate discussion by this paper, but only as indicating how confused and perplexing is the problem to which the balancing doctrine seeks to supply an answer. Some observations on this underlying theme are offered in Meiklejohn, *What Does the First Amendment Mean?* 20 U. CHI. L. REV. 461 (1953). But the issue needs far more critical examination than it has yet been given either by the advocates or the opponents of the balancing theory. For example, we need to make sure whether or not there are provisions of the Constitution other than the relevant clause of the fifth amendment which, by this successful resistance to the claims of self-preservation, show that they are superior in constitutional status to the first amendment.

V

The making of our attack requires that we begin by attempting to survey the structure and functioning of the Constitution as, through changing conditions, it ordains and maintains our national plan of government.

For the purposes of this argument, the most significant feature of the Constitution is its division into two radically different parts. The first of these is the preamble, which lists the "ends" toward which our governing is directed. The second part consists of the seven articles, together with their amendinents, which specify the "means" by which those ends are to be served. The preamble ordains and establishes, in general terms, our public "values" or "interests," in so far as government deals with them. In the articles and amendmets, a sovereign people, while "reserving" to itself some of its powers, delegates to its agencies other powers, by virtue of which they are authorized to further the interests established by the preamble. The task which we now face is that of interpreting this two-fold plan of government in such a way that "the right of self-preservation" shall find its proper place, its proper limits, within it. To that end, the following suggestions are offered for consideration:

A. The preamble lists six different values—unity, justice, domestic tranquility, the common defense, the general welfare, the blessings of liberty—which the governing agencies are directed, and the sovereign people are pledged, to serve. But to these there is added, by the form of statement, an all-inclusive seventh interest—that of political self-government. This is expressed by the words, "We, the People of the United States, . . . do ordain and establish this Constitution for the United States of America." "We" are "sovereign."

B. The articles, with their amendmets, are our national decisions as to which of our sovereign powers shall be granted, and which shall be denied, to the agencies which we create to act for us. And here it must be noted that the two parts of our Constitution, dealing respectively with ends and with means, are so closely bound together that each depends for its meaning upon the other.

C. The six "explicit" interests of the preamble, if they were taken by themselves, would be merely aspirations, rather than concrete plans. They become politically effective only as they are implemented into general delegations of constitutional power by the articles and their amendmets. And this "end-means" connection is so close and vital that every statute or decree enacted and administered by the agencies of the people would read—if its full meaning were made explicit—"Inasmuch as the preamble has defined specific aims of the government, and since there is delegated to this agency specific authority to further those aims, be it resolved or enacted by us that the following action shall be taken." In a word, the preamble indi-

cates to the articles the public interests toward which governing action may be taken, and by which alone such action can be justified.

D. The intellectual and practical task which faces the makers or maintainers of a constitution is indicated by the fact that the "interests" or "ends" of the preamble, when dealt with more concretely, are in large measure opposed to one another. In many cases we can make legislative and executive provision for unity or for justice or for tranquillity, and so on, only by denying or limiting our provisions for the other five values which are correlative with it in constitutional status. As the makers or amenders of a constitution determine and define any one of its "provisions" they must, therefore, take into account not only one general interest of the nation but all its general interests, as well as all its other provisions. In this operation all the provisions are balanced and combined into a total plan of government, in which every one of them finds its place, is strictly limited to that place, while all other provisions are debarred from it.

E. From what has been said it follows that while the values or ends of the preamble may be and, in fact, must be in conflict with one another, the provisions of the articles are never in mutual conflict. In the devising of those provisions there is carried on by a constitutional convention a vast and intricate procedure of "balancing" of ends, together with their appropriate means. But when the Constitution has been completed, such "balancing" ceases to have any meaning whatever, except as amendments to the structure are thought to be needed. If conflict between articles, or within any one of them, should appear, that conflict would give sufficient evidence that the making of the Constitution had not been properly done and that, therefore, amendment to the work must be undertaken. But, at this point, two considerations must be kept in mind. First, there is no power, nor is there any need to "balance" the provisions of the Constitution against one another, unless amendment of the Constitution itself is in question. And, second, authority to "amend" is not delegated either to the legislature or the executive, or the judiciary, or to all of them combined. So far as working arrangements can be devised, that power is "reserved" to the sovereign people and is exercised by them in the maintaining of the Constitution.

F. Finally, within the structure of ends and means thus devised, the daily work of concrete governing is carried on by the legislative, executive, and judicial agencies of the people, and by the citizens themselves, acting as an electorate. And here again, on the practical level, "balancing" of values is needed and authorized as decisions are made among plans for roads, schools, taxes, war or peace, commerce and industry, and so on, in vast concrete complexity. By these choices and decisions, the citizens and their agents seek to further the public interest.

VI

In the *Barenblatt* opinion the Supreme Court claims for Congress or for the Court itself—it is not clear which—authority to “balance,” against the freedom which is protected by the first amendment, a national “right of self-preservation” which, as such, is not mentioned by the Constitution. That right, as we have seen, is assessed by the Court as “the ultimate value of any society”¹³ and described by Justice Frankfurter in *Dennis* as indicating “the highest duty of the nation.”¹⁴ In opposition to that way of interpreting the Constitution, this paper now ventures to offer the following suggestions.

A.

There can be no doubt that the United States, being a sovereign nation, whose political decisions are limited only by its own will, has authority to provide for its own self-preservation by denying or limiting the political freedom of its citizens. But that assertion has no bearing upon the question which Mr. Barenblatt’s appeal has brought to the attention of the Court. The issue in question concerns not the sovereign powers of the nation but the delegated powers of Congress. And the pronouncements concerning sovereignty would be relevant only if we assumed that the sovereign United States had delegated all its powers to Congress, its agent. But the principle of “reserved powers” makes untenable that assumption. Under the Constitution, powers are denied as well as delegated; they are limited as well as granted. And that being true, the remarks about “sovereign powers” which are made by the *Barenblatt* opinion and by Justice Frankfurter in *Dennis* have no significance for the issue under discussion where “contempt of Congress” is affirmed and denied.

B.

A striking feature of the *Barenblatt* opinion’s discussion of “the right of self-preservation” under the Constitution is its failure even to mention either the preamble’s listing of the duty “to provide for the common defence” or the provisions of the articles granting and limiting powers by which that duty is to be done. The seriousness of this disregard of the relevant text of the Constitution can be seen if we read what are the actual provisions established in the interest of defense against aggression.

Section 8, article I of the Constitution defines the defense powers granted, within limits, to the Congress, as follows:

The Congress shall have power . . . [to] provide for the common Defence and general Welfare of the United States To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on

¹³ See text at note 6 *supra*.

¹⁴ See text at note 7 *supra*.

Land and Water; To raise and support Armies, but no appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia, according to the discipline prescribed by Congress. . . . And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

For an understanding of the Constitution at this point, it is essential to note how precise and guarded is this delegation of "Defence" authority. No appropriation of money "shall be for a longer Term than two years." Authority for "the Appointment of Officers" in the militia and "for training of the Militia" is denied to Congress and "reserved to the States." Here are "considerations" other than that of self-preservation, which are not "to be subordinated to it."

And section 9 of the same article adds two other limiting considerations, as follows:

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion, the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

The same limiting purpose is seen in the specific and rigid defining of "treason" and, most important of all, in the far-reaching prohibitions of the Bill of Rights, with the first amendment leading the way.

In a word, when the "ends" of the preamble and the proximate "means" of the articles and the amendments are taken into account, we can see that it is the deliberate and carefully devised plan of the Constitution that authority "to provide for the common Defence" shall be kept within strict and explicit limits. Defense must be correlated with the five other values which equal it in constitutional status. And they must be defined in such ways as will provide for all of them a coherent and self-consistent plan of action, whose several parts are not in conflict with one another.

But the *Barenblatt* opinion, with one smashing blow, proceeds at this point to amend the Constitution. In place of the limited congressional authority "to provide for the common Defence" it establishes "the [sovereign] right of self-preservation" and gives to it an "ultimate status" as contrasted with the other values which Congress is commissioned to serve. This is a

judicial usurpation of the amending power which is far removed from a proper regard for "judicial restraint."

C.

The opinion's justification of this amending or violating the Constitution, in so far as it is explained or defended at all, rests upon the valid observation that if the self-preservation of the nation were lost, all the other values which are listed by the preamble and implemented by the articles would likewise cease to exist.¹⁵ But that argument fails of validity because the same claim to ultimacy, the same priority of status, would hold good for each of the other values which, as the preamble tells us, the Constitution intends to serve. If unity were completely destroyed in our body politic, neither justice nor any other political value would have a chance for existence. If there were no justice, the Constitution, as a whole, would have no meaning. And the same ultimacy belongs to tranquillity, to the general welfare, or to the blessings of liberty. All of these, when taken in the due and limited measure which the preamble and the articles assign to them, are essential elements in the politically organized life of a self-governing nation. But to ascribe to any one of them a primacy which would justify a nullification of the claims of the others would bring about disruption of our entire plan of government. And that is what is done when "the right of national self-preservation" is allowed to nullify the first amendment's protection of political freedom. It cannot be justified by any valid interpretation of the Constitution, nor by any "gloss of history." On the contrary, it expresses, in the judicial field, a paranoiac fear which, since 1919, has come upon our national spirit as the outcome of world wars, hot and cold—a paranoia which sees human living through a blinding and distorting haze of anxiety, of hostility, of dread of aggression, which subordinates "nearly all other considerations" to an hysterical yearning to be secure.

D.

At this point we may note—as an interesting aside which, strictly speaking, does not fall within the limits which this argument has chosen for itself—that the *Barenblatt* opinion makes no accurate use of the "balancing" procedure which it advocates.

The "balancing" figure of speech suggests the using of a pair of scales into which two co-ordinate weights may be put so that they may be measured in relation to one another to see which is heavier. But, in concrete terms, no such measuring is done by the opinion. The legal issue before the Court arises from the accusation that, by refusing to testify, Mr. Barenblatt has done damage to the security, the self-preservation, of the nation. How much damage has he done? What specific damage? It can hardly be pre-

¹⁵ Cf. *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1903); Hughes, *War Powers Under the Constitution*, in 42 REPORTS OF AMERICAN BAR ASSOCIATION 232 (1917).

sumed that his single act has placed the nation as a whole in mortal danger. How great, then, is the harm for which he is individually responsible? That estimate of the amount in one scale is not made, or even considered, by the opinion.

And, in like manner, the weight which is placed in the other scale is equally indeterminate. The opinion asserts that Mr. Barenblatt's "individual interest" suffers a lesser damage from the action of the Government. What interest, or interests, of his are sacrificed? What do they amount to? Here, again, the words of the opinion have nothing relevant to say.

All that we are given as justifying a concrete decision is the general principle that the national "right of self-preservation" is "ultimate," as contrasted with all other interests, public or private. No one can seriously say that we have here that "candid and informed weighing of the competing interests, within the confines of the judicial process" which Justice Frankfurter asserts in *Dennis* to be the method of the "balancing" procedure.

As we have seen, the Court renders its verdict in the words, "We conclude that the balance between the individual and governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended."¹⁶

It would be hard to find an inference less convincing, less supported by relevant and accurate fact, than that on which the verdict rests. It has many factual inadequacies. Not the least of them is the suggestion that, while national security has interest for all the people, political freedom has interest only for the individual person whose freedom is at stake.

In a word, the "balancing" theory is, for the opinion, an unused, and unusable, figure of speech. It is a fiction which serves to cover the fact that with respect to issues of political freedom, the Court has reinstated as "controlling" the "clear and present danger" test of 1919,¹⁷ but with the words "clear" and "present" left out. Here the "aside" ends.

VII

And finally we must recognize that throughout the *Barenblatt* opinion there runs the strong contention that valid interpreting of the Constitution, or of congressional statutes, must rest not only on a reading of the words of the texts in question but also upon whatever historical evidence relevant to those words discloses their essential meaning. Thus, in its section upon "vagueness" in the action of Congress or of its committees, the opinion turns for help to a "persuasive gloss of legislative history." So, too, the argument on "Constitutional Contentions" opens with a reference to "judicial history" when it says, "The Court's past cases establish sure guides to

¹⁶ See text at note 4 *supra*.

¹⁷ *Schenck v. United States*, 249 U.S. 47 (1919).

decision.”¹⁸ And Justice Frankfurter, in the *Dennis* case, goes even further along the same road, requiring that interpreters of the Constitution take into account “our whole history” which, he says, speaks “more decisively than the course of decisions in this Court.” In all its forms this is good doctrine. The meaning of words varies with the contexts in which they are used. And, more specifically, a plan of government can be understood only when it is seen as serving the purposes of an ongoing plan of life.

But the lessons of history are hard to read. And to the writer of this paper it seems certain that, on the issue before us, both Justice Frankfurter’s *Dennis* opinion and the *Barenblatt* opinion rest upon a mistaken reading of what history records.

Our “whole history” tells us that the “ultimate,” though not the only, interest of our Constitution is that of creating and maintaining the political freedom of our citizens. Public security is a value, correlative with the five other values which the preamble recognizes as the goals of all governing action. But the claim that self-preservation shall be ultimate, shall have an overruling priority over the other interests of the nation, has no constitutional basis whatever.

Our national tradition finds its most adequate expression in the contrast between two fundamentally different political systems. There are nations which, to our horror, give to national self-preservation priority over the political freedom and the dignity of the individual person. But there are other nations which establish the freedom and consequent dignity of the individual as higher in status than the security, either of the individual himself or of the state of which he is a member. As between those two systems we have proudly chosen the latter. We believe, as we say, in the dignity of the free man.

When we explain ourselves to others and, in sober moments, to ourselves, we recall that, through the many centuries of Western Civilization prior to the writing of our Constitution, religious and political freedom had been officially sacrificed in the interest of the self-preservation of the church or of the state. Heresies had been brutally punished on the ground that they threatened the self-preservation of the church. And the abridgment of political freedom was likewise persistently justified by the plea that it threatened the self-preservation of the state. But, with the writing of the Constitution, we are proud to say, there came about a revolution, which, passionately and intelligently, established the decision that that plea should no longer be recognized as valid.

What history tells us about Justice Frankfurter’s *Dennis* opinion and the *Barenblatt* opinion is that, by their assertion of the “ultimacy” of national self-preservation they deny the Constitution, in its most essential intention.

¹⁸ 360 U.S. at 126.