To: The Chief Justice
Mr. Justice Frankfurter
Mr. Justice Douglas
Mr. Justice Burton
Mr. Justice Clark
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Whittaker

From: Black, J.

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SUPREME COURT OF THE UNITED STATES

Nos. 6, 7 and 8.—October Term, 1956.

Oleta O'Connor Yates, Henry Steinberg, Loretta Starvus Stack, et al., Petitioners,
6 v.
United States of America.

William Schneiderman, Petitioner,
7 v.
United States of America.

Al Richmond and Philip Marshall Connelly, Petitioners,
8 v.
United States of America.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1957.]

Mr. Justice Black, concurring in part and dissenting in part.

I.

I would reverse every one of these convictions and direct dismissal of all the indictments. In my judgment the provisions of the Smith Act on which these prosecutions are based abridge freedom of speech, press and assembly in violation of the First Amendment to the United States Constitution. See my dissent and that of Mr. Justice Douglas in *Dennis* v. *United States*. Also see my opinion in *American Communications Association* v. *Douds*, 339 U. S. 382, 445.

These trials are wholly dissimilar to the normal criminal trials. Ordinarily, as here, each trial is a prolonged affair lasting months. In part this is attributable to the

routine introduction in evidence of massive collections of books, tracts, circulars, newspapers, and manifestoes discussing Communism, Socialism, Capitalism, Feudalism and governmental institutions in general, which, it is not too much to say, are turgid, diffuse, abstruse, and just plain dull. Of course, no juror can or is expected to plow his way through this jungle of verbiage. The testimony of witnesses is comparatively insignificant. Guilt or innocence often turns on what Marx or Engels or someone else may have written and advocated as much as a hundred or more years ago. Elaborate, refined distinctions are drawn between "Communism," "Marxism," "Leninism," "Trotskyism," and "Stalinism." When the "propriety" of obnoxious or unorthodox political or religious views is in reality made the crucial issue, as it must be in cases of this kind, conviction is inevitable except in the rarest circumstances. In our judgment trials like these are not really trials at all in any meaningful sense.

II.

Since the Court proceeds on the assumption that the provisions of the Smith Act involved here are valid, however, I feel free to express my views about the issues it treats.

First.—I agree with Part I of the Court's opinion that deals with the statutory term, "organize," and holds that the organizing charge in the indictment was barred by the three-year statute of limitations.

Second.—I also agree with the Court insofar as it holds that the trial judge erred in instructing that persons could be punished under the Smith Act for teaching and advocating forceful overthrow as an abstract principle. But on the other hand, I cannot agree that the instruction which the Court indicates it might approve is constitutionally permissible. The Court says that the defendants can be punished for advocating action to overthrow the

Government by force and violence, where those to whom the advocacy is addressed are urged "to do something now or in the future, rather than merely to believe in something." Under the Court's approach, defendants could still be convicted simply for agreeing to talk as distinguished from agreeing to act. I do not believe that it is within the competence of Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal. See *Virginia Electric & P. Co.* v. *Labor Board*, 319 U. S. 533, 539; *Gibbony* v. *Empire Storage and Ice Co.*, 336 U. S. 490, 501–502.[1] As the Virginia Assembly said in 1785, in its "Statute for Religious Liberty," which was written by Thomas Jefferson, "it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order."[2]

Third.—I also agree with the Court that petitioners, Connelly, Kusnitz, Richmond, Spector, and Steinberg, should be ordered acquitted since there is no evidence that they have ever engaged in anything but "wholly lawful activities." But in contrast to the Court, I think the same action should also be taken as to the remaining nine petitioners. The Court's opinion summarizes what it considers to be the strongest record evidence against these defendants. This summary reveals a pitiful inadequacy of proof to show beyond a reasonable doubt that the defendants were guilty—under the Court's interpretation of the Smith Act—of conspiring to incite persons to act to overthrow the Government. The Court says:

> "In short, while the record contains evidence of little more than a general program of educational

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[1] See Meiklejohn, Free Speech and Its Relation to Self-Government. Cf. Chaffee, Book Review, 62 Harv. L. Rev. 891.

[2] 12 Hening's Stat. (Virginia 1823), c. 34, p. 85.

> activity by the Communist Party which included advocacy of violence as a theoretical matter, we are not prepared to say, at this stage of the case, that it would be impossible for a jury, resolving all conflicts in favor of the Government and giving the evidence as to these San Francisco and Los Angeles episodes its utmost sweep, to find that advocacy of action was also engaged in when the group involved was thought particularly trustworthy, dedicated and suited for violent tasks."

It is inconceivable that these nine defendants should be forced to go through the ordeal of another prolonged trial on such a flimsy evidential basis. As the Court's summary demonstrates, the evidence introduced during the trial against these defendants was insufficient to support their conviction. Under such circumstances, it was the duty of the trial judge to direct a verdict of acquittal. He had no authority to grant the Government a mistrial so that it could gather additional evidence in an attempt to convict these defendants. And a discharge of the jury under such circumstances would have been a sound basis for a plea of former jeopardy in a second trial. See *Wade* v. *Hunter,* 336 U. S. 684, and cases cited there. I cannot agree that "justice" requires this Court to send these cases back to put these defendants in jeopardy again in violation of the spirit if not the letter of the Fifth Amendment's provision against double jeopardy.

One other aspect of the evidence deserves comment. In remanding nine of these defendants for a new trial, the Court relies heavily on the testimony of a witness who had been a Communist for the FBI. This witness testified that he had been "taught surreptitiously to assemble and operate a printing press, cached in the garage of a Party member, for the purpose, he was told, of moving

'masses of people in time of crisis.'" It seems to me that evidence of ownership of a printing press [redacted] cannot support an inference of conspiracy to overthrow the Government. While printing presses have sometimes been destroyed in this country by angry mobs and their owners abused, it has not been common, to say the least, for the law to impute criminality from their ownership. The freedom to own and use a printing press is a highly prized freedom which has been dearly won. For example, near the end of the Sixteenth Century, the Puritan, John Penry, was hanged by the government on the charge that he secretly owned a printing press from which he published pamphlets inciting the people to sedition against the then dominant ruling classes. Those who had harbored his press were also tried and convicted.[3] In 1644, John Milton, in his Areopagitica, made his justly renowned plea for freedom of the press in protest against laws regulating or licensing printing presses and printed matter. The same philosophy so persuasively expressed by Milton is reflected in the First Amendment which encourages ownership of printing presses by forbidding censorship through the device of licensing. See *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Lovell* v. *Griffin*, 303 U. S. 444. It seems anomalous, therefore, as well as a bad omen, to hold, in this country, that inferences can be drawn from the ownership of a printing press that the owner is conspiring to overthrow the Government by force and violence.

Fourth.—The section under which these conspiracy indictments were brought, 18 U. S. C. § 371, requires proof of an overt act done "to effect the object of the con-

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[3] See "John Penry" in 25 Dictionary of National Biography 791–795; Trial of Sir Richard Knightley and Others, 1 Howell's State Trials 1263.

spiracy." Originally, 11 such overt acts were charged here. These 11 have now dwindled to 1, and as the Court says:

> "Each was a public meeting held under Party auspices at which speeches were made by one or more of the petitioners extolling leaders of the Soviet Union and criticizing various aspects of the foreign policy of the United States. At one of the meetings an appeal for funds was made. Petitioners contend that these meetings do not satisfy the requirement of the statute that there be shown an act done by one of the conspirators "to effect the object of the conspiracy. The Government concedes that nothing unlawful was shown to have been said or done at these meetings, but contends that these occurrences nevertheless suffice as overt acts under the jury's finding."

In addition, the Government concedes that there was not a single word at these meetings inciting anyone to violence or disorder. Nevertheless the Court holds that attendance at these lawful and orderly meetings constitutes an "overt act" sufficient to meet the statutory requirements. I disagree.

The requirement of proof of an overt act in conspiracy cases is no mere formality, particularly in prosecutions like these which in many respects are akin to trials for treason. Article III, § 3, cl. 1 of the Constitution provides that "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." One of the objects of this provision was to keep people from being convicted of disloyalty to government during periods of excitement when passions and prejudices ran high, merely because they expounded unacceptable views. See *Cramer* v. *United States,* 325 U. S. 1, 48. The same reasons that make proof of overt acts so important in treason cases apply

here. The only overt act which is now charged against these defendants is that they went to a constitutionally protected public assembly where they took part in lawful discussion of public questions, and where neither they nor anyone else advocated or suggested overthrow of the United States Government. Many years ago this Court said that "The very idea of a Government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation with respect to public affairs and petition for redress of grievances." *United States* v. *Cruikshank*, 92 U. S. 542, 552. And see *DeJonge* v. *Oregon*, 299 U. S. 353, 364. In my judgment defendant's attendance at these public meetings cannot be viewed as an overt act to effectuate the object of the conspiracy charged.

III.

In essence, petitioners were really tried upon the charge that they believe in and want to foist upon this country a different and to us a despicable form of authoritarian government in which voices [redacted] criticizing the existing order are summarily silenced. I fear that the present prosecutions are more in line with this [redacted] philosophy of government than with that expressed by our First Amendment.

Doubtlessly, dictators have to stamp out causes and beliefs which are subversive to their abhorrent regimes. But governmental suppression of causes and beliefs seems to me to be the very antithesis of what our Constitution stands for. The choice expressed in the First Amendment in favor of free expression was made against a turbulent background by men such as Jefferson, Madison, and Mason—men who believed that loyalty to its provisions was the best way to assure a long life for this new nation and its Government. Unless there is complete freedom for expression of all ideas concerning the way

Government should be run and who shall run it, I doubt if any views in the long run can be secured against the censor.[4] It is never out of place to repeat that unless we allow free expression of views that we hate there can be no assurance of freedom for views that we cherish. Our Constitution provides a security system of its own in the First Amendment—one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.

[4] See 1 DeTocqueville, Democracy in America (Reeve transl. 1899), 181–183.