

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

2

From: Black, J.

SUPREME COURT OF THE UNITED STATES

Filed: _____

Recirculated: **JUN 14 1957**

Nos. 6, 7 AND 8.—OCTOBER TERM, 1956.

Oleta O'Connor Yates, Henry Stein-
berg, 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 Certio-
rari to the United
States Court of
Appeals for the
Ninth Circuit.

[June —, 1957.]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS
joins, concurring in part and dissenting in part.

I.

I would reverse every one of these convictions and
direct dismissal of the indictment. In my judgment
the provisions of the Smith Act on which these prosecu-
tions 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*, 341
U. S. 494, 579, 581. Also see my opinion in *American
Communications Assn. v. Douds*, 339 U. S. 382, 445.

The kind of trials conducted here are wholly dissimilar
to normal criminal trials. Ordinarily these Smith Act

6, 7 & 8—CONCUR & DISSENT

2

YATES *v.* UNITED STATES.

trials are prolonged affairs lasting for months. In part this is attributable to the routine introduction in evidence of massive collections of books, tracts, pamphlets, 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 may turn on what Marx or Engels or someone else wrote or 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 views about government is in reality made the crucial issue, as it must be in cases of this kind, prejudice makes conviction inevitable except in the rarest circumstances.

II.

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

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 persons can

6, 7 & 8—CONCUR & DISSENT

YATES v. UNITED STATES.

3

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 believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal. See Meiklejohn, *Free Speech and Its Relation to Self-Government*. Cf. Chafee, Book Review, 62 Harv. L. Rev. 891. As the Virginia Assembly said in 1785, in its "Statute for Religious Liberty," 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."¹ Cf. *Virginia Electric & P. Co. v. Labor Board*, 319 U. S. 533, 539; *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 501-502.

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 the strongest evidence offered 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

¹ 12 Hening's Stat. (Virginia 1823), c. 34, p. 85.

6, 7 & 8—CONCUR & DISSENT

4

YATES v. UNITED STATES.

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 seems unjust to compel these nine defendants, who have just been through one four-month trial, to go through the ordeal of another trial on the basis of such flimsy evidence. 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. If the jury had been discharged so that the Government could gather additional evidence in an attempt to convict, such a discharge 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, or of teaching another how to use it, cannot support an inference of conspiracy to incite persons to take action to overthrow the Government by force and violence. 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, secretly owned a printing press from which he published articles criticizing the then dominant ruling group. He was hanged by the government on the charge of inciting the people to sedition. Those who had harbored his press were also tried and convicted.² 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; *Lowell v. Griffin*, 303 U. S. 444. It seems anomalous to hold, in this country, that inferences can be drawn from the ownership or the ability to use a printing press that the owner is engaged in any criminal conspiracy. As DeTocqueville observed, "The sovereignty of the people and the liberty of the press may . . . be looked upon as correlative institutions; just as the censorship of the press and universal suffrage are two things

² See "John Penry" in 25 Dictionary of National Biography 791-795; "Marprelate Controversy" in 14 Encyclopaedia Britannica (1953 ed.) 937; "Penry, John" in 17 *ibid.* 487; Trial of Sir Richard Knightley and Others, 1 Howell's State Trials 1263.

6, 7 & 8—CONCUR & DISSENT

6

YATES *v.* UNITED STATES.

which are irreconcilably opposed, and which cannot long be retained among the institutions of the same people.”³

Fourth.—The section under which this conspiracy indictment was brought, 18 U. S. C. § 371, requires proof of an overt act done “to effect the object of the conspiracy.” 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

³ See 1 DeTocqueville, *Democracy in America* (Reeve transl. 1899), c. XI, p. 183.

6, 7 & 8—CONCUR & DISSENT

YATES v. UNITED STATES.

7

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 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 criticizing the existing order are summarily silenced. I fear that the present type of prosecutions are more in line with the philosophy of authoritarian government than with that expressed by our First Amendment.

Doubtlessly, dictators have to stamp out causes and beliefs which they deem subversive to their evil regimes. But governmental suppression of causes and beliefs seems to me to be the very antithesis of what our Constitution

6, 7 & 8—CONCUR & DISSENT

8

YATES *v.* UNITED STATES.

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, whether we like them or not, 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 The First Amendment provides the only kind of security system that can preserve a free government—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.