

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

From: Douglas, J.

April 10, 1957
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MEMORANDUM TO THE CONFERENCE

Re: No. 15.—*Yates v. U. S. of America.*

In view of our vote at the last Conference to reverse in No. 570, *Brown v. United States*, I think No. 15, *Yates v. U. S.*, should be restored to the Conference List and discussed again.

In the *Brown* case the majority has voted to reverse because the conduct of the defendant did not obstruct justice within the meaning of 18 U. S. C. § 401, and *Ex parte Hudgings*, 249 U. S. 378.

The refusals of petitioner in No. 15 to answer were on her cross-examination. This was at a time when the prosecution's case was concluded and when 10 of the defendants had rested their cases.

At the trial the membership of the defendants in the Communist Party was not contested.

Witnesses had testified for the prosecution identifying certain third persons—Glickson, Kaplan, Rothstein, Alexander, and Strack—with the Communist Party. That issue was not contested at the trial.

Three of the specifications (Nos. I, II, and III, R. 3-5) relate to petitioner's association with Kaplan, who was not a defendant in the case. Three other specifications (Nos. IV, V, and XI, R. 5-8, 13-14) relate to her association with Rothstein, Alexander, and Strack, who were likewise not defendants in the case. Petitioner admitted her acquaintance with these third persons, but refused to state whether they were members of the Communist Party or had attended Communist meetings.

Five specifications (Nos. VI-X inc., R. 8-13) involve her relations with five co-defendants who had already rested their cases. Petitioner had admitted that she was Organizational Secretary of the Communist Party in California. She refused to state whether defendants Rich-

mond, Healey, Spector, Fox and Lima had been members with her, in 1950, of the California State Committee of the Communist Party. The District Judge overruled defense objections, on the behalf of the defendants who had rested their cases, to this inquiry. He ruled that the evidence was being offered as to a defendant who had not rested.

There is nothing in this record which indicates that petitioner's replies or demeanor were discourteous or disrespectful. And, it seems clear that the District Judge proceeded on the theory that the refusal to answer any competent, relevant question might be treated as a criminal contempt "as a vindication of the judicial authority."

The issue in the case was whether the defendants had conspired to advocate the overthrow of the Government by force and violence and whether the third party declarants were members of the conspiracy. See 106 F. Supp. 906, 933, 936-937. Membership in the Party was therefore subsidiary to the main issue.

But at no time during the trial did any of the defendants dispute the charge that they were members of the Party. Nor was the affiliation of the third parties with the Communist Party contested. Nor did petitioner deny her membership nor lay false tracks designed to obscure or mislead the court and the jury.

When she testified the Government's case was in; and on that evidence the defendants were convicted.

It is therefore somewhat difficult to say that petitioner's refusal to testify concerning her association with the third parties and with the five co-defendants obstructed justice in the sense of *Ex parte Hudgings*. || ✓

WILLIAM O. DOUGLAS.