

BLACK, J., Concurring in Part, Dissenting in Part

SUPREME COURT OF THE UNITED STATES

354 U.S. 298

Yates v. United States

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 6 Argued: October 8-9, 1956 --- Decided: June 17, 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 that all the defendants be acquitted. In my judgment, the statutory provisions 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*, 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" 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. [p340]

II

Since the Court proceeds on the assumption that the statutory provisions 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 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. . . .^[*] *Cf. Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 501-502; *Labor [p341] Board v. Virginia Electric & P. Co.*, 314 U.S. 469, 476-480; *Virginia Electric & P. Co. v. Labor Board*, 319 U.S. 533, 539.

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 defendants. 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 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 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 [p342] 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 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.

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 2, 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 nonetheless sufficed as overt acts under the jury's findings.

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, of the Constitution provides [p343] 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 expressed "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 in respect to public affairs and to petition for a redress of grievances.

United States v. Cruikshank, 92 U.S. 542, 552. *And see De Jonge v. Oregon*, 299 U.S. 353, 364-365. In my judgment, defendants' 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. [p344] 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 the provisions of this Amendment 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. 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.

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

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