**"The distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized in the opinions of this Court. ..."—Justice HARLAN**

**"[T]he First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal."—Justice BLACK**

**"I have studied the section of the opinion concerning the instructions and frankly its 'artillery of words' leaves me confused as to why the majority concludes that the charge as given was insufficient."—Justice CLARK**

## Yates v. United States

354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957).

Shortly after *Dennis,* the Department of Justice obtained convictions under the Smith Act against fourteen lower echelon leaders of the Communist party. The specific charges and evidence were quite similar to those lodged in *Dennis*. The court of appeals affirmed and the Supreme Court granted certiorari.

Mr. Justice **HARLAN** delivered the opinion of the Court. ...

[The first part of the opinion dealt with the meaning of the word "organize" in the Smith Act. Harlan concluded that it meant only the initial founding of a group. Thus, because the Smith Act was subject to a three-year statute of limitations, the Communist party had been "organized" in 1945 (it was disbanded during World War II), and the indictments had not been obtained until 1951, petitioners could not be tried for violating that section of the Act.]

### II. Instructions to the Jury

Petitioners contend that the instructions to the jury were fatally defective in that the trial court refused to charge that, in order to convict, the jury must find that the advocacy which the defendants conspired to promote was a kind calculated to "incite" persons to action for the forcible overthrow of the Government. It is argued that advocacy of forcible overthrow as mere *abstract doctrine* is within the free speech protection of the First Amendment; that the Smith Act, consistently with that constitutional provision, must be taken as proscribing only the sort of advocacy which incites to illegal *action*. ...

There can be no doubt from the record that in so instructing the jury the court regarded as immaterial, and intended to withdraw from the jury's consideration, any issue as to the character of the advocacy in terms of its capacity to stir listeners to forcible action. ... We are thus faced with the question whether the Smith Act prohibits advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent. We hold that it does not.

The distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized in the opinions of this Court, beginning with Fox v. Washington [1915] and Schenck v. United States [1919]. This distinction was heavily underscored in Gitlow v. New York [1925]. ...

We need not, however, decide the issue before us in terms of constitutional compulsion, for our first duty is to construe this statute. In doing so we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked, or that it used the words "advocate" and "teach" in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation. ... Cf. United States v. Carolene Products [1938]. The legislative history of the Smith Act and related bills shows beyond all question that Congress was aware of the distinction between the advocacy or teaching of abstract doctrine and the advocacy or teaching of action, and that it did not intend to disregard it. The statute was aimed at the advocacy and teaching of concrete action for the forcible overthrow of the Government, and not of principles divorced from action.

The Government's reliance on this Court's decision in Dennis v. United States (1951) is misplaced. The jury instructions which were refused here were given there, and were referred to by this Court as requiring "the jury to find the facts *essential* to establish the substantive crime." ... It is true that at one point in the late Chief Justice's opinion it is stated that the Smith Act "is directed at advocacy, not discussion," ... but it is clear that the reference was to advocacy of action, not ideas, for in the very next sentence the opinion emphasizes that the jury was properly instructed that there could be no conviction for "advocacy in the realm of ideas." The two concurring opinions in that case likewise emphasize the distinction with which we are concerned. ...

In light of the foregoing we are unable to regard the District Court's charge upon this aspect of the case as adequate. The jury was never told that the Smith Act does not denounce advocacy in the sense of preaching abstractly the forcible overthrow of the Government. ... The essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something. ...

**III. The Evidence**

The determinations already made require a reversal of these convictions. Nevertheless, in the exercise of our power ... to "direct the entry of such appropriate judgment ... as may be just under the circumstances," we have conceived it to be our duty to scrutinize this lengthy record with care, in order to determine whether the way should be left open for a new trial of all or some of these petitioners. ...

... [W]hen it comes to Party advocacy or teaching in the sense of a call to forcible action at some future time we cannot but regard this record as strikingly deficient. At best this voluminous record shows but a half dozen or so scattered incidents which even under the loosest standards could be deemed to show such advocacy. Most of these were not connected with any of the petitioners, or occurred many years before the period covered by the indictment. We are unable to regard this sporadic showing as sufficient to justify viewing the Communist Party as

the nexus between these petitioners and the conspiracy charged. We need scarcely say that however much one may abhor even the abstract preaching of forcible overthrow of government, or believe that forcible overthrow is the ultimate purpose to which the Communist Party is dedicated, it is upon the evidence in the record that the petitioners must be judged in this case. ...

[The Court then found the evidence too insubstantial to permit the retrial of five of the defendants and so directed an acquittal. The Court found the evidence against the other nine to be sufficiently weighty to allow the government to seek a retrial if it wished.]

Mr. Justice **BURTON,** concurring in the result. ...

Mr. Justice **BRENNAN** and Mr. Justice **WHITTAKER** took no part in the consideration or decision of this case.

Mr. Justice **BLACK,** with whom Mr. Justice **DOUGLAS** joins, concurring in part and dissenting in part.

... In my judgment the statutory provisions on which these prosecutions are based abridge freedom of speech, press and assembly. ...

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". ... *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 ... I cannot agree that the instruction which the Court indicates it might approve is constitutionally permissible. ... 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. ... *Third.*—I also agree with the Court that [five of the] petitioners ... should be ordered acquitted. ... I think the same action should also be taken as to the remaining nine. ...

In essence, petitioners were tried upon the charge that they believe in and want to foist upon this country ... 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 stands for. ... 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.

Mr. Justice **CLARK** dissenting. ...

The petitioners ... were engaged in this conspiracy with the defendants in *Dennis.* ... The conspiracy includes the same group of defendants as in the Dennis case though petitioners here occupied a lower echelon in the party hierarchy. They, nevertheless, served in the same army and were engaged in the same mission. The convictions here were based upon evidence closely paralleling that adduced in *Dennis*. ...

... [This] Court has freed five of the convicted petitioners and ordered new trials for the remaining nine. As to the five, it says that the evidence is "clearly insufficient." I agree with the Court of Appeals, the District Court, and the jury that the evidence showed guilt beyond a reasonable doubt. ... In any event, this Court should not acquit anyone here. In its long history I find no case in which an acquittal has been ordered by this Court solely on the *facts.* It is somewhat late to start in now usurping the function of the jury. ...

... I have studied the section of the opinion concerning the instructions and frankly its "artillery of words" leaves me confused as to why the majority concludes that the charge as given was insufficient. I thought that *Dennis* merely held that a charge was sufficient where it requires a finding that "the Party advocates the theory that there is a duty and necessity to overthrow the Government by force and violence ... not as a prophetic insight or as a bit of ... speculation, but as a program for winning adherents and as a policy to be translated into action" as soon as the circumstances permit. ... I notice, however, that to the majority

> The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to "action for the accomplishment" of forcible overthrow, to violence "as a rule or principle of action," and employing "language of incitement," ... is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented toward action, and other circumstances are such as reasonably to justify apprehension that action will occur.

I have read this statement over and over but do not seem to grasp its meaning for I see no resemblances between it and what the respected Chief Justice wrote in *Dennis,* nor do I find any such theory in the concurring opinions. As I see it, the trial judge charged in essence all that was required under the *Dennis* opinions. ...

**Editors' Notes**

(1) **Query:** To what extent does Harlan's distinction between "advocacy of abstract doctrine" and "advocacy directed at promoting unlawful action" conform to the plain words or even general sense of the Smith Act? To the plain words of the First Amendment? To what extent does that distinction make sense in the real world? Would an interpreter who took seriously a theory of "reinforcing representative democracy" find that reading Harlan's distinction into the Smith Act preserved the statute's constitutionality?

(2) Note the narrowness of Harlan's opinion. He managed to encapsulate, perhaps even disguise, critical constitutional questions about protection of democratic processes within

statutory interpretation. What sort of approach to constitutional interpretation does this style manifest?

(3) Why the shift between *Dennis* and *Yates?* Changes among the justices had some effect. John Marshall Harlan, II, had replaced Robert H. Jackson; and Earl Warren, whose chief justiceship was to become synonymous with civil liberty, had succeeded Fred Vinson. Two other members of the majority in *Dennis,* Sherman Minton and Stanley Reed, had retired, though their replacements, William J. Brennan, Jr., and Charles E. Whittaker, did not sit in *Yates.* Thus only two of the six members of the majority in *Dennis,* Harold Burton and Felix Frankfurter, were still on the Court when *Yates* was decided. Both of the dissenters in *Dennis,* Black and Douglas, were still sitting. Frankfurter switched sides, at least to the extent of joining Harlan's "constitutional interpretation as statutory interpretation." Burton also switched, though he had reservations. Tom Clark, who had been attorney general when *Dennis* began, had taken no part in that ruling, though his dissent in *Yates* indicates how he would have voted. Brennan, of course, became closely allied with the views of Warren, Douglas, and Black on the First Amendment.

There may have been other reasons for change. In 1951, the anti-Communist hysteria fanned by Richard Nixon and Joseph McCarthy was near its peak. Six years later, the mood of the country had sobered. It is unlikely that judges were unaffected by either set of sentiments. See Justice Cardozo's comments on this point, above, p. 627.

(4) When the justices met in conference after *Yates* had been argued, the vote was four (Reed, Burton, Minton, and Clark) to affirm the convictions, three (Warren, Black, and Douglas) to reverse, and two justices (Frankfurter and Harlan) "passed." Warren suggested postponing a final vote for a few weeks. During that interval Minton retired and Frankfurter and Harlan joined Warren et al. to make the vote 5–3 to reverse. Warren assigned the task of writing the opinion of the Court to Harlan, hoping that because of his middle position he might persuade some of the dissenters to join him. By the time the decision was announced, Reed had also retired, leaving the final vote 5–2. We recite this history because it helps explain some other rulings, notably Barenblatt v. United States (1959; reprinted below, p. 803), in which Harlan and Frankfurter apparently flipflopped. The point is that they were never firm members of the liberal bloc of the Warren Court (at that time Warren, Black, and Douglas, and when Minton retired Brennan, and some years later Goldberg then Fortas and Marshall). See the analysis in Bernard Schwartz, *Super Chief* (New York: New York University Press, 1983), pp. 232–234.

(5) After *Yates,* the Department of Justice dropped all prosecutions under the Smith Act that involved charges of advocacy, did not retry any of the nine defendants whose retrial the Supreme Court had allowed, and through 1995 had not again used these clauses. The reactions to *Yates* varied. Communists were delighted. "We rejoice. Victory is, indeed, sweet," *The People's World* crowed. Conservatives wept. "The boys in the Kremlin," the *Chicago Tribune* lamented, "may wonder why they need a 5th column in the United States so long as the Supreme Court is determined to be so helpful." Reaction in Congress took the form of a massive attack on the Court. For details, see C. Herman Pritchett, *Congress versus the Supreme Court* (Minneapolis: University of Minnesota Press, 1961), and Walter F. Murphy, *Congress and the Court* (Chicago: University of Chicago Press, 1962). After several legislative battles, Congress

amended the Smith Act to define "organize" to include the day-to-day operations of maintaining a group.