its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose."[693] Justices Black and Douglas dissented separately, the former viewing the Smith Act as an invalid prior restraint and calling for reversal of the convictions for lack of a clear and present danger, the latter applying the Holmes-Brandeis formula of clear and present danger to conclude that "[t]o believe that petitioners and their following are placed in such critical positions as to endanger the Nation is to believe the incredible."[694]

In *Yates v. United States*,[695] the convictions of several second-string Communist Party leaders were set aside, a number ordered acquitted, and others remanded for retrial. The decision was based upon construction of the statute and appraisal of the evidence rather than on First Amendment claims, although each prong of the ruling seems to have been informed with First Amendment considerations. Thus, Justice Harlan for the Court wrote that the trial judge had given faulty instructions to the jury in advising that all advocacy and teaching of forcible overthrow was punishable, whether it was language of incitement or not, so long as it was done with an intent to accomplish that purpose. But the statute, the Justice continued, prohibited "advocacy of action," not merely "advocacy in the realm of ideas." "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."[696] Second, the Court found the evidence insufficient to establish that the Communist Party had engaged in the required advocacy of action, requiring the Government to prove such advocacy in each instance rather than presenting evidence generally about the Party. Additionally, the Court found the evidence insufficient to link five of the defendants to advocacy of action, but sufficient with regard to the other nine.[697]

Compelled Registration of Communist Party.—The Internal Security Act of 1950 provided for a comprehensive regulatory scheme by which "Communist-action organizations" and "Communist-

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[693] 341 U.S. at 561, 572, 575.

[694] 341 U.S. at 579 (Justice Black dissenting), 581, 589 (Justice Douglas dissenting).

[695] 354 U.S. 298 (1957).

[696] 354 U.S. at 314, 315–16, 320, 324–25.

[697] 354 U.S. at 330–31, 332. Justices Black and Douglas would have held the Smith Act unconstitutional. Id. at 339. Justice Harlan's formulation of the standard by which certain advocacy could be punished was noticeably stiffened in Brandenburg v. Ohio, 395 U.S. 444 (1969).