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SENATOR EASTLAND'S ATTACK ON THE UNITED STATES SUPREME COURT: AN ANALYSIS AND RESPONSE

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On May 2, 1962, Senator James O. Eastland of Mississippi, Chairman of the Senate Judiciary Committee, made an extended attack on the Supreme Court.[a] *He charged that in a large number of cases the Justices of the Court had voted "pro-Communist," thus threatening "fundamentally the basic security of our country from the onslaught of the Communist conspiracy . . . ."*[b] *In support of his remarks, the Senator inserted in the Congressional Record a chart of selected cases, which indicated how the individual Justices had voted.*[c] *In Senator Eastland's words, "If the decision of the individual judge was in favor of the position advocated by the Communist Party, or the Communist sympathizer involved in the particular case, it was scored as pro, meaning pro-Communist. If the judge's decision was contrary to this position, he was scored as con—or contrary."*[d]

Shortly thereafter, Senator Jacob K. Javits of New York requested Associate Professor Norman Dorsen of the New York University School of Law to prepare a response to Senator Eastland. This response was printed, following prefatory remarks by Senator Javits, in the Congressional Record of October 12, 1962.[e] *Because the Editors of the Law Review agree with Dean Griswold of the Harvard Law School that this reply deserves wider circulation,*[f] *we reprint it below.*

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[a] 108 CONG. REC. 7026 (daily ed. May 2, 1962).
[b] *Id.* at 7027.
[c] *Id.* at 7028-29, 7030-31.
[d] *Id.* at 7027.
[e] 108 CONG. REC. 22071-75 (daily ed. Oct. 12, 1962).
[f] Letter From Dean Erwin N. Griswold to Professor Norman Dorsen, Nov. 16, 1962.

I. The Supreme Court Decisions Referred to by Senator Eastland

Several years ago, one of this country's greatest jurists, the late Learned Hand, counseled us wisely on the subject of criticism of the judges of the Supreme Court and other courts, whether federal or state. Judge Hand said:

> While it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties. Perhaps it is also fair to ask that before the judges are blamed they shall be given the credit of having tried to do their best. Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand.[1]

The valid technique for evaluating the work of the Supreme Court is scrupulous legal analysis of the decisions themselves in light of their historical antecedents. Senator Eastland's charges against the members of the Supreme Court represent an entirely inconsistent approach. They are completely unrelated to legal doctrine or historical context. Instead, they focus solely on the results of cases, and measure these results by a distorting and oversimplified standard. A subsequent section of this memorandum contains comment on certain unfortunate consequences of Senator Eastland's method of criticism. This section will concentrate on legal analysis of the Supreme Court cases referred to by Senator Eastland in his attack on the Court.

As Judge Learned Hand indicated, it is not a simple matter to evaluate the work of the Supreme Court. The complexities of law and fact make treacherous any but the most comprehensive analysis. Nevertheless, inspection of a certain number of decisions may be helpful in demonstrating that the members of the Supreme Court, in the cases singled out by Senator Eastland, used well-established legal doctrines in reaching their conclusions. That individual Justices can differ as to the applicability of a legal doctrine in a particular case is merely further proof of the difficulty of the judicial task assigned the Supreme Court.

In view of limitations on space, only two methods of analysis will be employed. These show: (a) that many of the cases cited by Senator Eastland were decided on the basis of judicial precedent and therefore obviously did not represent a break with the past; and (b) that doctrines employed by the Court in cases involving national security (Communism) are also employed in other types of cases.

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[1] Hand, *How Far Is a Judge Free in Rendering a Decision?*, in The Spirit of Liberty 103, 110 (3d ed. 1960).

A. Legal Precedent

In *Curcio v. United States*,[2] the question was whether the petitioner's personal privilege against self-incrimination under the fifth amendment attached to questions relating to the whereabouts of certain union books and records which he declined to produce pursuant to a grand jury subpoena. The Court unanimously held that it did.

It was well established by prior cases that custodians of the documents of associations, whether incorporated or unincorporated, had no privilege with respect to such records.[3] It was equally well established that the custodian had a constitutional privilege to decline to answer questions about the whereabouts of such records when they no longer were in his possession. Thus, in *Wilson v. United States*, Justice (later Chief Justice) Hughes said: "They [the custodians of records] may decline to utter upon the witness stand a single self-criminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony . . . ." [4] And in *Shapiro v. United States*, the Court said, "Of course all *oral* testimony by individuals can properly be compelled only by exchange of immunity for waiver of privilege." [5] In view of these precedents, it is clear that the decision of the unanimous Court in the *Curcio* case was solidly grounded.

In the area of fair administration of justice, *Gold v. United States* [6] is squarely based on *Remmer v. United States*,[7] which involved income tax fraud. Gold had been convicted of filing a false non-Communist affidavit and the district court judgment had been affirmed by an equally divided court of appeals. One of the issues was whether Gold had been deprived of a fair trial because "an F.B.I. agent, investigating another case in which falsity of a non-Communist affidavit was also charged," [8] had asked 3 members of the jury whether they had received propaganda literature, and also because other members of the jury had heard of the FBI contacts.

In a 6 to 3 per curiam decision, the Supreme Court held that a new trial should be granted, "because of official intrusion into the

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2 354 U.S. 118 (1957). See Senator Eastland's Tabulation, 108 CONG. REC. 7028 (daily ed. May 2, 1962) [hereinafter cited as Tabulation].

3 United States v. White, 322 U.S. 694 (1944); Hale v. Henkel, 201 U.S. 43 (1906).

4 221 U.S. 361, 385 (1911).

5 335 U.S. 1, 27 (1948).

6 352 U.S. 985 (1957), cited in Tabulation.

7 347 U.S. 227 (1954), 350 U.S. 377 (1956).

8 Gold v. United States, 237 F.2d 764, 775 (D.C. Cir. 1956) (Bazelon, J., dissenting), *rev'd per curiam*, 352 U.S. 985 (1957).

privacy of the jury." [9] It is true, as the dissenters stated in *Gold*, that the earlier *Remmer* opinion had said that tampering with a juror was only "presumptively prejudicial." [10] However, the Supreme Court in its second opinion in the *Remmer* case had ruled that intrusion on a jury could be deemed non-prejudicial only in the rarest instances. The decision in the *Gold* case seems a highly appropriate application of the *Remmer* doctrine; indeed, the facts indicate that there was at least as much likelihood of prejudice in *Gold* as in *Remmer*.

A series of cases illustrating both the principle of stare decisis and the fact that it is often difficult of application are *Galvan v. Press*,[11] *Rowoldt v. Perfetto*,[12] and *Niukkanen v. McAlexander*.[13] In *Galvan v. Press*, it was held that an alien was properly ordered deported under section 22 of the Internal Security Act of 1950,[14] two Justices dissenting on the ground that the provision was unconstitutional. In the *Rowoldt* case, after a careful review of the legislative history of the 1951 amendments to the Internal Security Act, a majority of the Court concluded that Congress did not intend the deportation of former members of the Communist Party unless their association was "meaningful" and had "political implications." The majority concluded that the one-year membership of the petitioner in the party during which he "didn't get a penny" nor betrayed any ideological identification with the party's unlawful aims was insufficient to warrant deportation. The dissenting Justices disagreed that the 1951 amendments required a "meaningful association" with the Communist Party, and thought that mere membership (which was conceded) was sufficient.

In the third case, *Niukkanen v. McAlexander*,[15] the petitioner was an alien who had been brought to this country when less than a year old and who lived here for over 50 years. Although he was briefly a member of the party in the late 1930's, the testimony showed that he never was an officeholder, never was employed by the party, and never represented the party on any occasion. There was also testimony, as in the *Rowoldt* case, that the petitioner's sole interest in joining during the depression was in "bread and butter" and the "sufferings of the people." A majority of the Court held that because the trial examiner disbelieved

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[9] 352 U.S. 985 (1957).

[10] *Id.* at 985-86 (Reed, J., dissenting), quoting Remmer v. United States, 347 U.S. 227, 229 (1954).

[11] 347 U.S. 522 (1954), cited in Tabulation.

[12] 355 U.S. 115 (1957), cited in Tabulation.

[13] 362 U.S. 390 (1960), cited in Tabulation.

[14] Internal Security Act of 1950, § 22, 64 Stat. 1006, as amended, 8 U.S.C. § 1182 (1958).

[15] 362 U.S. 390 (1960).

certain testimony of the petitioner, the *Rowoldt* rule did not apply. Four Justices disagreed on the ground that undisputed evidence put the case squarely within the "meaningful association" rule of *Rowoldt v. Perfetto.*

Ignoring the complex factual and legal issues in these cases, Senator Eastland simply counts as "pro-Communist" the votes of the dissenters in the *Galvan* and *Niukkanen* cases, and the majority in the *Rowoldt* case.[16]

B. Application of Legal Doctrine to Non-Communist Cases

Some of the cases discussed immediately above had precedents not involving national security. Many other cases referred to by Senator Eastland involve doctrines that have been applied across the board, irrespective of the nature of the litigant before the Court.

1. Contempt Cases

Sacher v. United States[17] involved a contempt citation of defense counsel for 11 Communist leaders who were convicted of violating the Smith Act after a turbulent nine-month trial. During the Smith Act trial the judge repeatedly warned counsel that their conduct was contemptuous. Immediately upon receiving the jury's verdict of guilty, the judge, without further notice or hearing, found counsel guilty of criminal contempt and sentenced them to prison. On appeal, a majority of the Supreme Court affirmed the contempt conviction. The dissenting Justices contended that the citation for contempt should have been tried before a jury; that it should not in any event have been tried before the same judge who conducted the Smith Act trial; and that a full hearing was essential to due process of law. Senator Eastland has characterized the dissenters' votes as "pro-Communist," presumably because the defense counsel had been representing Communists on trial under the Smith Act.

But procedural protections have been jealously guarded in all kinds of contempt cases having nothing remotely to do with national security. Just last term, the Supreme Court reversed the conviction of an attorney held in contempt for his conduct during a civil antitrust suit.[18] Also last term, the Court held that the summary contempt power could not be used to punish out-of-court statements of a sheriff attacking as "agitation" and "intimidation" a grand jury investigation into alleged block voting by Negroes.[19]

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[16] See Tabulation.

[17] 343 U.S. 1 (1952), cited in Tabulation.

[18] *In re* McConnell, 370 U.S. 230 (1962).

[19] Wood v. Georgia, 370 U.S. 375 (1962).

There are many other decisions in favor of individuals on trial under the summary contempt power. In none of them could it fairly be said that the Court, or the individual Justices, were doing more than their duty to oversee the judiciary's awesome contempt power. Likewise, there is no basis for the conclusion that any sympathy existed for the cause of the defendant, or with his conduct. As Justice Frankfurter said in dissent in the *Sacher* case itself:

> I would not remotely minimize the gravity of the conduct of which the petitioners have been found guilty, let alone condone it. But their intrinsic guilt is not relevant to the issue before us. This Court brought the case here in order to consider whether the trial court followed the proper procedure in determining that the misconduct of the petitioners subjected them to punishment. . . . Time out of mind this Court has reversed convictions for the most heinous offenses, even though no doubt about the guilt of the defendants was entertained. It reversed because the mode by which guilt was established disregarded those standards of procedure which are so precious and so important for our society.[20]

2. Free Speech Cases

Many of the cases cited by Senator Eastland involve freedom of expression. In all of them the votes in favor of the individual's right to speak or publish are regarded as "pro-Communist." [21]

Many of the same constitutional arguments urged by the dissenting Justices in the above cases, in all of which a majority ruled that no first amendment violation occurred, were equally pressed in cases not involving Communism.

Thus, in *Beauharnais v. Illinois*,[22] a majority of the Court upheld a conviction under a state criminal libel law against a speaker who was exposing Negroes to "contempt, derision, and obloquy." The dissenting Justices claimed that the conviction was unconstitutional as invading the defendant's right to freedom of speech. In *Terminiello v. Chicago*,[23] a majority of the Court reversed a conviction for breach of the peace based on the defendant's speech attacking Jews, Catholics, and Negroes. The majority held that the defendant had a constitutional right to express his views, no matter how unpopular and how odious.

It makes as much sense to say that the votes selected by Senator Eastland were "pro-Communist" as to say that the Justices voting in

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[20] 343 U.S. at 27-28.

[21] Tabulation, citing Scales v. United States, 367 U.S. 203 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); Dennis v. United States, 341 U.S. 494 (1951).

[22] 343 U.S. 250 (1952).

[23] 337 U.S. 1 (1949).

favor of the first amendment in the *Beauharnais* and *Terminiello* cases were anti-Negro, anti-Jewish, and anti-Catholic.

3. Statutory Interpretation

Many of the cases referred to by Senator Eastland involve questions of statutory interpretation. He characterizes as "pro-Communist" certain votes in those cases without regard to their validity under established canons of interpretation.

a. Construction of Statutes To Avoid Constitutional Issues

It is well established that courts will attempt to interpret statutes so as not to require a judicial ruling on constitutional questions. In the words of Chief Justice Taft, "it is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality." [24] Again, as Chief Justice (then Justice) Stone wrote, what Congress has written "must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity." [25] A recent decision resting on this rule of statutory construction is *United States v. Rumely*,[26] in which the Court narrowly construed a congressional resolution authorizing an investigation of "lobbying activities" so as to include only "representations made directly to the Congress, its Members, or its committees" and not all activities intending "to influence, encourage, promote or retard legislation." As a result, a contempt conviction of a purveyor of literature of a conservative persuasion was overturned.

In *United States v. Witkovich*,[27] the Court interpreted section 242(d) of the Immigration and Nationality Act [28] so as to deny authorities the power to require an alien under a final order of deportation to furnish information except with respect to his availability for deportation. A majority of the Court believed that serious constitutional questions under the first amendment would be presented by a contrary interpretation. Since the language of section 242(d) could fairly be construed to limit the authority to request information, it did so.

Senator Eastland counts the votes in favor of a narrow interpretation of the statute in *Witkovich* as pro-Communist,[29] presumably because many of the questions asked by immigration officials related to

24 Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 346 (1928).
25 Lucas v. Alexander, 279 U.S. 573, 577 (1929).
26 345 U.S. 41 (1953).
27 353 U.S. 194 (1957).
28 Immigration and Nationality Act of 1952, § 242(d), 66 Stat. 211, as amended, 8 U.S.C. § 1252(d) (1958).
29 Tabulation.

Witkovich's possible membership in the Communist Party and activities on behalf of the party. Such a conclusion ignores the rule of statutory construction, as illustrated by the cases discussed above, that was in fact the basis for the decision.

b. Strict Construction of Penal Laws

A longstanding maxim of statutory interpretation cautions judges to interpret criminal statutes strictly in order to be sure, before a person is convicted and perhaps imprisoned, that defendants are punished only for violations that they could have avoided. As Chief Justice Marshall said over a century ago:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.[30]

More recently, in *United States v. Universal C.I.T. Credit Corp.*,[31] involving a prosecution for violation of minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act, the Court reversed a conviction by applying this doctrine. The Court said:

> Very early Mr. Chief Justice Marshall told us, "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ." *United States v. Fisher*, 2 Cranch 358, 386. Particularly is this so when we construe statutes defining conduct which entail stigma and penalties and prison. Not that penal statutes are not subject to the basic consideration that legislation like all other writings should be given, insofar as the language permits, a commonsensical meaning. But when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.[32]

Senator Eastland lists among the votes labeled "pro-Communist" cases in which certain Justices employed the canon of strictly construing penal statutes.[33] Whether or not they were correct in doing so is a

[30] United States v. Wiltberger, 18 U.S. (5 Wheat.) 35, 43 (1820).

[31] 344 U.S. 218 (1952).

[32] *Id.* at 221-22.

[33] Tabulation, citing, *e.g.*, Yates v. United States, 354 U.S. 298 (1957); United States v. Fleischman, 339 U.S. 349 (1950).

difficult question of law in each case. What is not difficult is to see that the doctrine is a confirmed part of the law of legislative interpretation; that its use is common in the Supreme Court in a wide variety of contexts; and that to brand Justices who use it in a case that happens to involve national security as voting "pro-Communist" is totally unjustified.

II. The Good Faith of the Justices

As already has been mentioned, the proper basis for criticism of decisions of the Supreme Court is a rigorous legal and historical analysis of the cases themselves. But because Senator Eastland did not content himself with making charges based on such a standard, it is necessary to go beyond the decisions and show the weaknesses of his allegations in other respects.

In the course of his remarks, despite certain intimations in the language employed, Senator Eastland at no point charged that individual members of the Supreme Court or the Court as an institution ever had the motive of advancing the Communist cause of weakening this country's ability to preserve its democratic form of government.

This is not surprising. To impute such motives to the men sitting on the Supreme Court would be ridiculous—tantamount to the assertion, in a wide variety of other cases, that a vote in favor of a particular result necessarily coincided with sympathy on the part of the individual Justice for the litigant for whom he voted. Thus, to suggest a "pro-Communist" purpose to the Justices of the Court would be to make a similar charge in the following cases, among many others:

(1) That the votes of Justices Black, Douglas, Murphy, and Rutledge in *Adamson v. California*,[34] indicate their sympathy for murderers because they voted in favor of the position advocated by counsel for accused murderers. The real question in that case was whether the due process clause of the fourteenth amendment to the Constitution prohibited a state prosecutor from commenting on the fact that a criminal defendant did not take the stand to testify on his own behalf.

(2) That the votes of Justices Frankfurther, Black, Reed, Douglas, Jackson, Burton, Vinson, and Clark in *Rochin v. California*,[35] indicate their sympathy for narcotics peddlers because they voted in favor of the position advocated by counsel for alleged narcotics peddlers. The real question was whether the due process clause of the fourteenth amendment to the Constitution permitted police to obtain evidence of a narcotics violation by forcing an emetic solution through a tube inserted in a man's stomach.

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[34] 332 U.S. 46 (1947).
[35] 342 U.S. 165 (1952).

(3) That the votes of Justices Clark, Black, Frankfurter, Douglas, Jackson, Burton, Vinson, and Minton in *Hoffman v. United States*,[36] indicate their sympathy for racketeers because they voted in favor of a position advocated by counsel for alleged racketeers. The real question was whether an individual properly declined to answer questions during a grand jury investigation on the ground that the privilege against self-incrimination of the fifth amendment to the Constitution justified the refusal.

(4) That the votes of Justices Black, Douglas, Reed and Jackson in *Beauharnais v. Illinois*,[37] indicate their sympathy with racists because they voted in favor of a position taken by certain avowed racists. The real question was whether the liberty of speech and of the press guaranteed as against the states by the due process clause of the fourteenth amendment to the Constitution prohibited a conviction for portraying "depravity, criminality, unchastity, or lack of virtue of citizens of the Negro race."

(5) That the votes of Justices Douglas, Black, Reed, Burton and Vinson in *Terminiello v. Chicago*,[38] indicate their sympathy with Nazis because they voted in favor of a position taken by a Nazi sympathizer. The real question again involved the scope of the protection offered, even to words calculated to invite sharp dispute and anger, by the free speech guarantees of the Constitution.

(6) That the votes of Justices Douglas and Black in *Hannah v. Larche*,[39] indicate their sympathy with segregationists because they voted in favor of a position restricting investigative rights of the United States Commission on Civil Rights. The real question was whether one Commission's rules of procedure denying to persons against whom complaints have been filed the right of cross-examination of witnesses are consistent with the protection offered by the due process clause of the fifth amendment to the Constitution.

It is no more bizarre to suggest that the present and past Justices of the Supreme Court sympathize with the causes of the parties in the above cases than to make the same suggestion in cases involving national security. Accordingly, it should be no surprise that Senator Eastland refrained from charging that members of the Court were purposefully advancing the cause of Communism by their votes in the cases he selected.

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[36] 341 U.S. 479 (1951).
[37] 343 U.S. 250 (1952).
[38] 337 U.S. 1 (1949).
[39] 363 U.S. 420 (1960).

III. Senator Eastland's Underlying Assumptions

If Senator Eastland did not mean to accuse the Supreme Court of lending conscious aid to enemies of the United States, then he meant that the effect of the Court decisions and the votes of individual Justices aided Communism. This position, when analyzed, discloses a particular attitude toward two distinct and important matters of government: (1) the function of the Supreme Court of the United States, including the proper basis for criticism of its rulings, and (2) the nature of the constitutional democracy known as the United States of America. On both issues Senator Eastland's assumptions are subject to severe criticism.

A. The Supreme Court

At the outset, let it be made clear that the Supreme Court should no more be immune from criticism than any other governmental organization in a functioning democracy. Such criticism is vital if the Court is to reflect the general will of the people. But not all criticism stands on an equal footing, and the charges leveled by Senator Eastland neither fairly assess the work of the Court nor make any contribution to its improvement.

Senator Eastland evaluates decisions of the Supreme Court according to their result and in so doing considers only one criterion—whether the decision is "pro-Communist" or "anti-Communist." Professor Robert Girard has pointed out that such epithets

> signify nothing more than that their author either agrees or does not agree with a particular decision or group of decisions by the Court. If he thinks the Court should not have interferred as it did, then you have "judicial legislation" or, even worse, "judicial usurpation" depending upon the intensity of the author's conviction. If the Court should have stepped in when it did not the result is "judicial abnegation." On the other hand if the Court's response meets his fancy then you are blessed with "judicial restraint" or "judicial statemanship." [40]

Professor Henry M. Hart has pungently parodied the kind of result-oriented criticism that Senator Eastland has engaged in: " 'One up (or one down) for subversion,' 'One up (or one down) for civil liberties . . . .' " [41]

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[40] Girard, Book Review, 11 Stan. L. Rev. 800, 804 (1959).

[41] Hart, *The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 125 (1959).

Result-oriented criticism, like the accusations of Senator Eastland, is unfair and narrow. It ignores the law governing a particular legal or constitutional issue, and the reasoning by which a particular result is reached.

Before a ruling of the Supreme Court can be properly evaluated, it is necessary to know more than which side won. It is necessary to study the facts and the law governing a particular controversy, including the arguments prepared by counsel versed in the case. A proper respect for the Court requires such candid recognition of the competing legal claims and constitutional values. Proper criticism takes account of this, and judges the Court according to professional standards appropriate to its work.

Once again, it must be repeated, the Supreme Court does not and should not stand above criticism. But the criticism must be intelligent and discriminating, fitting to the high function of our highest Court. Perhaps the true standard for critics of the Court should be the same as that to which we expect the Justices themselves to adhere. In the words of Dean Griswold of Harvard Law School:

> It is a process requiring great intellectual power, an open and inquiring and resourceful mind, and often courage, especially intellectual courage, and the power to rise above oneself. Even more than intellectual acumen, it requires intellectual detachment and disinterestedness, rare qualities approached only through constant awareness of their elusiveness, and constant striving to attain them.[42]

Senator Eastland's criticism surely does not measure up to this exacting and high standard.

B. Constitutional Philosophy

As already mentioned, the sole guide to Supreme Court decisions, according to Senator Eastland, is whether the ruling is or is not "pro-Communist." [43] The fallaciousness of this standard as a means of judging the work of the Supreme Court has already been discussed. This portion of the memorandum will deal with some implications of this standard for our constitutional democracy.

In almost every case cited by Senator Eastland, an individual, several individuals, or an organization was asserting a claim under the Constitution of the United States. In some of these cases the claim

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[42] Griswold, *Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 94 (1960).

[43] 108 CONG. REC. 7027 (daily ed. May 2, 1962).

was accepted by the Court, on other occasions it was rejected. Senator Eastland's view is that when the claim was recognized by a Justice, his vote was "pro-Communist." This is an incorrect and dangerous attitude in terms of the high purposes of the Constitution and the Bill of Rights.

Why should not a vote in favor of a constitutional claim be counted "pro-American" rather than "pro-Communist"? Do not such votes serve to extend the liberties protected by the Constitution? Why could it not be said, with fervor at least equal to that of Senator Eastland's, that when a vote is cast in favor of freedom of speech or of the press or of religion, or to protect individuals against unwarranted searches of their homes or person, or to assure criminal defendants a fair trial, or to invalidate governmental action that discriminates on the basis of race, creed, or color, that the Justice is fulfilling the high trust imposed upon him by his oath to "uphold the Constitution of the United States"?

The precedent for this view, contrary to Senator Eastland's, is long and weighty. The principal architect of the Constitution, James Madison, said in the very first Congress that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights . . . ." [44] Madison was speaking of rights guaranteed to the people by the Bill of Rights.

The decisive importance to this country of the freedoms guaranteed by the Bill of Rights can be illustrated by taking two brief excerpts from talks recently delivered by members of the Harvard Law School faculty to audiences abroad in which they described the essence of the American system. Senator Eastland's chart includes different types of cases involving the Bill of Rights; a high proportion of these cases concern freedom of speech and the rights of those accused of crime. Professor Livingston Hall had this to say about the rights of the accused:

> Our traditional and cultural heritage of due process of law has greatly inspired and influenced the lives and activities of the millions of individuals, living and dead, who have made up Anglo-American society. Rules of criminal procedure which treat human beings as individuals, and hold each one individually responsible only for his own acts, leave them free to go about their business, secure in the knowledge that they will not be unjustly punished by the State. This had a great effect in releasing their energy for productive and imaginative ends.[45]

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[44] 1 ANNALS OF CONG. 439 (1789).

[45] Hall, *The Rights of the Accused in Criminal Cases*, in TALKS ON AMERICAN LAW 55, 68-69 (Berman ed. 1961).

And, in discussing the pivotal right of free expression, Professor Roger Fisher said:

> Fundamental among the purposes of the first amendment is the role of free expression in the democratic process. Free expression is a means of developing public opinion. Free expression is an aid to an intelligent choice. And free expression provides an opportunity to make a choice. New and better ideas are most likely to be developed in a community which allows free discussion of any ideas. Without discussion who can be sure which ideas are right and which ideas are wrong? Finally, freedom of expression serves as an outlet for resentments and hostilities that otherwise might find more dangerous expression.[46]

A particularly moving statement of the enduring value of the freedoms guaranteed by the Constitution has been made by Professor Charles Black of the Yale Law School. It capsulizes the reasons for believing that decisions of the Supreme Court and votes by individual Justices in favor of enforcing the provisions of the Bill of Rights are patriotic in the most meaningful sense.

> Consider the place of these phrases "equal protection," "freedom of speech," and the rest in the moral life of our Nation. They state our highest aspirations. They are our political reason for being; they are the things we talk about when we would persuade ourselves or others that our country deserves well of history, deserves to be rallied to in its present struggle with a system in which "freedom of speech" is freedom to say what is welcome to authority, and "equal protection" is the equality of the cemetery. Surely such words, standing where they do and serving such a function are to be construed with the utmost breadth.[47]

As wholeheartedly as one may subscribe to the above views, it is well to recall that they do not decide concrete cases. To decide properly, as has been emphasized above, one must study and reflect upon the law, the facts, and the contentions of the parties.

The point here is different, but no less important. It is that Senator Eastland's methodology depreciates the constitutional protections that all Americans enjoy. It is impossible to accept the facile label "pro-Communist" without recognizing that the Senator includes within that definition Supreme Court decisions and votes of individual Justices that enforce the Bill of Rights—decisions and votes that do

[46] Fisher, *The Constitutional Right of Freedom of Speech*, in *id.* at 85, 88-89.

[47] Black, *Old and New Ways in Judicial Review*, Bowdoin College Bulletin, No. 328, p. 11 (1958).

not seem alien to our heritage, but, on the contrary, are in the finest American tradition.

The attack by Senator Eastland on the Supreme Court and its members has now been analyzed from several points of view. Examination of a sample of the pertinent cases indicates that the rulings of the Court rest on solid ground. Moreover, there is no basis for any possible claim that in their rulings the Justices were motivated by sympathy for Communism. Finally, the simplistic criterion employed by Senator Eastland in evaluating the work of the Supreme Court ("pro-Communist" or "anti-Communist" decisions) has no validity in terms of the Court's complex constitutional role. Accordingly, it must be concluded that Senator Eastland's charges are wholly without foundation.