

## INTERNATIONAL EXTRADITION: IMPLICATIONS OF THE EISLER CASE

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Two critical issues were raised by the attempt of the United States Government to secure the extradition of Gerhart Eisler, the Communist alien who jumped bail and fled the United States after being convicted both of contempt of Congress and of making false statements to secure an exit permit. The first concerns the test of "double criminality." This test derives from extradition laws and treaties which specify that a person shall be extradited only if the act of which he is accused is a crime by the law both of the state which is demanding and the state which is asked to grant extradition.<sup>1</sup> The unhesitating decision of a British magistrate to reject the United States' plea demonstrated the serious rift which has developed between English and American extradition practice in applying the test of "double criminality" to determine whether offenses are extraditable.

Secondly, the case reveals the uncertainty of legal practice with reference to extraditability when the extradition proceedings are challenged as being politically inspired.<sup>2</sup> Eisler resisted extradition on the grounds that the United States was seeking his surrender to persecute him for his Communist activities. The British decision avoided this issue and the actual effect of law and treaty in preventing extradition for ulterior political purposes remains ill-defined. But in view of the increasing bitterness of the conflict between Communists and their opponents, within as well as between states, the issue may be expected to arise again, and with the shoe on the other foot as a fugitive resists extradition demanded by a Communist government. The Eisler proceedings therefore suggest the advisability of reevaluating the safeguards provided for political dissidents under existing treaties and municipal law.

### BACKGROUND OF THE CASE<sup>3</sup>

Eisler, an Austrian national, arrived in the United States in 1941 and was admitted as a political refugee in transit to Mexico. He remained in the United States throughout the war. In 1946 he applied

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1. See 4 HACKWORTH, DIGEST OF INTERNATIONAL LAW 42 *et seq.* (1942); 1 OPPENHEIM, INTERNATIONAL LAW 640 (Lauterpacht ed. 1948). See also HARVARD RESEARCH IN INTERNATIONAL LAW, EXTRADITION, 29 AM. J. INT'L L. SUPP. 80 *et seq.* (1935).

2. Extradition laws and treaties commonly provide exemption from extradition for persons accused of "political crimes" and also for those whose surrender is sought with a view to trying or punishing them for acts of a political character. See note 31 *infra*.

3. See *Eisler v. United States*, 170 F.2d 273 (D.C. Cir. 1948); *United States v. Eisler*, 75 F. Supp. 640 (D.D.C. 1948); Report of Hearing, Bow St. Magistrate's

to the Department of State for permission to return to Germany, a procedure then required of all aliens wishing to leave the United States. On July 31, 1946 he was granted an exit permit.

On January 24, 1947, however, the House Committee on Un-American Activities summoned him to appear before it as a witness, publicly proclaiming him to be the "No. 1 Communist" in the United States. The Attorney-General was asked to prevent Eisler from leaving the country and to assure his appearance. Immigration officers arrested him and on February 6th brought him before the Committee. Eisler refused to be sworn in unless he were allowed to make a preliminary statement; the Committee's chairman refused to permit the statement unless Eisler was first sworn. As a result Eisler was dismissed without testifying and the Committee voted to cite him for contempt of Congress. On February 27th an indictment for contempt was returned; a jury in the Federal District Court for the District of Columbia found him guilty. The court of appeals by a 2-1 decision affirmed the judgment on June 14, 1948.<sup>4</sup> Certiorari was granted by the Supreme Court on November 8, 1948 but Eisler fled the country before the decision was made.

In the meantime, Eisler had been tried for a second offense, making false statements in his application to depart from the United States.<sup>5</sup> The Department of Justice secured an indictment on this and two similar counts on April 14, 1947 while the trial for contempt of Congress was pending. The indictment charged that Eisler in response to questions on the application had concealed his affiliation with the Communist Party, his residence in the United States prior to 1941, and his former use of various "aliases," thereby violating Section 223, Title 22 of the United States Criminal Code which makes it a criminal offense "knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission."<sup>6</sup> After a month's

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Court, London, May 27, 1949, Case of Gerhard Eisler. A transcript of the latter was forwarded to the United States Department of State by the United States Embassy in London, and the Legal Division of the Department kindly permitted the writer to read it.

4. *Eisler v. United States*, 170 F.2d 273 (D.C. Cir. 1948).

5. *United States v. Eisler*, 75 F. Supp. 640 (D.D.C. 1948); also same case, 75 F. Supp. 634 (D.D.C. 1947).

6. 40 STAT. 559 (1918), as amended, 55 STAT. 252 (1941), 22 U.S.C. § 223 (1946). The related counts on which Eisler was charged were: "knowingly and wilfully making and using a false affidavit knowing the same to contain fraudulent and fictitious statements in a matter within the jurisdiction of the Department of State" in violation of 18 U.S.C. § 80 (1946); and "knowingly and wilfully making and causing to be made false and fraudulent statements and representations in a matter within the jurisdiction of the Department of State" also in violation of 18 U.S.C. § 80 (1946). The trial judge ruled that these counts could be dismissed as they were grounded upon the same alleged false statement and were each addressed to the identical wrongful act. *United States v. Eisler*, 75 F. Supp. 634 (D.D.C. 1947).

trial Eisler was convicted but consideration of various defense motions delayed sentence until March 24, 1948. Eisler appealed, and his conviction was affirmed by the court of appeals on April 18, 1949.<sup>7</sup> A delay again ensued as Eisler moved for a rehearing. Finally on May 6, 1949, the circuit court denied the motion. On the same day Eisler fled the United States on the Polish steamship *Batory*. Notification of Eisler's presence on board was given the next day.<sup>8</sup>

The Department of Justice immediately requested the Department of State to seek Eisler's extradition. The British government was asked to seize Eisler upon the arrival of the *Batory* at Southampton and hold him for extradition under the British-United States Extradition Treaty of 1931. This was done on May 14 despite vehement objections by the ship's captain and physical resistance by Eisler.<sup>9</sup> The Polish Embassy strenuously protested this act as "forcible abduction" in "violation of the Polish sovereign flag."<sup>10</sup> The British authorities nevertheless kept Eisler in custody, and remanded him to Bow Street Magistrate's Court, London, for a hearing on the extradition request.

At the hearing, on May 27, 1949, Sir Valentine Holmes, representing the United States, argued that Eisler should be extradited because he had been convicted of an offense tantamount to perjury, an extraditable crime under the treaty and the British Extradition Act.<sup>11</sup> The magistrate, Sir Laurence Dunne, found, however, that the evidence failed to show that Eisler's offense corresponded to perjury as defined by English law. Inasmuch as both the treaty and the statute provided for extradition only when the act charged constituted an extraditable offense under the law of the territory where the fugitive was found,<sup>12</sup> Eisler was ordered released forthwith.

The American Government thereupon dropped the matter, except for a rigorous investigation of the officials and crew of the *Batory* upon its return to the United States to determine whether there had been complicity in Eisler's escape.

#### THE CONSTRUCTION OF DOUBLE CRIMINALITY: AN ANGLO-AMERICAN RIFT

The American case for extradition assumed a broad interpretation of the double criminality test. Judicial precedent for this view was set

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7. Report of Hearing, Bow St. Magistrate's Court, *supra* note 3.

8. N.Y. Times, May 12, 1949, p. 1, col. 6-7.

9. N.Y. Times, May 15, 1949, p. 1, col. 8.

10. N.Y. Times, May 16, 1949, p. 1, col. 8.

11. British-United States Extradition Treaty, Dec. 22, 1931, 163 LEAGUE OF NATIONS TREATY SERIES 59, Art. 3(14) (1935); Extradition Act, 1873, 36 & 37 VICT. c. 60, § 8 schedule.

12. British-United States Extradition Treaty, *supra* note 11, Art. 9; Extradition Act, 1870, 33 & 34 VICT. c. 52, § 10, § 26; also Act of 1873, *supra* note 11.

by the case of *Factor v. Laubenheimer*.<sup>13</sup> In this case, the British government had requested extradition of a person charged with receiving money, knowing that it had been fraudulently obtained. The criminal law of Illinois, where Factor was found, did not cover such an offense. Nevertheless, a majority of the United States Supreme Court held that he was extraditable on the ground that the offense was named in the treaty and was recognized as a crime "by the jurisprudence of both countries."<sup>14</sup>

The Supreme Court in effect set aside the treaty requirement of double criminality in the interest of British justice, declaring that:

"The obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships . . . should be construed more liberally than a criminal statute or the technical requirements of criminal procedure. . . . It has been the policy of our own government, as of others, in entering into extradition treaties, to name as treaty offenses only those generally recognized as criminal by the laws in force within its own territory. But that policy when carried into effect by treaty designation of offenses with respect to which extradition is to be granted, affords no adequate basis for declining to construe the treaty in accordance with its language, or for saying that its obligation, in the absence of some express requirement, is conditioned on the criminality of the offense charged according to the laws of the particular place of asylum."<sup>15</sup>

The State Department failed to anticipate that the British court would adopt a strict construction of double criminality instead of reciprocating the liberal interpretation in the *Factor* case. They had undertaken the extradition proceedings as more or less routine and expected little difficulty, especially as the conviction of Eisler obviated the necessity of making out a prima facie case supporting the accusation against him. The conviction for contempt of Congress did not figure in the extradition proceedings because this offense clearly lay entirely outside the enumerated list of extraditable offenses in the

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13. 290 U.S. 276 (1933).

14. A critical view of this decision is taken by Manley O. Hudson, *The Factor Case and Double Criminality in Extradition*, 28 AM. J. INT'L L. 274 (1934). Hudson maintains that the Court's opinion did not take adequate account of the history of Anglo-American extradition law nor of the principles of international law and cautions that such a liberal construction of extradition treaties undermines the safeguards set up for protection of both nationals and aliens. On the other hand, Edwin Borchard, *The Factor Extradition Case*, 28 AM. J. INT'L L. 742 (1934), defends the decision as in the interest of the administration of justice and in accordance with the intended purpose of the treaty to suppress crime. He asserts that the requirement of double criminality is not a rule of international law and that strict construction of the Anglo-American treaty provision is not essential in order to establish extraditability.

15. *Factor v. Laubenheimer*, 290 U.S. 276, 298 (1933).

Extradition Treaty. But Sir Valentine Holmes proposed to prove that the false statements on the application to depart from the United States had been "made for the purposes of a proceeding before a person having power to hear, receive, and examine evidence on oath" and would, therefore, have warranted a charge of perjury under Section 1 of the British Perjury Act of 1911<sup>16</sup> had the offense been committed in England. This would satisfy the requirement of double criminality insofar as English law was concerned. In regard to the nature of the offense under American law, Holmes argued that even though Eisler had not actually been convicted of the technical charge of perjury, the facts would have warranted such a charge if the Department of Justice had chosen to prosecute on this basis.<sup>17</sup>

The defense insisted that important elements of perjury were absent under British law. It claimed that Eisler had not been lawfully sworn, nor had his statements been made as a witness or as an interpreter in a judicial proceeding as required by British law. "It is a complete abuse of the language," declared Mr. Pritt, the defense counsel, "to describe a man who is making application on a printed paper sent up from New York to Washington to say that that person is a witness."

The magistrate agreed that Eisler's offense could not be considered to have taken place in the course of a judicial proceeding; hence it did not constitute perjury according to English law and was not an extradition crime. The proceeding, in which Eisler had been involved, said Sir Laurence Dunne, had been "purely an administrative action performed by the officer in question. He was taking and recording statements of Mr. Eisler." Though the officer may have had legal authority to receive evidence under oath, this did not give him judicial capacity under English law.<sup>18</sup> Even if a false statement under such circumstances might be perjury in the United States, it was only "akin to perjury" in England. To Sir Valentine Holmes' remonstrance that the court was under obligation to construe the provisions of the treaty and statute liberally, the magistrate replied that it would require altogether too liberal a construction of the meaning of perjury under

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16. Section 1 of this act provides that "If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury. . . ." The term "judicial proceeding" is defined by the Act as including "a proceeding before any court, tribunal or person having by law power to hear, receive and examine evidence on oath." Perjury Act, 1911, 1 & 2 GEO. 5, c. 6, §§ 1(1), 1(2).

17. In contrast to British law, see note 16 *supra*, United States law provides that perjury may include any false statement made under oath before a competent tribunal, officer or person where the oath is required by law. 35 STAT. 1111 (1909), 18 U.S.C. 231 (1946). Perjury in the United States is thus not restricted to statements material in a judicial proceeding.

18. The magistrate noted that in England an administrative official would only be acting in a judicial capacity if he were participating in a ministerial tribunal or inquiry.

British law to hold Eisler for extradition. He dismissed a plea for an adjournment to permit the securing of further evidence asserting that it was "abundantly clear that in no circumstances whatever could that offence of which Mr. Eisler was convicted in America be brought under the technical head of perjury in this country." <sup>19</sup>

In insisting on a strict application of the principle of double criminality, Sir Laurence Dunne conformed not only to the letter of British law but to the main trend of British judicial practice. Extradition by England is dependent entirely upon the statutory authority granted by the Extradition Act of 1870 and its amendments.<sup>20</sup> This act authorizes extradition of persons convicted or accused of specifically designated "extradition crimes" but only if "such evidence is produced as . . . would, according to the law of England, prove that the prisoner was convicted of such crime. . . ." <sup>21</sup> By the Act of 1873, perjury was included in the list of extraditable crimes, but with the specific proviso that:

"The following list of crimes is to be construed according to the law existing in England or in a British possession (as the case may be) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act." <sup>22</sup>

The governing statute is therefore explicit that the construction of the criminal nature of an act for which extradition is requested shall be made according to the law of England; and so construed, it must conform to an offense specifically designated in the statute.

In pursuance of the Extradition Act, the British-United States Treaty of 1931 specifies clearly that

"extradition shall take place only if the evidence be found sufficient, according to the law of the High Contracting Party applied to . . . to prove . . . that the crime or offense of which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to." <sup>23</sup>

19. Report of Hearing, Bow St. Magistrate's Court, *supra* note 3.

20. See 8 HALSBURY'S STATUTES OF ENGLAND 449 (1929). The statute rather than the treaty is held in England to be the ultimate source of authority in regard to extradition. The statute actually defines the permissible limits of treaty obligations which may be undertaken by the government, rather than providing simply for the implementation of treaty commitments. In contrast, treaties in the United States automatically become part of the law of the land and are therefore essentially self-executing.

21. Extradition Act, 1870, 33 & 34 VICT. c. 52, § 10. Some disagreement has arisen over the intent of this provision. It has been urged that only the sufficiency of the evidence produced need be tested "according to the law of England." On the other hand, the provision has been held to apply the law of England to determining the criminality of the act charged. The latter view appears to be more generally accepted. See Hudson, *supra* note 14.

22. Extradition Act, 1873, 36 & 37 VICT. c. 60, § 8 schedule.

23. British-United States Extradition Treaty, *supra* note 11, Art 9.

Thus an offense is extraditable under the treaty only if it is so considered by the law of the state of asylum.

British courts furthermore have customarily made a careful determination of whether an alleged offense would constitute, according to English law, one of the crimes for which extradition was provided by treaty. Thus in *King v. Dix*<sup>24</sup> extradition was refused on a charge of larceny because the "charge disclosed no offense according to the law of England"; but on a second charge, "embezzlement in the State of Washington," the prisoner was considered extraditable because the crime corresponded directly to "fraud" in England, which was covered by the extradition treaty and statute. In the case of *Ex parte Windsor*<sup>25</sup> a prisoner wanted in the United States for forgery was discharged because the offense charged was held not to be forgery by the law of England.

Until the *Factor* case American judicial practice had followed a closely parallel development on the issue of double criminality. Courts held that an offense was extraditable only if it was named in the relevant treaty and if such an act was considered criminal under the laws of the particular state of the United States where the fugitive was found. Decisions as to extraditability were usually based upon quite precise construction of the relevant state statutes and avoided any undue "stretching" of the established statutory definition of crimes to encompass particular offenses for which extradition was claimed.<sup>26</sup>

The decision in the *Eisler* case has been criticized on the grounds

24. 18 T.L.R. 231 (K.B. 1902).

25. 12 L.T. 307 (Q.B. 1865).

26. See *Collins v. Loisel*, 259 U.S. 309 (1922); *Wright v. Henkel*, 190 U.S. 40 (1903). The *Factor* case reversed this approach. But the HARVARD RESEARCH, *op. cit. supra* note 1, at 80 *et seq.*, found the principle of double criminality so generally accepted among states throughout Europe and America that it introduced it in its Draft Convention on Extraditions.

Neither British nor United States courts have required that an offense be defined identically by the laws of the demanding and asylum states, so long as the particular act charged is in substance an extraditable crime in both states. See 4 HACKWORTH, *op. cit. supra* note 1, at 42 *et seq.*; 8 HALSBURY'S STATUTES OF ENGLAND 460 (1929). For instance, in *Collins v. Loisel*, *supra*, the United States Supreme Court declared that "the law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions." See also *Kelly v. Griffin*, 241 U.S. 6 (1916). The British rule is similar. *Reg. v. Jacobi & Hiller*, 46 L.T. 595 n.(a) (Q.B. 1881); *In re Belencontre*, [1891] 2 Q.B. 122.

In the *Eisler* case, however, the issue was a matter of *substance*, not terminology. The question was whether the particular false statements had been material in a judicial proceeding, and thus was an important part of the definition of perjury under British law. To have disregarded this element would have in effect amounted to judicial modification of the substance of the law, not just the equating of different words whose essential meaning was the same.

that Eisler's offense, even if it may not have been perjury, corresponded to a "kindred offense" as defined by the British Perjury Act and should therefore have been considered extraditable.<sup>27</sup> Sir Laurence Dunne himself admitted that the offense might be "akin to perjury" and the language of the statute corroborates such a conclusion.<sup>28</sup> But the British-United States Extradition Treaty of 1931 names only "perjury" as extraditable. To assume that the treaty was also intended to cover related offenses appears unwarranted in the absence of any provision to that effect and in view of the clear and precise distinction drawn by British law between perjury and kindred offenses. The Perjury Act of 1911 and British judicial practice have established specific criteria for the determination of perjury, which make it *substantively* a different crime from a "kindred offense." For instance, the criterion of perjury that a false statement shall have been made in a judicial proceeding does not apply to a kindred offense. Such a distinction appears sufficiently important to justify the restriction of extradition to the crime actually specified in the treaty and statute. Actually, counsel for the United States did not undertake to argue that kindred offenses should be held extraditable, but only attempted to prove that Eisler's action would have constituted real perjury if committed in England.

Barring fundamental statutory revision by Parliament, Britain will undoubtedly continue to limit its obligation to extradite to offenses which, by the definition of British law, constituted crimes specified in its extradition treaties. Such a stand may block substantial progress toward the codification and development of a widely applicable international law of extradition. Effective multilateral action on extradition demands a generally acceptable standard of reference to determine extraditability. As most states are hardly ready to give automatic effect to each other's criminal laws and extradite merely on evidence that a person has been accused of a crime in another country, the standard of double criminality seems unavoidable. Unless extraditability is based on the degree of penalty provided for the offense rather than on the nature of the offense,<sup>29</sup> strict application of the test of double criminality will limit extradition on a multilateral basis to those offenses which are similarly defined in the various municipal

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27. See Finch, *The Eisler Extradition Case*, 43 AM. J. INT'L L. 487 (1949).

28. Section 2 of the British Perjury Act, 1911, 1 & 2 GEO. 5, c. 6, provides that if any person, being required or authorized by law to make any statement on oath for any purpose, and being lawfully sworn (otherwise than in a judicial proceeding) willfully makes a statement which is material for that purpose and which he knows to be false or does not believe to be true, he shall be guilty of a misdemeanor.

29. The HARVARD RESEARCH, *op. cit. supra* note 1, at 74 *et seq.* has proposed basing extraditability on the severity of the penalty provided by the two states concerned for the offense in question, regardless of the definition of its nature. Such a test of extraditability is allowed by some countries, *e.g.*, France, see 2 DALLOZ, NOUVEAU REPERTOIRE DE DROIT 476 *et seq.* (1948) (Law of March 10, 1927) but its acceptance is not general.

criminal codes. This means that a very narrow range of crimes can be covered because discrepancies between national legal systems are substantial in defining criminal offenses (often far greater than in the definition of perjury by British and American law discussed above). Reconciliation between the British test of double criminality as applied in the Eisler case and a multilateral standard of extraditability may therefore be beyond realization.

#### EXEMPTION FROM POLITICALLY INSPIRED EXTRADITION

Modern extradition law has been solicitous of political fugitives. Three provisions inserted in most extradition treaties have safeguarded the political dissident against being returned for punishment to the country from which he escaped. First, persons accused of offenses "of a political character" are not usually extraditable. Second, the offender may not be prosecuted or punished for an offense other than that for which he is extradited, unless he is first given an opportunity to leave the country upon completing his sentence for the extradited offense. Thus he is presumably protected against prosecution for a political crime after being extradited for a non-political one. Finally, extradition may be denied if shown to be requested for the purpose of punishing a person for a political offense.<sup>30</sup> All of these provisions appear both in the British Extradition Act and in the British-United States Extradition Treaty of 1931.<sup>31</sup>

The implications of the first of these provisions have been extensively, though not uniformly, determined in a long record of cases.

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30. These provisions were developed during the 19th century as a result of vigorous public protest against the surrender of fugitives who had been engaged in unsuccessful democratic revolutions against monarchical governments. See 4 HACKWORTH, *op. cit. supra* note 1, at 45 *et seq.*; HARVARD RESEARCH, *op. cit. supra* note 1, at 108 *et seq.*; 1 OPPENHEIM, *op. cit. supra* note 1, at 643 *et seq.*

31. Section 3 of the Extradition Act of 1870, 33 & 34 VICT., c. 60, provides that "A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character." Section 9 reads: "The police magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offense of a political character or is not an extradition crime."

Article 6 of the British-United States Extradition Treaty of 1931, *supra* note 11, makes almost the identical provision as § 3 of the statute quoted above. Article 7 of the Treaty provides further that "A person surrendered can in no case be kept in custody or be brought to trial in the territory of the High Contracting Party to whom the surrender has been made for any other crime or offense or on account of any other matters than those for which the extradition shall have taken place until he has been restored or has had an opportunity of returning to the territories of the High Contracting Party by whom he has been surrendered."

Practice has differed between countries with reference to such issues as the extraditability of "mixed" offenses which include both political and criminal aspects. But there is general agreement regarding certain basic tests of the political character of an offense. To be so held, for instance, it must be incident to and form a part of a political disturbance and the offender must have been involved in an organized movement or party seeking to impose a government of its choice in opposition to that favored by an opposing group or to the government in power.<sup>32</sup> On the whole, substantial protection has been afforded to persons who have committed crimes in the course of bona fide political agitation.<sup>33</sup>

Eisler made no claim to exemption under this provision. His contention was not that the *offense* was political but that the *prosecutions* were of a political character. Had the decision not gone off on the issue of double criminality, this would have warranted careful consideration of the applicability of the other statutory and treaty provisions concerning the exemption of political offenders.

Eisler's prosecutions and convictions appear inseparable from his Communist activities and affiliations, even though his political actions were not the purported subject of the criminal charge against him. His appearance before the House Committee on Un-American Activities which led to his conviction for contempt of Congress was unquestionably ordered because of his reputed Communist activities. Refusal of the Committee chairman to allow Eisler to make an initial statement before taking the oath as a witness probably reflected antagonism towards Eisler because of his political beliefs and may even have lacked legal authority.<sup>34</sup> The second indictment against Eisler—for false statement—occurred only *after* the prosecution for contempt was under way, when the man had become a *cause célèbre* and the Department of Justice was under heavy congressional and public

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32. See 8 HALSBURY'S STATUTES OF ENGLAND 454 (1929); 35 C.J.S. 357 (1943).

33. See 4 HACKWORTH, *op. cit. supra* note 1, at 45 *et seq.*; HARVARD RESEARCH, *op. cit. supra* note 1, at 107 *et seq.*; 1 OPPENHEIM, *op. cit. supra* note 1, at 646 *et seq.* A careful study of the subject is Deere, *Political Offenses in the Law and Practice of Extradition*, 27 AM. J. INT'L L. 247-70 (1933).

34. In dissenting from the decision of the circuit court affirming Eisler's conviction for contempt, Judge Prettyman maintained that Eisler was entitled to prove what he intended to say to the Committee before being sworn and that he should not automatically have been held in default because he had clearly indicated his readiness to answer the Committee's questions. Furthermore, the Judge asserted, the Government had failed to prove that Eisler was summoned to testify in a matter of inquiry within the competence of the Committee. See *Eisler v. United States*, 170 F.2d 273, 283 (D.C. Cir. 1948) (dissenting opinion).

The purpose of the hearing (to investigate Communist activities), the Committee's action in causing the prior arrest of Eisler, its public accusation of Eisler as the No. 1 Communist leader in the United States and its peremptory dismissal of the witness on a technicality of procedure give a strong presumption of political bias to the Committee's citation of Eisler for contempt.

pressure to do something about Communists. This indictment was returned almost nine months after the State Department had approved of Eisler's departure, and the official responsible for this approval admitted during the trial that the Department had had in its files, at the time the decision was made, full accurate information on the questions to which Eisler had made false answer. In other words, although the Government had long known of Eisler's offense, it had refrained from prosecution until his public exposé as a Communist; in fact he had actually been granted permission to depart from the United States.<sup>35</sup> Such circumstances, coupled with journalistic notoriety, gave the Eisler trials an unmistakable political connotation, even if they were not directly instigated for political reasons.

Would such a background be sufficient to establish an exemption under either of the latter two treaty provisions concerning political fugitives? Neither of these provisions has had a settled record of interpretation and application. They have been considered in only a few cases and the courts have avoided conclusive judgments on them. The effect of such decisions as have been made is to decrease rather than increase the assurance of protection for the political fugitive.

In the first place, the courts have assumed a very modest view of their judicial competence when faced with the plea that the government requesting extradition is politically motivated. They have declined to hear evidence on the matter, passing on to the executive branch the ticklish responsibility of inquiring into another state's possible ulterior motives. When Britain requested the extradition of Ignatius T. T. Lincoln during the First World War, the defendant argued that the action was really prompted by a desire to punish him for and to interfere with his public utterances and writings in the United States which were politically antagonistic to Britain. The court denied Lincoln leave to prove that the prosecution would be politically animated, declaring:

"[I]t is not part of the court proceedings nor of the hearing upon the charge of crime to exercise discretion as to whether the criminal charge is a cloak for political action, nor whether the request is

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35. The trial judge appears to have been considerably disturbed by the above evidence as it bore upon defense motion to arrest judgment, which was based in part on the claim that Eisler's statement could hardly have been material to the proceeding, if the knowledge of the true circumstances was in the hands of the Department of State when the decision was made. The judge admitted that there was "no satisfactory explanation in the record as to why this action was taken and for that matter the testimony of the witness to whom had been delegated the authority to act was confused and conflicting respecting the issuance of the notice." Nevertheless the judge dismissed the motion holding that it was a matter for the jury to decide whether the concealment had induced the granting of the departure permit and had been made with that intent. *United States v. Eisler*, 75 F. Supp. 640, 645 (D.D.C. 1948).

made in good faith. Such matters should be left to the Department of State. . . .

"It is thought by the Court that application to the Secretary of State of the United States will furnish full protection against the delivery of the accused to any government which will not live up to its treaty obligations, and that the Secretary of State will be fully satisfied (before delivering the accused to the demanding government) that he is wanted (in the legal sense of that term) upon a criminal charge, that it is not sought to secure him from a country upon which he is depending as an asylum because of political matters, and that the treaty is not actually used as a subterfuge."<sup>35</sup>

This decision was affirmed by the United States Supreme Court.<sup>37</sup>

Where British and American courts have undertaken to rule on the plea that extradition was politically motivated, they have hesitated to question the good faith of the requesting state in regard to honoring its treaty obligations. Only compelling evidence could establish the ulterior intent of the demanding state to prosecute or punish the fugitive for political considerations. As a matter of fact, in no British or American case does it appear that the accused has been able to convince the court that he should be released on this premise. In one instance a British court gave the matter serious consideration when the defendant argued that if he were returned to France he would have to undergo interrogation with reference to political secrets which he had formerly refused to disclose, and that if he should again refuse, he would be punished.<sup>38</sup> Lord Russell well understood the import of the charge:

"[It] means that a person having committed an offense of a political character another and wholly different charge (which does come within both the Extradition Act and the treaty) is resorted to as a pretence and excuse for demanding his extradition in order that he may be tried and punished for the offense of a political character which he has already committed."<sup>39</sup>

The judge, however, could find no evidence to warrant the conclusion "that the requisition for extradition is made with a view to punish the prisoner for such an offense." A somewhat similar question was raised but not decided with reference to a request by the Nazi Government of Germany in 1934 for extradition of a Jewish professor residing in the United States.<sup>40</sup> The accused resisted extradition on the grounds that the anti-Semitic policy of the German government would prevent his receiving a fair trial. The court referred the issue to the Department

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36. *In re Lincoln*, 228 Fed. 70, 74 (E.D.N.Y. 1915).

37. 241 U.S. 651 (1916).

38. *In re Arton*, [1896] 1 Q.B. 108 (1895).

39. *Id.* at 114.

40. *In re Normano*, 7 F. Supp. 329 (D. Mass. 1934).

of State for inquiry, but released the defendant before a report was received because the time limit for holding him had expired.

Thus there is still lacking an adequate judicial determination of the sufficiency of evidence necessary to establish ulterior political motivation on the part of a government requesting extradition. Considering the gravity of such an imputation, insistence by the courts on convincing evidence to support the claim is understandable. But it means that as yet there is no assurance as to the legal effect of the exemption purportedly provided by British and American treaty and statute for a political fugitive from extradition for an essentially political purpose.

Pending further development of precedent in such cases, perhaps the cautious and strict interpretation of extraditability followed by the British in regard to the requirement of double criminality and the limitation of extradition to specific offenses named in treaties may be justified. Indirectly, such strict interpretation and limitation provide a safeguard for political dissidents fleeing from persecution by powers-that-be. The misfire of the Eisler extradition may actually benefit others on the opposite side of the ideological conflict whose extradition may be demanded for non-political crimes but who would face upon their return, stringent penalties for their political recalcitrance. For the Eisler decision demonstrates the possibility of relying in certain situations on a well-established, if conservative, test of extraditability—double criminality—where a ruling on the test of political motivation of the requesting government might be embarrassing as well as novel.