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Case Comment

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SCOPE OF REVIEW IN EXTRADITION PROCEEDINGS: The Government Cannot Appeal A Denial of Extradition Request Based on the Declaratory Judgment Act — *United States v. Doherty*, 786 F.2d 491 (2d Cir. 1986).

I. Facts and Holding

The United States, on behalf of the United Kingdom, appealed a denial of a motion for declaratory judgment in response to an order denying the extradition of Joseph Patrick Thomas Doherty.[1] A Diplock Court in Northern Ireland[2] convicted Doherty, a member of the Provisional Irish Republican Army (PIRA),[3] *in absentia* for murder, attempted murder, illegal possession of firearms and ammunition, and membership in a proscribed organization.[4] Pursuant to 18 U.S.C. section

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1. United States v. Doherty, 786 F.2d 491 (2d Cir. 1986).

2. The United Kingdom established the Diplock Court System as a special non-jury tribunal to try terrorist offenses. The Diplock Courts have been criticized because the trial is by judge, not jury, and testimony of the defendant's accomplice may be the sole basis of a conviction. Proponents of the system contend that because of terrorist intimidation and retaliation, trial by an impartial jury is difficult at best and, for the same reasons, it is difficult to obtain testimony against a PIRA defendant. *The Impact of the Supplementary Treaty Upon American Domestic Law and Upon the American Constitutional Process in the Fight Against Terrorism: Hearings on the Supplementary Treaty Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 74-75 (1985) [hereinafter cited as Supplementary Treaty Hearings] (Statement of Abraham D. Sofaer, Legal Adviser). Doherty argued in the district court that the Diplock Courts are unfair, and that he did not and could not get a fair trial in Northern Ireland. Matter of Doherty, 599 F. Supp. 270, 276 (S.D.N.Y. 1984). For an analysis of the Diplock Court System prepared by the State Department for the Senate Foreign Relations Committee, see 132 Cong. Rec. S9168-71 (daily ed. July 16, 1986).

3. The PIRA's goal is Irish nationalism, specifically the unification of Ireland through violence directed against British security forces. *See* Matter of Doherty, 599 F. Supp. at 273.

4. *Doherty*, 786 F.2d at 493. The acts for which Doherty's extradition was requested date from May 2, 1980. In an attempt to ambush a convoy of British soldiers, Doherty and other PIRA members seized a private residence in Belfast and held the family as hostages. When five British Special Air Servicemen arrived carrying machine guns, the two groups exchanged gunfire and British Captain Herbert Richard Westmacott was killed. Doherty was arrested and held in a Belfast prison. However, he escaped from

3184[5] and the Treaty of Extradition Between the United States and the United Kingdom of Great Britain and Northern Ireland,[6] the United States requested Doherty's extradition to the United Kingdom before an extradition magistrate.[7] Doherty asserted that because his actions fell within the political offense exception to the Treaty,[8] the court should deny the extradition request. The district court agreed, holding that Doherty's acts were political in nature,[9] and, therefore, not extraditable of-

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prison after his trial and came to the United States. *Id.*

5. The language of 18 U.S.C. § 3184 (1985) provides:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

6. June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468.

7. Matter of Doherty, 599 F. Supp. at 270.

8. *Id.* at 272-73. Article V (1)(c)(i) of the Treaty provides:

> (1) Extradition shall not be granted if: . . .
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> (c)(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; . . . .

For a detailed discussion of the political offense exception in extradition treaties, see Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986); Banoff & Pyle, *To Surrender Political Offenders: The Political Offense Exception to Extradition in United States Law,* 16 N.Y.U.J. INT'L L. & POL. 169 (1984); Thompson, *The Evolution of the Political Offense Exception in an Age of Modern Political Violence,* 9 YALE J. WORLD PUB. ORD. 315 (1983). *See generally* C. VAN DEN WIJNGAERT, THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION (1980).

9. The court reviewed the historical background of the PIRA and found that a political conflict existed in Northern Ireland and Doherty's acts were in furtherance of that struggle. 599 F. Supp. at 273-74. However, the court concluded that a correct interpretation of the Treaty required a finding that acts that violated international law could not be regarded as political offenses. *Id.* at 274. In order to determine whether to apply the exception, the court "must assess the nature of the act, the context in which it is committed, the status of the party committing the act, the nature of the organization on whose

fenses under the Treaty.[10]

Rather than adopting the customary approach of submitting the request to another extradition magistrate,[11] the United States sought collateral review in a declaratory judgment action against Doherty in the same district court.[12] The government argued that because the Fifth Circuit previously held that the Declaratory Judgment Act[13] is available to the extraditee after a magistrate certifies his extradition,[14] recourse should be available to a foreign nation after a court denies its extradition request. In his cross-claim, Doherty motioned for dismissal for lack of subject matter jurisdiction[15] and for failure to state a claim upon which relief can be granted.[16] The district court granted Doherty's second motion, holding that declaratory judgment was not a viable option in extradition proceedings for either the extraditee[17] or, as in *Doherty*, the requesting nation.[18] On appeal to the Second Circuit Court of Appeals, *affirmed*, *Held*: where a magistrate denies a request for extradition, the Government may not base an action for collateral review on the Declaratory Judgment Act and is restricted to submitting the request to another extradition magistrate. *United States v. Doherty*, 786 F.2d 491 (2d Cir. 1986).

II. LEGAL BACKGROUND

Extradition is defined as "the process by which a person charged with or convicted of a crime under the law of one state is arrested in another

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behalf it is committed, and the particularized circumstances of the place where the act takes place." *Id.* at 275.

10. *Id.* at 277.

11. *See, e.g.*, Collins v. Loisel, 262 U.S. 426 (1923); Hooker v. Klein, 573 F.2d 1360, 1365-66 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978).

12. United States v. Doherty, 615 F. Supp. 755 (S.D.N.Y. 1985).

13. The language of 28 U.S.C. § 2201 provides:

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

14. 615 F. Supp. at 758 (citing Wacker v. Bisson, 348 F.2d 602 (5th Cir. 1965)); *see infra* notes 64-79 and accompanying text.

15. FED. R. CIV. P. 12(b)(1).

16. FED. R. CIV. P. 12(b)(6).

17. 615 F. Supp. at 759-60.

18. *Id.* at 761.

state and returned for trial or punishment to the state under whose law he has been charged or convicted."[19] Extradition is not required by customary international law.[20] Nations generally enter into extradition treaties to obtain the return of fugitive offenders; to facilitate the punishment of wrong-doers; to avoid sheltering criminals;[21] and to avoid the increase of international tensions.[22] The United States, therefore, will only extradite a fugitive on the basis of a pre-existing treaty with the requesting nation.[23] United States courts will grant extradition only for crimes specified in a particular treaty.[24] Furthermore, the doctrine of dual criminality applies, requiring that the extraditable conduct be criminal in the United States as well as in the requesting nation.[25] United States courts further require the requesting party to show probable cause that the accused committed the particular offense for which he is charged.[26] Under the doctrine of "specialty", the requesting nation is prohibited from prosecuting the extraditee for any offense other than those for which the surrendering state agreed to extradite.[27] Finally, the United States will not extradite persons accused of political offenses.[28]

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19. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 486-89 introductory note (Tent. Draft No. 5, 1984) [hereinafter RESTATEMENT]. For an earlier definition of extradition, see Harvard Research in International Law, DRAFT CONVENTION ON EXTRADITION, 29 AM. J. INT'L L. 15, 21 (Supp. 1935).

20. RESTATEMENT, *supra* note 19, introductory note at 64.

21. In Eain v. Wilkes, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981), the court was concerned that:

> Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighborhoods and walk our streets forever free from any accountability for their acts. We do not need them in our society. We have enough of our own domestic criminal violence with which to contend without importing and harboring with open arms the worst that other countries have to export.

Id. at 520.

22. Banoff & Pyle, *supra* note 8, at 173, nn. 20-23.

23. *Id.* at 176, *see also* 18 U.S.C. § 3181 (list of nations which are parties to bilateral extradition treaties with the United States); Factor v. Laubenheimer, 290 U.S. 276, 287 (1933).

24. United States v. Rauscher, 119 U.S. 407, 430 (1886).

25. *See, e.g.*, Collins v. Loisel, 259 U.S. 309, 312 (1922); Kelly v. Griffin, 241 U.S. 6 (1916); Wright v. Henkel, 190 U.S. 40 (1903).

26. *See, e.g.*, Glucksman v. Henkel, 221 U.S. 508 (1911); United States *ex rel* Sakaguchi v. Kaululukui, 520 F.2d 726, 729-31 (9th Cir. 1975).

27. United States v. Rauscher, 119 U.S. 407, 420-21 (1886); Caplan v. Vokes, 649 F.2d 1336, 1343 (9th Cir. 1981).

28. *See, e.g.*, Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986); Matter of Mackin, 668 F.2d 122 (2d Cir. 1981), *see also supra* note 8. Political crimes are either "pure" or "relative." A "pure" political act is an offense against a government such as treason,

While an extradition request may be filed directly with a federal court,[29] the requesting nation normally submits it to the Department of State.[30] The Department of State receives and considers all extradition requests and if the request conforms to the applicable treaty, it forwards the appropriate papers to the United States Attorney in the district where the proposed extraditee is located.[31] The United States Attorney then files a complaint and seeks an arrest warrant upon preliminary review by a magistrate.[32] Under section 3184, if the magistrate issues a warrant he must conduct a hearing to decide whether the evidence is sufficient to sustain a charge under the appropriate treaty or convention.[33] If the magistrate determines that there is insufficient probable cause or the offense charged is not within the terms of the treaty, he cannot certify the matter to the Secretary of State for extradition. If, however, the magistrate finds probable cause and certifies the case, the Secretary of State may proceed further with the actual issuance of a warrant of surrender to the requesting nation.[34] The Secretary has the discretion to decline to surrender the extraditee on policy grounds, including international relations[35] or human rights considerations.[36] Extradition orders by the federal magistrate are, therefore, unique because there is no judgment of guilt or innocence but only a guarantee that culpability will be determined in a foreign forum.[37]

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sedition and espionage. "Relative" political acts include crimes against persons or property incidental to a war, revolution, rebellion or political uprising at the time and place of the commission of the act. *Mackin*, 668 F.2d at 124.

29. Extradition procedure in the Unites States is codified in 18 U.S.C. §§ 3181, 3184, 3186, 3188-95. For a discussion of international extradition procedure and the law of the United States, see RESTATEMENT § 479 (Tent. Draft No. 6, 1985).

30. *Id.* at comment a. *See* Eain v. Wilkes, 641 F.2d 504, 508 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

31. *Eain*, 641 F.2d at 508.

32. *Id.*

33. *Id.* The extraditee is not entitled to a full trial on the merits at a probable cause hearing in this country. That determination is to be made by the courts of the requesting nation. Neither the Federal Rules of Evidence nor the Federal Rules of Criminal Procedure apply to the magistrate's hearing. *Id.*

34. 18 U.S.C. § 3186. *See* 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 316 (1942); Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313 (1962). *See generally* M.C. BASSIOUNI, INTERNATIONAL EXTRADITION (1983).

35. *See* G. HACKWORTH, *supra* note 34, § 334, at 174.

36. *See* Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); Sindona v. Grant, 619 F.2d 167, 174-75 (2d Cir. 1980).

37. *E.g.*, Hooker v. Klein, 573 F.2d 1360, 1369 (9th Cir.) (Chambers, J., concurring), *cert. denied*, 439 U.S. 932 (1978); Jhirad v. Ferrandina, 536 F.2d 478, 482 (2d Cir), *cert. denied*, 429 U.S. 833 (1976).

Some scholars contend that extradition law essentially stopped developing at the turn of the century.[38] Older United States Supreme Court cases illustrate the major precepts which remain valid.[39] One precept, the doctrine of unappealability of extradition decisions, provides that neither the extraditee nor the government can appeal the magistrate's decision directly to a higher court.[40] The extraditee is limited to collateral review through a writ of habeas corpus.[41] The scope of habeas corpus review is restricted, however, to defer to the magistrate's initial factual determination.[42] Specifically, "[h]abeas corpus is available only to inquire whether the magistrate had jurisdiciton, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."[43] A higher court will not review the adequacy of the evidence establishing the criminality of the accused.[44]

While the extraditee can obtain habeas corpus review, the government must submit the request to another extradition magistrate.[45] *Collins v. Loisel*[46] involved an extraditee's third appeal in habeas corpus proceedings to prevent extradition to British India.[47] In dismissing the extraditee's claim that a new hearing constituted double jeopardy, the Supreme Court affirmed the government's right to recommence extradition proceedings before another magistrate after a discharge or withdrawal.[48]

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38. *E.g.*, Lubet, *Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists*, 15 CORNELL INT'L L. J. 247, 253-54 (1982).

39. *See, e.g.*, Collins v. Loisel, 262 U.S. 426 (1922), discussed *infra* notes 46-50 and accompanying text.

40. *See* Collins v. Miller, 252 U.S. 364, 369-70 (1920); Greci v. Birknes, 527 F.2d 956, 958 (1st Cir. 1976).

41. *See* Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir.), *cert. dismissed by agreement of parties*, 414 U.S. 884 (1973).

42. Fernandez v. Phillips, 268 U.S. 311, 312 (1925). *See* In the Matter of Assarsson, 635 F.2d 1237, 1240-41 (7th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981); Laubenheimer v. Factor, 61 F.2d 626, 628 (7th Cir. 1932); Ornelas v. Ruiz, 161 U.S. 502 (1896).

43. *Fernandez*, 268 U.S. at 312 (Holmes, J.).

44. Grin v. Shine, 187 U.S. 181, 192 (1902).

45. *E.g.*, *Hooker*, 573 F.2d at 1365.

46. 262 U.S. 426 (1922).

47. *Id.* at 427.

48. The Court stated:

> [I]t has been consistently held under the treaties with Great Britain and other countries, that a fugitive from justice may be arrested in extradition proceedings a second time upon a new complaint charging the same crime, where he was discharged by the magistrate on the first complaint or the complaint was withdrawn.

While the Court recognized the possibility of abuse by the government, Justice Brandeis observed "[p]rotection against unjustifiable vexation and harassment incident to repeated arrests for the same alleged crime must ordinarily be sought, not in constitutional limitations or treaty provisions, but in a high sense of responsibility on the part of the public officials charged with duties in this connection."[49] More recently federal courts have construed *Collins* to hold the government to a good faith standard in recommencing extradition requests.[50]

Attempts at alternative methods of review of extradition orders, both granted and denied, date back to the initial adoption of section 3184.[51] In 1847, one year before Congress enacted the predecessor to section 3184,[52] the Supreme Court declared that it had no appellate jurisdiction over extradition matters in *In re Metzger*.[53] The Court stated that the magistrate exercised "a special authority, and the law has made no provision for revision of his judgment."[54] In *In re Kaine*[55] the question of appealability rose again. The British Consul in New York requested Kaine's extradition for attempted murder in Ireland.[56] A Commissioner of the United States heard the case and found sufficient evidence to justify commitment for extradition.[57] Kaine appealed to the Supreme Court after the Second Circuit refused to issue a writ of habeas corpus.[58] A majority of the Court based its denial of habeas corpus on the merits of the case.[59] In a separate opinion, Justice Curtis, citing *Metzger*, concluded that the Commissioner's action was unappealable because "[he] does not exercise any part of the judicial power of the United States."[60] According to Justice Curtis, the Supreme Court could neither review the Second Circuit decision nor exercise original jurisdiction by issuing the writ of habeas corpus.[61] The *Metzger* and *Kaine* decisions laid the foundation for the doctrine of unappealability of extradition decisions made by federal

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Id. at 429.

49. *Id.* at 429-30.
50. *Hooker*, 573 F.2d at 1366.
51. *See* Matter of Mackin, 668 F.2d at 125-26 n.n. 5-8 (discussion of appealability).
52. 9 Stat. 302 (1848).
53. 46 U.S. (5 How.) 175, 190-91 (1847).
54. *Id.* at 191.
55. 55 U.S. (14 How.) 103 (1852).
56. *Id.* at 108.
57. *Id.* at 104.
58. *Id.* at 104-05.
59. *Id.* at 116-17.
60. *Id.* at 120.
61. *Id.* at 120-21.

judges and magistrates.[62]

Although the doctrine of unappealability of extradition decisions was well-established in the last century, both the government and extraditees continue to adopt different approaches on which to base appellate review. In 1965, the Fifth Circuit allowed an extraditee to utilize the Declaratory Judgment Act (the Act)[63] to obtain collateral review of an extradition order in *Wacker v. Bisson*.[64] In *Wacker*, Canadian officials requested the extradition of J. Samuel Wacker for violating securities laws in Canada.[65] After two unsuccessful attempts to obtain a writ of habeas corpus, Wacker brought a declaratory judgment suit in the United States District Court for the Eastern District of Louisiana. The district court dismissed the complaint for lack of subject matter jurisdiciton. On appeal, the Fifth Circuit found that the scope of review in a declaratory judgment proceeding was as limited as in a habeas corpus suit.[66] The court held, "review by habeas corpus or declaratory judgment tests only the legality of the extradition proceedings; the question of the wisdom of extradition remains for the executive branch to decide."[67] The court then examined the Declaratory Judgment Act and found it to be an optional and alternative approach available to the extraditee.[68] The

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62. The doctrine of unappealability was recognized in an 1853 opinion by Attorney General Cushing:

> Nor can appeal be taken from the decision of Mr. Justice Edmonds to any other court, so as to revise that decision. The judge or magistrate in this case acts by special authority under the act of Congress; no appeal is given from his decision by the act; and he does not exercise any part of what is, technically considered, the judicial power of the United States.

6 Op. Atty. Gen. 91, 96 (1853), *cited in Mackin*, 668 F.2d at 127.

Ten years later, in an opinion to Secretary of State Seward, the same view was expressed in somewhat stronger language:

> In cases of this kind, the judge or magistrate acts under special authority conferred by treaties and acts of Congress; and though his action be in form and effect judicial, it is yet not an exercise of any part of what is technically considered the judicial power of the United States. No appeal from his decision is given by the law under which he acts, and therefore no right of appeal exists.

10 Op. Atty. Gen. 501, 506, *cited in Mackin*, 668 F.2d at 127.

63. 28 U.S.C. §§ 2201, 2202 (Supp. III 1985).

64. 348 F.2d 602 (5th Cir. 1965).

65. *Id.* at 604.

66. *Id.* at 606.

67. *Id.*

68. *Id.* at 607. The court cited Borchard on Declaratory Judgments: "[t]he declaratory judgment is an alternative and entirely optional remedy . . . [T]here is no justification ordinarily for the refusal of a declaratory judgment on the ground that an executory judgment was obtainable." *Id.*; *see also* Ballard v. Mutual Life Ins. Co. of New York,

court declared that the policies underlying the Act supported its use in extradition cases.[69] The Fifth Circuit, however, cautioned that "[i]f the district court should conclude that Wacker has had a full and fair hearing in the two habeas proceedings on those issues in this case which are serious, there is no necessity for holding any additional evidentiary hearing."[70]

In his dissenting opinion in *Wacker*, Judge Rives agreed with the district court that granting Wacker a declaratory judgment would frustrate the extradition process between the United States and Canada.[71] Rives disagreed with the majority's analogy of exclusion and deportation hearings to extradition cases.[72] He further disagreed with the appropriateness of allowing the extraditee to use a declaratory judgment as a review procedure. Rives saw no advantage to the extraditee in using a declaratory judgment because the scope of judicial review is as limited as habeas corpus.[73] Agreeing with a Ninth Circuit analysis,[74] Rives noted, "there is nothing in the statutes and nothing in the decisions which permits cumulative remedies by habeas corpus and declaratory petition against the same order of deportation or exclusion and *a fortiori* against the same extradition order."[75]

As the Fifth Circuit directed, the district court offered an additional evidentiary hearing on remand,[76] but the parties decided to rely on the

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109 F.2d 388 (5th Cir. 1940); Carpenter v. Edmondson, 92 F.2d 895 (5th Cir. 1937); Allen v. American Fidelity & Casualty Co., 80 F.2d 458 (5th Cir. 1935).

69. 348 F.2d at 608.

70. *Id.* at 611.

71. *Id.* at 612.

72. *Id.* The majority had cited Brownell v. We Shung, 352 U.S. 180 (1956) for the proposition that an alien may use a declaratory judgment rather than habeas corpus in an exclusion proceeding and could also use it to review a deportation order, as per Shaughnessy v. Pedreiro, 349 U.S. 48 (1955). 348 F.2d at 608. Judge Rives distinguished exclusion and deportation cases from extradition, stating, "there is a real need for the remedy by declaratory judgment in exclusion and deportation cases which need does not exist in extradition orders." *Id.* at 612. For a discussion of the historical background to extradition law and the related doctrines of exclusion and deportation, see Comment, *Unraveling the Gordian Knot: The United States Law of International Extradition and the Political Offender Exception*, 3 FORDHAM INT'L L.J. 141 (1980).

73. *Id.* "The point of holding that the Declaratory Judgment Act has opened a backdoor to review of an extradition order escapes me when the front door provided by the Great Writ grants access to the same court of justice and provides the same scope of relief." *Id.*

74. *See* Arellano-Flores v. Rosenberg, 310 F.2d 118 (9th Cir. 1962), *cert. denied*, 374 U.S. 838 (1963); Cruz-Sanchez v. Robinson, 249 F.2d 771 (9th Cir. 1957).

75. 348 F.2d at 613.

76. Wacker v. Beeson [sic], 256 F. Supp. 542 (E.D. La. 1966).

prior record.[77] The court dismissed Wacker's declaratory judgment action[78] and the Fifth Circuit affirmed.[79] Wacker's procedural victory, therefore, ultimately failed to prevent his extradition.

With *In re Mackin*,[80] the government tried yet another approach to obtain appellate review of a magistrate's decision denying extradition, but the Second Circuit rejected the government's appeal and its alternative petition for mandamus under 28 U.S.C. section 1651.[81] In *Mackin*, the United Kingdom requested the extradition of PIRA member Desmond Mackin. A court in Northern Ireland indicted Mackin on charges of attempted murder, intent to do grievous bodily harm, and intent to possess firearms and ammunition.[82] The magistrate determined that the United Kingdom had established probable cause to justify Mackin's committal for trial.[83] The magistrate found, however, that Mackin's crimes came within the political offense exception to the Treaty and declined to issue certification.[84] On appeal, the government argued that the Act of March 3, 1891,[85] which created the federal circuit courts of appeals, changed the basis for the doctrine of nonappealability

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77. *Id.* at 543-44.

78. *Id.* at 545.

79. Wacker v. Bisson, 370 F.2d 552 (5th Cir.) (per curiam), *cert. denied*, 387 U.S. 936 (1967).

80. 668 F.2d 122 (2d Cir. 1981). For a more detailed discussion of the case, see Note, *In re Mackin: Is the Application of the Political Offense Exception an Extradition Issue for the Judicial or the Executive Branch?*, 5 FORDHAM INT'L L.J. 565 (1982).

81. 28 U.S.C. § 1651 (1982) provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

82. 668 F.2d at 123-24. On March 16, 1978, Mackin had allegedly wounded a British soldier, Stephen Wooton, in Andersonstown, Belfast, Northern Ireland. *Id.* at 124.

83. *Id.* at 124 & n.4. Article IX(1) of the Treaty, *supra* note 6, states:

> (1) Extradition shall be granted only if the evidence be found sufficient according to the law of the requested Party either to justify the committal for trial of the person sought if the offense of which he is accused had been committed in the territory of the requested Party or to prove that he is the identical person convicted by the courts of the requesting Party.

84. 668 F.2d at 124. United States Magistrate Naomi Buchwald found that the PIRA was conducting a political uprising in Belfast at the time Mackin committed the offenses; Mackin was an active PIRA member, and Mackin's offenses were incidential to his role in the PIRA's political uprising in Belfast. *Id.* at 125.

85. Ch. 517, 26 Stat. 826.

of extradition orders reflected in the *Metzger* and *Kaine* decisions.[86] According to the *Mackin* court, however, this merely meant that the courts of appeals could exercise original jurisdiction over petitions for writs of habeas corpus. The Second Circuit repudiated the government's contention that the Act of 1891 and 28 U.S.C. section 1291[87] enabled the courts of appeals to exercise appellate jurisdiction over extradition decisions.[88] During its examination of the history of the nonappealability of extradition matters,[89] including hearing reports on the proposed Extradition Act of 1981, [90] the court noted that "courts at every level have continued to state that decisions, even when made by district courts, denying or granting requests for extradition are not appealable under 28 U.S.C. § 1291."[91] The court concluded that section 1291 clearly did not yield an appellate remedy for the government.[92]

When it considered the government's petition for mandamus, the court

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86. 668 F.2d at 127.

87. 28 U.S.C. § 1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

88. 668 F.2d at 127.

89. *Id.* at 125-30.

90. *Id.* at 128-29. According to the court, the government's position in *Mackin* was untenable because the government had told Congress that the law was exactly opposite of what it was now contending. One example the court utilized was a hearing on October 14, 1981, before the Senate Judiciary Committee in which Daniel W. McGovern, Deputy Legal Advisor of the Department of State, said the following:

> Under present law there is no direct appeal from a judicial officer's finding in an extradition proceeding. A person found extraditable may only seek collateral review of the finding, usually through an application for a writ of habeas corpus. The foreign government that is dissatisfied with the results of the hearing must institute a new request for extradition. The lack of direct appeal in extradition matters adds undesirable delay, expense and complication to a process which should be simple and expeditious. Section 3195 [of the proposed bill] remedies this defect in current procedure by permitting either party in an extradition case to appeal directly to the appropriate United States court of appeals from a judge or magistrate's decision.

Id. at 129 (quoting *Extradition Act of 1981: Hearing on S.1639 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 10 (1981)).

91. 668 F.2d at 127.

92. *Id.* at 130.

determined "that mandamus is reserved for 'exceptional cases.' "[93] According to the *Mackin* court, the only issue which qualified under the standard was whether the magistrate had jurisdiction to decide the political offense exception issue.[94] The government argued that because the "requested Party" in the Treaty referred to the executive branch of the United States government, the executive should determine political offender status.[95] The court contrasted the language of many other treaties which specified that the courts would decide the political offense question.[96] The government asserted that a judicial determination that the political offense exception barred extradition might jeopardize the United States' relations with a foreign nation.[97] The court reviewed the precedent and policy determination of the exception,[98] and concluded "that, as the law now stands, both the judicial and the executive branches have recognized that, under § 3184, [the] decision whether a case falls within the political offense exception is for the judicial officer."[99] Thus, the court dismissed the government's appeal for lack of jurisdiction and denied the mandamus application.[100]

In the instant case the United States government attempted to obtain collateral review of an order denying extradition by requesting a declaratory judgment followed by appeal, an approach successfully followed by the extraditee in *Wacker*.

III. INSTANT OPINION

In *Doherty* the Second Circuit affirmed the district court's order to dismiss the complaint for failure to state a claim upon which relief can be granted.[101] Rejecting the government's position that an extradition

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93. *Id.* at 131 (citing American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 283 (2d Cir. 1967)).

94. 668 F.2d at 131-32.

95. *Id.* Besides the language of the political offense exception itself, *see supra* note 8, the government referred to article XI(1) which states that "[t]he requested Party shall promptly communicate to the requesting Party through the diplomatic channel the decision on the request for extradition." The government also relied on article XIV(1) which states that "[t]he requested Party shall make all necessary arrangements for and meet the cost of the representation of the requesting Party in any proceedings arising out of a request for extradition." 668 F.2d at 132.

96. *Id.* at 133.

97. *Id.*

98. *Id.* at 134-37. Judge Friendly did a chronological review from the *Robbins* case in 1799 to the more recent cases involving the political offense exception. *Id.*

99. *Id.* at 137.

100. *Id.*

101. United States v. Doherty, 786 F.2d 491, 503 (2d Cir. 1986).

magistrate's decision to deny a certificate is subject to review by declaratory judgment, the court first reviewed established extradition law.[102] According to the court, the government's only recourse for review was to refile the extradition request with another magistrate.[103] The court looked at several recent congressional attempts at legislative reform of extradition law and observed that both the Department of Justice and Department of State supported changing the law specifically because of their limited options under current extradition procedure.[104] The Second Circuit then considered the government's argument that broad application of the Declaratory Judgment Act encompassed extradition matters.[105] The Court determined that allowing declaratory judgments in extradition cases was contrary to both the policy of the Declaratory Judgment Act and the language of section 3184.[106]

Essentially, the government asked the court to interpret the political offense exception narrowly and to certify Doherty for extradition. Because section 3184 forbids certification by an appellate court, the Second Circuit reasoned that a declaratory judgment could, at most, result in a favorable ruling on the application of the political offense exception to Doherty.[107] Such a ruling would, however, have an inhibiting effect upon subsequent extradition magistrates. The court emphasized, therefore, that its holding in *Doherty* applied specifically to that proceeding.[108] The court next reflected upon the government's reliance on *Wacker v. Bisson*.[109] The government asserted that if the extraditee could utilize declaratory judgment to procure review of the grant of an extradition certificate, it, too, ought to be able to employ the same technique to secure review of a denial.[110] The court stressed the extraditee can obtain either habeas corpus or declaratory judgment review, provided the scope of review is the same; the government, however, is simply not entitled to

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102. *Id.* at 494-97.

103. *Id.* at 495.

104. *Id.* at 496-97.

105. *Id.* at 497.

106. *Id.* at 498-99. The court looked at several sources as to the policy of the Act. For example, "the declaratory judgment procedure 'creates a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy, or in which the party entitled to such a remedy fails to sue for it.' " *Id.* at 498 (quoting WRIGHT, THE LAW OF FEDERAL COURTS § 100 (4th ed. 1983)).

107. *Id.* at 499.

108. *Id.* at 499-500.

109. *See supra* notes 64-79 and accompanying text.

110. 786 F.2d at 500.

review.[111] Finally, the court analyzed whether the government, acting in its sovereign capacity, could challenge administrative action by a suit for declaratory judgment.[112] The Second Circuit distinguished the cases on which the government relied, because they involved suits by private citizens.[113] The government's sole recourse, therefore, was to resubmit Doherty's case to another extradition magistrate.[114]

IV. COMMENT

Doherty is a case of first impression in any court[115] and one of late Judge Friendly's last opinions prior to his death on March 11, 1986.[116] Clearly, the judicial and legislative history of extradition procedure contradicted the government's position, and the Court correctly decided the case. While some of the government's arguments show creativity,[117] only an extreme reading of the Declaratory Judgment Act would suggest that Congress intended that it embrace extradition matters. The government essentially argued that "parity" required that it, like the extraditee in *Wacker*[118] have access to the declaratory judgment remedy. The government's reliance on *Wacker* is, however, misplaced. *Wacker* is unique in extradition law because it is the only United States extradition case in which an extraditee motioned for a declaratory judgment rather than habeas corpus review. Because the scope of review in either approach is the same, no extraditee has utilized the declaratory judgment method since *Wacker*.[119] The Second Circuit refused to consider whether *Wacker* was correctly decided.[120] The government built its entire case, therefore, on a shaky foundation. The Second Circuit arrived at the appropriate result by holding that the government could not bring an action for declaratory judgment in order to acquire review of an order denying Doherty's extradition.

The real issue underlying the instant case is a policy question:

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111. *Id.* at 501.
112. *Id.* at 502-03.
113. *Id.* at 503.
114. *See id.* at 495.
115. 615 F. Supp. 755, 758 (D.C.N.Y. 1985).
116. 786 F.2d 491, 492 (2d Cir. 1986).
117. *See*, e.g., *id.* at 500 ("The Government argues that what is sauce for the goose is sauce for the gander" (referring to *Wacker*)).
118. *Id.* at 501.
119. *Id.* "Since *Wacker* held that the scope of review in such an action is no broader than in *habeas*, which is always available, extraditees have evidently not thought the declaratory judgment game to be worth the candle." *Id.*
120. *Id.*

whether the judiciary should continue to determine the political offense exception in extradition cases.[121] The government has argued on several occasions that the executive branch should decide whether a crime is a "political offense" within the meaning of the relevant extradition treaty.[122] The government's argument has no basis in extradition law. In fact, the premise generally accepted by the United States is "that extradition without judicial oversight [is] highly dangerous to liberty and ought never to be allowed in this country."[123] Because courts contradict the government's position, the executive has turned to Congress to obtain a legislative resolution to the issue.

In the fifty-six cases involving requests by the United Kingdom for extradition made since the enactment of the original Treaty, United States courts denied only four.[124] Because these highly publicized denials involved PIRA members including Doherty, the government perceived a need to amend the Treaty or alter treaty interpretation to avoid the political offense exception.[125] In a message to the Senate, President Ronald Reagan characterized the Supplementary Treaty as

> represent[ing] a significant step in improving law enforcement cooperation and combatting terrorism, by excluding from the scope of the political exception serious offenses typically committed by terrorists, e.g., aircraft hijacking and sabotage, crimes against diplomats, hostage taking, and other heinous acts such as murder, manslaughter, malicious assault, and certain serious offenses involving firearms, explosives, and damage to property.[126]

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121. *See, e.g., id.* at 498-99.

122. *See, e.g.*, Eain v. Wilkes, 641 F.2d at 513; In re Mackin, 668 F.2d at 132-37.

123. *Mackin*, 668 F.2d at 135 (quoting *In re* Kaine, 55 U.S. (14 How.) 103, 113 (1852)).

124. Supplemental Treaty Hearings, *supra* note 2, at 54 (Opening statement of Senator DeConcini). Senator DeConcini stated, "I have considerable faith in both the judges in this country and in our system of checks and balances which allows the American judicial system to play a real role in matters of this sort and not merely be the rubber stamp for administration foreign policy decisions." *Id.*

125. S. DOC. No. 8, 99th Cong., 1st Sess. 1 (1985), *reprinted in* 24 INT'L LEGAL MATERIALS 1105 (1985)[hereinafter referred to as Supplementary Treaty]. The Senate voted for ratification of the Supplementary Treaty, with modifications, on July 17, 1986. *See* 132 CONG. REC. S9171 (daily ed. July 16, 1986). As of January, 1987, the United Kingdom Order in Council had not yet ratified the Treaty. For a detailed analysis of the Supplementary Treaty, see Note, *Eliminating the Political Offense Exception for Violent Crimes: The Proposed United States-United Kingdom Supplementary Extradition Treaty*, 26 VA. J. INT'L L. 755 (1986); *see also* Recent Developments, *Extradition: Limitation of the Political Offense Exception*, 27 HARV. INT'L L. J. 266 (1986).

126. Supplementary Treaty, *supra* note 125, at III (Transmittal Letter from President Ronald Reagan to the United States Senate (July 17, 1985)).

The original Supplementary Treaty significantly limited judicial determination of the political offense exception because it reduced the number of offenses regarded as political.[127] Because most extraditees previously deemed political offenders would be certified by the judiciary for extradition under the original Supplementary Treaty, the Secretary of State would, in effect, have made the ultimate decision whether to extradite. Hence, the original Supplementary Treaty allowed the executive to determine whether a particular offense was political based on current foreign policy.[128]

While some scholars contend that executive treatment of political of-

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127. Supplementary Treaty, *supra* note 125, at 1105-07. The original language of article 1 provided:

For the purposes of the Extradition Treaty, none of the following offenses shall be regarded as an offense of a political character:

(a) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at Hague on 16 December 1970;

(b) an offense within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature at Montreal on 23 September 1971;

(c) an offense within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature at New York on 14 December 1973;

(d) an offense within the scope of the International Convention against the Taking of Hostages, opened for signature at New York on 18 December 1979;

(e) murder;

(f) manslaughter;

(g) maliciously wounding or inflicting grievous bodily harm;

(h) kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage;

(i) the following offenses relating to explosives:

(1) the causing of an explosion likely to endanger life or cause serious damage to property; or

(2) conspiracy to cause such an explosion; or

(3) the making or possession of an explosive substance by a person who intends either himself or through another person to endanger life or cause serious damage to property;

(j) the following offenses relating to firearms or ammunition:

(1) the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life; or

(2) the use of a firearm by a person with intent to resist or prevent the arrest or detention of himself or another person;

(k) damaging property with intent to endanger life or with reckless disregard as to whether the life of another would thereby be endangered;

(l) an attempt to commit any of the foregoing offenses.

128. *See* 132 CONG. REC. S9148 (daily ed. July 16, 1986).

fenders is preferable,[129] the United States has had a long history of judicially resolving questions of individual rights.[130] The political offense exception is closely linked to political asylum and the international protection of human rights.[131] Judicial proceedings provide a public forum with an appearance of fairness and propriety to the international community.[132] An additional advantage to judicial determination of the political offense exception accrues to the executive by providing a "judicial shield."[133] By allowing the judiciary to make the initial decision whether to extradite, the executive avoids criticism and confrontation with the requesting nation.[134] Judicial determination, therefore, harmonizes the protection of political dissent with the punishment of wanton violence.[135]

When the Senate ratified the Supplementary Treaty, it added several amendments that substantially change current extradition law vis-a-vis the United Kingdom. A new article 3(a) provides:

> Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought *establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence* that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions.[136]

It is too early to determine whether PIRA defendants, like Doherty, will be able to avoid extradition on the basis of their "political opinions," Article 3(a) specifically retains judicial prerogatives regarding the initial extradition decision. The amendments direct the court to decide whether to apply the humanitarian exception based on a preponderance of the evidence. Significantly, article 3(b)[137] provides the government with the

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129. *See* Gilbert, *Terrorism and the Political Offense Exemption Reappraised*, 34 INT'L & COMP. L.Q. 695 (1985); Note, *Political Offenses in Extradition: Time for Judicial Abstention*, 5 HASTINGS INT'L & COMP. L. REV. 131 (1981).

130. Lubet, *supra* note 38, at 284.

131. *Id.* at 283.

132. *Id.* at 287.

133. *Id.* at 285.

134. *Id.* at 285-87.

135. *Id.* at 291.

136. 132 CONG. REC. S9171 (daily ed. July 16, 1986) (emphasis added).

137. The language of article 3(b) provides:

(b) In the United States, the competent judicial authority shall only consider the defense to extradition set forth in paragraph (a) for offenses listed in Article 1 of

right to appeal to either the district court or court of appeals. The Senate conditioned its ratification of the Supplementary Treaty on both the United States and the United Kingdom's acceptance of the amendments.[138]

The ultimate ramification of the *Doherty* decision is, therefore, to buttress longstanding extradition law which preserves the historic judicial role and upholds international human rights.

Susan Kelm Story

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this Supplementary Treaty. A finding under paragraph (a) shall be immediately appealable by either party to the United States district court, or court of appeals, as appropriate. The appeal shall receive expedited consideration at every stage. The time for filing a notice of appeal shall be 30 days from the date of the filing of the decision. In all other respects, the applicable provisions of the Federal Rules of Appellate Procedure or Civil Procedure, as appropriate, shall govern the appeals process.

Id.

138. *Id.* at S9148.

Case Comment

BANKRUPTCY—Section 304 Of The Bankruptcy Code Is Not An Exclusive Remedy In A Nonbankruptcy Court, *Cunard Steamship Co. Ltd. v. Salen Reefer Serv. A.B.*, 773 F.2d 452 (2d Cir. 1985).

I. INTRODUCTION

Defendant Salen Reefer Services A.B. (Salen), a Scandinavian business entity, commenced a bankruptcy proceeding in the Kingdom of Sweden[1] pursuant to Swedish bankruptcy law.[2] Subsequently, plaintiff Cunard Steamship Company, Ltd. (Cunard), an English company and creditor of Salen,[3] filed for an order of attachment in a United States district court against the chattels held by United Brands Company, a garnishee of Salen.[4] After the district court granted the order, Salen brought a motion to vacate the attachment, arguing that international comity[5] required the recognition of the Swedish bankruptcy proceeding

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1. Salen commenced the bankruptcy proceeding on December 19, 1984, in Stockholm City Court, Kingdom of Sweden.

2. The relevant Swedish bankruptcy statute, reprinted in the district court opinion, states:

> § 23. After the publication of the bankruptcy decision, property belonging to the bankruptcy estate may not be restrained for claims against the debtor. If such restraint would nevertheless take place, it will not be valid. Notwithstanding the bankruptcy, property which has been pledged for a certain claim may be restrained for the claim.

Cunard Steamship Co. Ltd. v. Salen Reefer Serv. A.B., 49 Bankr. 614, 616 (S.D.N.Y. 1985).

3. Under both United States and Swedish bankruptcy law, Cunard is classified as a general creditor of Salen.

4. Cunard Steamship Co. Ltd. v. Salen Reefer Serv. A.B., 49 Bankr. 614 (S.D.N.Y. 1985). Cunard alleged that Salen and Cunard had entered into a time charter with regard to a vessel called SCYTHIA and that subsequently Salen defaulted on its obligation under the contract, resulting in damages of $1.1 million. On January 9, 1985, Cunard obtained an order of attachment under Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims. The order of attachment authorized the attachment of goods in the amount of $1.1 million held by United Brands Company for Salen. *Id.* at 615.

5. In *Hilton v. Guyot*, 159 U.S. 113 (1895), the Supreme Court provided the following standard for U.S. courts to use in determining whether to grant extraterritorial effect to a foreign law or proceeding:

which prohibited such attachment.[6] The United States District Court for the Southern District of New York agreed with Salen and vacated the order of attachment by extending comity to the Swedish court and allowing a stay on creditors' actions.[7] On appeal, the United States Court of Appeals for the Second Circuit, *affirmed. Held:* Section 304 of the Bankruptcy Code is not an exclusive remedy for a bankruptcy trustee who seeks to stay creditor actions and further, a district court does not abuse its discretion by refusing to remand a foreign bankruptcy case to a United States bankruptcy court. *Cunard Steamship Co. Ltd. v. Salen Reefer Serv., A.B.*, 773 F.2d 452 (2d Cir. 1985).

II. LEGAL BACKGROUND

A. *The Doctrine of Pluralism*

Traditionally, United States courts have been reluctant to allow foreign trustees in bankruptcy to assert claims against the debtor's property located in the United States.[8] The doctrine of pluralism embodies this protection of United States creditors. Under the doctrine of pluralism,

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> "Comity", in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Id. at 163-64.

6. Salen brought the motion to vacate the attachment on January 24, 1985. Salen also presented the testimony of a witness, Elisabeth Fura-Sandstroem, a Swedish attorney who represented the trustee of Salen's estate. Ms. Fura-Sandstroem testified that according to Swedish law, all pending lawsuits are frozen and a meeting of creditors is called after a judicial declaration of bankruptcy occurs. *Cunard*, 49 Bankr. at 616.

7. *Id.* at 619. The district court stated that the public policy of the United States would best be served by extending comity to the Swedish bankruptcy proceedings and staying creditor's actions. The district court then ordered the attachment vacated so that the trustee could distribute Salen's assets in a single proceeding in Sweden pursuant to Swedish law. *Id.* at 618-19.

8. *See In re* Toga Mfg., Ltd., 28 Bankr. 165, 167 (E.D. Mich. 1983). *See generally* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) (holding that a foreign court's allowance of a discharge in bankruptcy is not a defense against a creditor who is a citizen of the United States unless the creditor consented to the foreign court's jurisdiction); Harrison v. Sterry, 9 U.S. (5 Cranch) 289 (1809) (noting that the bankruptcy law of a foreign country cannot compel a legal transfer of property in the United States). *But see* Canada S. Ry. Co. v. Gebhard, 109 U.S. 527 (1883) (holding that United States creditors were bound by the Canadian bankruptcy scheme because every person who deals with a foreign corporation implicitly subjects himself to the laws of the foreign country).

any country may maintain its own bankruptcy proceedings pursuant to its own bankruptcy law without recognizing any foreign judgment that might otherwise affect the outcome of the proceedings.[9]

Although the early United States courts did not explicitly recognize pluralism, they reached similar results favoring United States creditors by rarely granting extraterritorial effect to foreign bankruptcy proceedings.[10] In *Disconto Gesellschaft v. Umbreit*,[11] the United States Supreme Court implicitly adhered to the doctrine of plurality for the first time. In *Disconto Gesellschaft*, a German citizen left Germany, settled in Wisconsin, and assumed a new name.[12] The German government apprehended the German citizen as a fugitive from justice one month after he emigrated. The United States government extradited him to Germany.[13] A German bank, Disconto Gesellschaft, brought an action in a Wisconsin court against the German citizen the day after his arrest and at the same time garnished his funds in the First National Bank of Milwaukee.[14] Meanwhile, the German bank instituted bankruptcy proceedings in Germany against the German citizen.[15] Further, Disconto Gesellschaft presented its claim to the bankruptcy trustee and subsequently petitioned the Wisconsin court to turn over the funds on deposit at the Milwaukee bank to Germany for distribution in the German bankruptcy proceeding.[16] The interpleaded defendant, a Wisconsin attorney who had represented the German citizen, intervened in the suit, declaring that he

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9. *See In re* Toga Mfg., Ltd., 28 Bankr. 165 (E.D. Mich. 1983); Hensberger, *Conflicts of Laws and the Bankruptcy Reform Act of 1978*, 30 CASE W. RES. L. REV. 631, 634 (1980).

10. In addition to the case discussed in the text, see generally Cole v. Cunningham, 133 U.S. 107, 122-23 (1889) (stating that although all the parties were United States citizens, the statutory titles of foreign assignees will be "recognized and enforced when it can be done without injustice to the citizens of the State, and without prejudice to creditors pursuing their remedies under [the foreign forum's] statutes, provided, also, that such title is not in conflict with the laws or public policy of the state. . ."); *In re* Waite, 99 N.Y. 433, 2 N.E. 440 (1885). For a discussion of the *Waite* case see Morales & Deutcsh, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 BUS. LAW. 1573, 1578 (1984).

11. 208 U.S. 570 (1908).

12. *Id.* at 576. The German changed his name from Gerhard Terlinden to Theodore Grafe upon settling in the United States.

13. *Id.*

14. *Id.* at 574. Terlinden, alias Grafe, was in default of a judgment debt to Disconto Gesellschaft. Disconto Gesellschaft claimed the $6,969.47 on deposit in Grafe's name at the First National Bank of Milwaukee to satisfy a portion of the judgment debt.

15. *Id.* at 576.

16. *Id.* at 576-77.

had a claim for services rendered.[17] The attorney argued that the funds should remain in the United States.[18] The Circuit Court for Milwaukee County found for the plaintiff and ordered the Milwaukee bank to turn the funds over to Germany for distribution in the bankruptcy proceeding.[19] The defendant attorney appealed to the Wisconsin Supreme Court, which reversed. The court held that the removal of funds to a foreign country to administer them under foreign bankruptcy law conflicted with Wisconsin public policy forbidding discrimination against Wisconsin citizens.[20] The United States Supreme Court upheld the Wisconsin Supreme Court decision, stating that the United States should protect its citizens' property rights before allowing a foreign country to take property out of the United States for a proceeding which favors citizens of the foreign country.[21]

Approximately eight years after *Disconto Gesellschaft*, a United States District Court again applied the plurality approach in *In re Berthoud*.[22] In *Berthoud*, the plaintiff, American Express Company, filed an involuntary bankruptcy petition against the defendant Berthoud. Although Berthoud could not claim the United States as his principal place of business, his residence, or his domicile,[23] the court found that it had jurisdiction based solely upon the defendant's bank deposits in New York.[24] The court held that it had jurisdiction over the creditors and debtor as long as the debtor had property located within the court's jurisdiction.[25] Further the court reasoned that it should not deny United States citizens their right to have property located in the United States administered under United States bankruptcy law, solely because the owner of the property is not a United States citizen or resident.[26] The court thereby protected the United States creditors, who under English law might not have been able to assert their claims.[27]

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17. *Id.* at 575.
18. *Id.*
19. *Id.* at 577.
20. *Id.* at 578.
21. *Id.* at 582.
22. 231 F. 529 (S.D.N.Y. 1916).
23. *Id.* at 531.
24. *Id.* The bankrupt had more than $30,000 deposited in the National Park Bank.
25. *Id.* at 533.
26. *Id.* at 532.
27. *Id.* at 534. Under the English statute, the creditor was not entitled to present a bankrupt petition against the debtor unless the act of bankruptcy occurred within three months before the presentation of the petition. In the United States, however, the creditor was given four months in which to act. *Id.*

B. *The Development of Universality*

In general United States courts have moved away from pluralism toward a universality approach.[28] The universality theory requires that courts in all jurisdictions recognize the bankruptcy decision rendered in the debtor's jurisdiction. Therefore, only one bankruptcy proceeding is necessary.[29] Typically, the United States courts that adhere to some form of universality grant comity to the foreign jurisdiction because of this administrative consolidation. Accordingly, these courts emphasize deference to foreign bankruptcy proceedings, rather than protection of United States creditors.

In the more recent cases, however, courts have not adopted a strict view of universality. Rather, the courts focus on the potential harm to a United States creditor caused by the extension of comity. Under this modified approach the courts generally recognize the foreign court's judgment unless the creditor proves that the granting of comity would harm him.[30] Specifically, the United States District Court of Hawaii, in *Waxman v. Kealoha*,[31] adopted the universality theory while recognizing the policy of protecting United States creditors in limited instances. In *Waxman*, a Canadian-appointed bankruptcy trustee brought suit in Hawaii on behalf of a Hawaiian corporation.[32] The trustee sought to recover $71,500 of unpaid stock subscriptions from the corporation's Hawaiian incorporators and stockholders.[33]

In reaching its decision to entertain the foreign trustees claim, the *Waxman* court initially noted that although the bankruptcy courts of one country should assist those of another, no court had formally prescribed

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28. *See* Clarkson Co., Ltd. v. Shaheen, 544 F.2d 624 (2d Cir. 1976); *In re* Colorado Corp., 531 F.2d 463 (10th Cir. 1976); Cornfeld v. Investors Overseas Servs., Ltd., 471 F. Supp. 1255 (S.D.N.Y. 1979); Waxman v. Kealoha, 296 F. Supp. 1190 (D. Haw. 1969); *see also* Note, *Section 304 of the Bankruptcy Code: Has It Fostered the Development of an "International Bankruptcy System"?*, 22 COLUM. J. TRANSNAT'L L. 541 (1984).

29. *See In re* Toga Mfg., Ltd., 28 Bankr. 165 (E.D.Mich. 1983); J. STORY, COMMENTARIES IN THE CONFLICT OF LAWS §§ 403-05 (4th ed. 1852), *cited in* Hensberger, *Conflicts of Laws and the Bankruptcy Reform Act of 1978*, 30 CASE W. RES. L. REV. 631, 633 (1980).

30. *See In re* Culmer, 25 Bankr. 621 (S.D.N.Y. 1982) (suggesting that United States creditors bear the burden of proving the applicability of the Bankruptcy Code Section 304 factors); *see also* Morales & Deutcsh, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 BUS. LAW. 1573, 1595 n.125 (1984).

31. 296 F. Supp. 1190 (D. Haw. 1969).

32. *Id.* at 1191.

33. *Id.* at 1192.

the practice.[34] The *Waxman* court further reasoned that because international treaties did not provide guidance, the courts should determine whether foreign receivers in bankruptcy could maintain suits in the United States to recover money owed to the bankrupt from general principles of comity.[35] Finally, the court emphasized that "comity will be extended in situations such as the one at bar, unless to do so would prejudice local creditors and citizens."[36] Therefore, because the defendant failed to show that the court's granting of comity to the Canadian decree would prejudice local creditors, the court found that it had jurisdiction to entertain the foreign trustee's claim.[37]

Six years after the *Waxman* decision, the Second Circuit adhered to the universality theory in *Fotochrome, Inc. v. Copal Co., Ltd.*[38] In *Fotochrome*, the court extended comity in favor of a foreign creditor, while leaving United States creditors unprotected. Fotochrome, Inc., a Delaware Corporation, and Copal Co., a Japanese corporation, entered into a contract in which Copal agreed to manufacture cameras for Fotochrome.[39] Additionally, the contract provided that the parties would settle disputes by arbitration in Japan.[40] After a dispute arose,[41] Copal filed a petition for arbitration in accordance with the contract. Subsequently, Fotochrome filed a bankruptcy petition in a New York bankruptcy court.[42] In response, the referee issued a stay against arbitration.[43] The Japanese arbitral panel, however, ignored the stay and found for Copal.[44] Copal then filed proof of its arbitral award in the Fotochrome bankruptcy proceeding.[45] The District Court dismissed the

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34. *Id.* The *Waxman* court quoted Nadelman, *International Bankruptcy Law: Its Present Status*, 5 U. TORONTO L.J. 324, 351 (1943) which states:

> In view of the developments in other parts of the world, the fact that the United States and Canada, immediate neighbours with a similar bankruptcy law, still are without any agreement on questions of bankruptcy administrations involving both countries, must appear strange.

35. 296 F. Supp. at 1193.

36. *Id.* at 1194.

37. *Id.*

38. 517 F.2d 512 (2d Cir. 1975).

39. *Id.* at 514. Copal was not present or doing business in the United States.

40. *Id.*

41. The dispute arose because each party charged the other with failure to abide by the terms of the contract. Copal claimed that Fotochrome failed to pay for delivered cameras. Fotochrome claimed that delivery was late and that the cameras were defective.

42. 517 F.2d at 514.

43. *Id.* at 515.

44. *Id.*

45. *Id.*

bankruptcy referee's restraining order because the Bankruptcy Court's ruling had no extraterritorial effect and because the Bankruptcy Court did not have jurisdiction over Copal.[46] On appeal, the Second Circuit affirmed the holding of the District Court and permitted Copal to seek confirmation of the arbitral award obtained in Japan.[47] The court's granting of comity with respect to the arbitral award arguably prejudiced the United States creditors. Although the *Fotochrome* case concerned a United States bankruptcy proceeding and not a foreign bankruptcy proceeding, the decision signifies the trend away from protecting United States creditors.

One year after the *Fotochrome* decision, the Second Circuit advanced the universality theory in *Clarkson Co., Ltd. v. Shaheen.*[48] In *Clarkson*, a Canadian trustee brought suit in the United States to obtain records located in the New York offices of the bankrupt's two Canadian corporations.[49] The United States District Court for the Southern District of New York granted a preliminary injunction requiring the bankrupt to give the records to the trustee and restraining the bankrupt from disbursing property.[50]

On appeal, the Second Circuit applied the doctrine of comity.[51] The court stated that in a comity case if a foreign trustee in bankruptcy meets certain conditions New York courts must recognize the trustee's rights. Specifically, a domestic court must recognize the rights of a foreign trustee as long as none of the following exceptions exist: (1) the foreign court does not have jurisdiction over the bankrupt, or (2) the foreign proceeding will cause injustice to New York citizens and will prejudice a creditor's New York statutory remedies or (3) the foreign proceeding will violate New York laws or public policy.[52] In addition, the *Clarkson* court held that these exceptions should be construed narrowly when the foreign jurisdiction is a sister common-law jurisdiction with procedures similar to those used in the United States.[53] Because the facts in *Clarkson* supported comity under New York law, the court allowed the Canadian trustee to discover the documents. In *Clarkson* the court adopted a universality approach to comity, while it recognized a strong pluralistic

46. *Id.* The court stated that Copal did not have "minimum contacts" with the United States as required under *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).
47. 517 F.2d at 520.
48. 544 F.2d 624 (2d Cir. 1976).
49. *Id.* at 626.
50. *Id.*
51. *Id.* at 629.
52. *Id.*
53. *Id.* at 630.

preference for protecting the domestic creditor.[54]

In 1979, the United States District Court for the Southern District of New York expanded the principle of comity to an almost pure universality approach in *Cornfeld v. Investors Overseas Servs.*[55] Cornfeld, the founder of Investors Overseas Services, Ltd. (I.O.S.) and a citizen of New York, petitioned to attach the assets of I.O.S., the debtor in a Canadian bankruptcy proceeding. Emphasizing international comity, I.O.S. sought to dismiss or stay Cornfeld's action based upon deference to the Canadian proceeding.[56] The court noted that exceptions to the comity doctrine had been narrowly construed in New York. "[F]oreign-based rights should be enforced unless the judicial enforcement of such a [right] would be the approval of a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."[57]

The *Cornfeld* court further stated the firm United States judicial policy to stay actions against a corporation which is the subject of a foreign bankruptcy proceeding.[58] Additionally, the court compared Canadian and United States bankruptcy laws and concluded that the procedures were similar.[59] For these reasons, the court extended comity to the Canadian bankruptcy proceeding and did not allow Cornfeld, the United States creditor, to attach the Canadian debtor's assets located in the United States. The *Cornfeld* case demonstrates, therefore, the movement of the courts away from pluralism toward a more universal approach.[60]

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54. In addition to looking at whether the United States creditors would be prejudiced by the foreign proceeding in determining whether to grant comity, some courts have looked at whether the foreign court would grant reciprocity to U.S. courts in similar situations. Under the universality approach, reciprocity is a minor factor and the inference is usually in favor of recognizing the foreign proceeding.

In *In re* Colorado Corp., 531 F.2d 463 (10th Cir. 1976), the court was confronted with whether it should refuse to grant comity to the foreign proceeding because Luxembourg or Netherlands Antilles might not grant comity to orders from United States bankruptcy courts. The court noted that reciprocity is a consideration in determining whether to grant comity; however, the trustee in bankruptcy failed to present any evidence that Luxembourg or Netherlands Antilles would not grant comity. The court, therefore, held that the lower court abused its discretion in not granting comity to the orders of a foreign court. *Id.* at 469.

55. 471 F. Supp. 1255 (S.D.N.Y. 1979).

56. *Id.* at 1258.

57. *Id.* at 1259 (citing Intercontinental Hotels Corp. v. Golden, 15 N.Y.2d 9, 13, 203 N.E.2d 210, 212, 254 N.Y.S.2d 527, 529 (1964)).

58. 471 F. Supp. at 1259.

59. *Id.* at 1260.

60. *But see* Morales & Deutsch, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 BUS. LAW. 1573, 1582 (1984) (suggesting that *Cornfeld* can be read narrowly).

C. *Section 304 — The Blending of the Pluralism and the Universality Doctrines*

In 1978 Congress enacted section 304 to facilitate review of international bankruptcy cases.[61] Upon filing a section 304 petition, a foreign representative is able to commence an action in the United States that is ancillary to the full bankruptcy proceeding in the foreign jurisdiction. A full bankruptcy proceeding in the United States is, therefore, unnecessary, and the foreign representative does not suffer from exposure to the broad jurisdiction of the United States courts. Once a foreign representative has filed a section 304 petition, the bankruptcy court can use its discretion to decide what, if any, relief to grant.[62] However, section 304(c) provides that in making that relief determination the court should:

> [B]e guided by what will best assure an economical and expeditious administration of [the bankrupt's] estate, consistent with —
>
> (1) just treatment of all holders of claims against or interests in such estate;
>
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
>
> (3) prevention of preferential or fraudulent dispositions of property of such estate;
>
> (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
>
> (5) comity; and
>
> (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.[63]

On its face, section 304 embodies a mixture of pluralism and universality.[64] Accordingly, the bankruptcy code as amended favors the foreign representative's administration of all assets, including those located in the United States, when the United States creditors will not be prejudiced.[65]

A problem arises in determining whether a section 304 petition *must* be filed. Because section 304 is a relatively new section of the bankruptcy code, the courts have not yet fully delineated the section's underlying

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61. Section 304 is a new provision in the Bankruptcy Code. Prior to its enactment, no parallel section in the code existed.

62. *See* 11 U.S.C. § 304(b) (1982).

63. 11 U.S.C. § 304(c).

64. *But see In re* Toga Mfg., Ltd., 28 Bankr. 165, 167 (E.D. Mich. 1983) (stating that section 304 embodies only the universality theory).

65. *See* Note, *Section 304 of the Bankruptcy Code: Has it Fostered the Development of an "International Bankruptcy System"?* 22 COLUM. J. TRANSNAT'L L. 541 (1984).

procedural mechanism.[66] Thus, areas of uncertainty exist in the implementation of section 304. Specifically, the District Court for the Southern District of New York in *Kenner Products Co. v. Société Fonciere et Financiere*[67] faced a situation in which the defendant failed to file a section 304 petition. In *Kenner*, the plaintiff brought an action in the United States against the bankrupt defendant on a guaranty of trade credit for merchandise sold. The defendant sought to have the action dismissed without prejudicing the plaintiff's refiling in France, or, alternately, to transfer the action to the suspense docket pending the determination of the bankruptcy proceeding in France.[68] The defendant did not file a section 304 petition and the court did not mention the need for a section 304 petition. Without addressing the issue of whether a section 304 petition should have been filed, the court found that comity and United States public policy required that it defer to the French bankruptcy court.[69] By sidestepping the issue, the *Kenner* court left open for debate whether it implicitly found that a section 304 petition was not the exclusive remedy.

Four months later, however, the United States District Court for the Southern District of New York emphasized in *RBS Fabrics Ltd. v. G. Beckers & Le Hanne*[70] the need for a foreign representative to file a section 304 petition when it has assets in the United States. In *RBS Fabrics*, the bankrupt defendant sought to dismiss the plaintiff's order of attachment on the defendant's assets. To this end, the defendant argued that the plaintiff's action should have been brought in Germany pursuant to an alleged contractual forum selection clause or, in the alternative, that the doctrine of *forum non conveniens* applied.[71] Additionally, in preliminary discussions with the court the defendant argued that if the court, denied its motion to dismiss, it would commence an action pursuant to section 304 in a United States bankruptcy court.[72] Subsequently, the court denied the defendant's motion to dismiss and granted the plaintiff's attachment.[73] The court based its ruling on the representation by the defendant that it would commence a proceeding under section 304 in

66. *See In re* Culmer, 25 Bankr. 621, 624 (S.D.N.Y. 1982) (stating that "the procedural and substantive contours of the attenuated but elastic provisions of 11 U.S.C. Section 304 are still unchartered. . .").

67. 532 F. Supp. 478 (S.D.N.Y. 1982).

68. *Id.*

69. *Id.* at 479.

70. 24 Bankr. 198 (S.D.N.Y. 1982).

71. *Id.* at 199.

72. *Id.*

73. *Id.*

a United States bankruptcy court.[74] The court further stated that "the preferable procedure is to have the ancillary proceeding brought in the United States bankruptcy court so that the provisions of 11 U.S.C. section 304(b) and (c) can be applied by the bankruptcy court. . . ."[75]

The few courts that have interpreted section 304 focused sharply on the first factors of the section and particularly on whether the creditor's interest would be protected if the court recognized the foreign proceedings.[76] In *In re Lineas Areas De Nicaragua, S.A.*[77] the bankruptcy court for the Southern District of Florida became one of the first courts to consider whether to grant relief to a foreign representative under section 304. In *Lineas Areas*, the Nicaraguan bankrupt commenced an ancillary case in a United States bankruptcy court under section 304.[78] The bankruptcy court ordered the turnover of the debtor's property to the debtor's foreign representative, although in reality the assets remained in the United States.[79] In reaching its decision, the bankruptcy court retained significant control over the debtor's assets. Specifically, the foreign trustee promised the court that none of the debtor's assets would be removed from the United States and that the debtor would use the assets primarily to satisfy the debts he owed United States creditors.[80] Further, the court prohibited the trustee from encumbering, assigning or abandoning the debtor's assets located in the United States.[81] Finally, the court ordered the trustee to file an inventory of the debtor's assets located in the United States so the court could maintain even greater control over assets.[82]

The bankruptcy court's decision in *Lineas Areas* illustrates that al-

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74. *Id.*

75. *Id.* at 200.

76. *In re* Culmer, 25 Bankr. 621 (S.D.N.Y. 1982); RBS Fabrics Ltd. v. G. Beckers & Le Hanne, 24 Bankr. 198 (S.D.N.Y. 1982); *In re* Egeria Societa Per Azioni Di Navigazione, 20 Bankr. 625 (E.D. Va. 1982).

77. 10 Bankr. 790 (S.D. Fla. 1981).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* In a subsequent action in the same case, the court appointed a domestic co-trustee when it became apparent that the foreign trustee had a conflict of interest which might prevent him from acting in the best interests of U.S. trustee. The court noted that section 304(b)(3) gives courts broad authority to order the appropriate relief. The court also stated that Congress gave the courts maximum flexibility in handling ancillary cases so that they could fashion the appropriate relief for each case, balancing the comity interest and the claimholders' interest. *In re* Lineas Areas De Nicaragua, S.A., 13 Bankr. 779, 780 (S.D. Fla. 1981).

though a court may recognize a foreign bankruptcy proceeding under section 304, the court still focuses on the protection of the United States creditors and the maintenance of control over the debtors' assets in the United States. This emphasis on protecting United States creditors again demonstrates that, although universality principles underly section 304, the courts seem to focus on pluralism theories when applying the provision.

In 1982 a bankruptcy court applied the traditional universality approach to a section 304 case. In *In re Culmer*[83] the court focused its analysis on the "policy favoring uniform administration in a foreign court."[84] In *Culmer*, a banking company, Banco Ambrosiano Overseas Limited (BAOL), became involved in bankruptcy liquidation under the Bahamian bankruptcy laws. On behalf of BAOL, the liquidators filed a section 304 petition in the United States Bankruptcy Court in the Southern District of New York.[85] Subsequently, the bankruptcy court issued an order requesting all interested parties to show cause why the court should not grant the relief sought in the section 304 petition.[86] In response, several entities contested the section 304 petition. In particular, Ultrafin International Corporation moved to dismiss the section 304 petition on the ground that BAOL was engaged in the banking business in the United States and was not eligible for section 304 relief under 11 U.S.C. section 109.[87]

To reach its decision, the *Culmer* court examined the section 304(c) factors.[88] The court noted that Congress intended that the courts use these factors flexibly.[89] Initially, the *Culmer* court examined subsections (c)(1), (2), (3), and (4) and found that the creditor had not submitted concrete evidence of any wrong-doing or propensity for wrong-doing by BAOL.[90] The court stated that "the central examination which it must undertake in order to comply with section 304(c) is whether the relief petitioners seek will afford equality of distribution of the available assets."[91] Applying the criteria, the *Culmer* court found that the Bahamian

83. 25 Bankr. 621 (S.D.N.Y. 1982).
84. *Id.* at 629.
85. *Id.* at 623.
86. *Id.*
87. *Id.* at 623-24.
88. *Id.* at 627-32.
89. *Id* at 627-28.
90. *Id.* at 627-31.
91. *Id.* at 628. The legislative history of section 304 states that the factors are:

> [G]uidelines . . . designed to give the court maximum flexibility in handling ancillary cases. Principles of international comity and respect for the judgments

liquidation complied with section 304(c) and the principle of equal distribution.[92] The court also applied an interest analysis balancing the interests of the United States, the Bahamas, and the State of New York, and found that the Bahamas had the greatest interest in BAOL's liquidation.[93]

Although the *Culmer* court examined all of the section 304(c) factors, it stated that historically the courts have relied on principles of comity.[94] The *Culmer* court held that the other factors of section 304 are only used to determine whether the application of Bahamian law would be "wicked, immoral, or violate American law and public policy."[95] The court further noted that the Bahamian bankruptcy law substantially conformed with United States bankruptcy law and that the Bahamas, like Canada, is a sister common-law jurisdiction with procedures similar to those of the United States.[96] Based on principles of comity and on these facts, the court granted the section 304 petition for ancillary relief.[97]

Conversely, in *In re Matter of Toga Mfg., Ltd.*,[98] the bankruptcy court moved away from universality and protected the rights of the local creditors. In *Toga*, a Canadian trustee filed a section 304 petition for Toga Manufacturing, Limited (Toga).[99] Prior to the filing, the debtor contracted with Peter T. Hesse Enterprises, Inc. (Hesse), a Michigan corporation, to make Hesse a sales representative for Toga.[100] Under the contract, the parties agreed to submit any contractual disputes to the American Arbitration Association.[101] After a dispute did arise, the American Arbitration Association entered an award for Hesse,[102] which perfected its judgment by serving writs of garnishment on some of Toga's

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and laws of other nations suggest that the court be permitted to make the appropriate orders under all of the circumstances of each case, rather than being provided with inflexible rules.

Id., *quoting* H. REP. NO. 595, 95th Cong., 2d Sess. 324-25 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6281, and S. REP. NO. 989, 95th Cong., 2d Sess. 35 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5821.

92. 25 Bankr. at 628.
93. *Id.* at 628-29.
94. *Id.* at 629.
95. *Id.*
96. *Id.* at 629-31.
97. *Id.* at 633-34.
98. 28 Bankr. 165 (E.D. Mich. 1983).
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*

creditors.[103] Under United States law Hesse, a lien creditor, would be one of the first creditors to receive payment.[104] Under Canadian bankruptcy law, however, Hesse would most likely be considered an "ordinary creditor."[105]

The *Toga* court noted that under Canadian bankruptcy law, Hesse would not receive priority "substantially in accordance with the order prescribed by this title" as required in section 304(c)(4).[106] Accordingly, the *Toga* court held that comity required that Hesse's claim remain in the United States courts. Otherwise, under Canadian bankruptcy law, Hesse would receive treatment substantially unequal to other creditors.[107] Thus, the *Toga* court strictly adhered to the section 304 factors in refusing to grant comity.

III. INSTANT OPINION

In *Cunard* the Second Circuit first addressed the question of whether section 304 is the exclusive remedy for a representative who seeks to stay or enjoin creditor actions in the United States.[108] In resolving this issue the court noted that the section 304 remedy is intended to be broad and flexible.[109] In addition, the court held that although it preferred referral of the case from the district court to a bankruptcy court, the fact that the district court failed to allow removal did not require a reversal of the district court's ruling.[110]

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103. *Id.* at 166.

104. *Id.* at 168.

105. *Id.*

106. *Id.*

107. *Id.* at 170. The *Toga* court further stated that comity might be granted if the United States and Canada had a treaty based on reciprocity. Although at the time of the *Toga* decision a proposed United States - Canada bankruptcy treaty did exist, the Canadian Parliament and the United States Senate had not ratified it. *Id.* at 169.

108. Cunard Steamship Co. Ltd. v. Salen Reefer Servs., A.B., 773 F.2d 452, 454 (2d Cir. 1985).

109. *Id.* at 455; *see also* S. REP. NO. 989, 95th Cong; 2d Sess. 35 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5821 [hereinafter S. REP. NO. 989]; H.R. REP. NO. 595, 95th Cong., 2d Sess. 324-25 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6281 [hereinafter H.R. REP. NO. 595].

110. The court noted that bankruptcy courts are historically favored to adjudicate bankruptcy cases because of their expertise in the subject matter. *Cunard*, 773 F.2d at 455; *see, e.g., In re* Raiser, 722 F.2d 1574, 1581 (2d Cir. 1983).

The instant court also stated that nothing in the statue or in the legislative history shows a clear congressional mandate that section 304 is the exclusive remedy for a foreign trustee. *Cunard*, 773 F.2d at 455. Accordingly, the court said that the Senate and House reports state that "the foreign representative *may* file a petition under this sec-

In determining that section 304 was not an exclusive remedy, the Second Circuit stated that courts could still decide international bankruptcy cases based upon the principles of comity.[111] After examining section 304 as Congress originally introduced it, the court found that comity remained a viable remedy. The Second Circuit noted that the original section 304 did not refer to comity.[112] Congress amended the original proposal to require the bankruptcy courts to consider comity along with the other factors in section 304.[113] The instant court stated:

> It is clear that the drafters of the original bill did not intend to overrule in foreign bankruptcies well-established principles based on considerations of international comity. A more reasonable interpretation is that comity was added to section 304(c) to clarify and require that comity must be considered in ancillary proceedings in the bankruptcy court.[114]

Finally, the *Cunard* court noted that when Congress prescribes an additional statutory remedy, it is exclusive if Congress so states.[115]

After finding that comity was a proper remedy in this case, the Second Circuit determined that the district court acted properly in extending comity to the Swedish court's bankruptcy proceeding. The Second Circuit noted that it would grant comity if the foreign court had competent jurisdiction and the extension of comity would not violate the laws and public policy of the forum state and the rights of the forum's residents.[116] The circuit court then responded to appellant Cunard's argument that the district court should not have granted comity because the Swedish bankruptcy court lacked *in personam* jurisdiction over Cunard and lacked *in rem* jurisdiction over the attached property.[117] The instant court first noted that the concept of due process only required proof of *in personam* jurisdiction over the debtor before comity would be granted to a foreign court.[118] The Second Circuit also noted the policy rationale of extending comity to a foreign court because of the advantage of having a single court disperse the debtor's assets in an "equitable, orderly and

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tion." *Id.* at 456 (citing S. REP. No. 989, *supra* note 109, at 35, and H.R. REP. No. 595, *supra* note 109, at 324 (emphasis added by the court).

111. *Cunard*, 773 F.2d at 456.

112. *Id. See* H.R. REP. No. 8200, 95th Cong., 1st Sess. § 304, *reprinted in* COLLIER ON BANKRUPTCY, app. III (1984).

113. *Cunard*, 773 F.2d at 456; *see* 11 U.S.C. § 304(c)(5) (1982).

114. *Cunard*, 773 F.2d at 456 (citations omitted).

115. *Id.* (citing, Leist v. Simplot, 638 F.2d 283, 313 (2d Cir. 1980)).

116. *Cunard*, 773 F.2d at 457.

117. *Id.*

118. *Id.*

systematic manner, rather than in a haphazard, erratic or piecemeal fashion."[119]

The court further found that the principles of Swedish bankruptcy law are similar to the principles incorporated in the United States bankruptcy code.[120] The guiding premise of the bankruptcy code is equality in the distribution of assets among creditors.[121] The court found that under either United States law or under Swedish bankruptcy law, Cunard would not receive preference over other creditors.[122] Additionally, the instant court suggested that Sweden had a greater interest in protecting Cunard because (1) Cunard was incorporated in England; (2) the contract at issue had no connection with the United States; and (3) Salen is a Swedish business entity.[123]

Finally, the Second Circuit noted that although it considered reciprocity a factor, the court would not require reciprocity from another country as a prerequisite to granting comity.[124] Cunard argued that a Swedish court would not grant comity to a United States bankruptcy proceeding in situations similar to the case at bar. The instant court held, however, that neither party presented proof that conclusively established what the Swedish courts would do in a similar situation. Thus, because reciprocity was not an essential element of comity, and because the parties did not establish the absence of reciprocity, the Second Circuit held that the district court did not abuse its discretion in granting comity.[125]

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119. *Id.* at 458. The instant court also stated that the United States courts have continually recognized the interest of foreign courts in liquidating the affairs of their domestic business entities. *Id.*

120. *Id.* at 459. The instant court considered Cunard's argument that the vacating the attachment order violated United States public policy in favor of arbitration. The court noted that, although the public policy in favor of arbitration was strong, the legislative history of the Bankruptcy Act indicated that arbitrators are still subject to automatic status under section 362 of the U.S. Bankruptcy Code. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* In addition, the instant court noted that Cunard had not shown that the laws or the public policy of the United States would be violated by granting comity to the Swedish bankruptcy proceeding. Instead, the court said the public policy of the United States would best be served by recognizing the Swedish bankruptcy proceeding. Cunard also failed to show that any United States citizens would be prejudiced if they had to participate in the Swedish bankruptcy proceeding. *Id.*

124. *Id.* at 460.

125. *Id.* Cunard also argued that Salen failed to comply with the Federal Rules of Civil Procedure 44.1 which requires reasonable notice of a party's intention to prove foreign law. The court, however, found that Cunard was informed of the fact that the Swedish bankruptcy proceeding was a central issue in the case and therefore had reasonable notice of the foreign law. *Id.* at 460-61.

IV. COMMENT

The instant court continues the trend of expanding universality and deferring to foreign bankruptcy proceedings that Congress began with the enactment of section 304. Prior to *Cunard*, only one court addressed the issue of whether to apply section 304 as a preferred remedy. The court in *RBS Fabrics, Ltd.* concluded that section 304 was preferred.[126] The instant court, however, expanded on this foundation and declared that section 304 is not the only method a foreign bankruptcy trustee who wishes to stay or enjoin creditor actions in the United States may use to obtain comity.[127] Although the instant court agreed with the *RBS Fabrics* court that section 304 was the preferred remedy, courts now are free to grant comity outside of a section 304 proceeding.

The court also decided that the district court did not abuse its discretion in refusing to refer this case to a bankruptcy court.[128] In so holding, the instant court in effect has declared that a foreign bankrupt can go directly to a district court in New York without filing a section 304 petition and without first confronting a bankruptcy court. This holding conflicts directly with congressional intent. Congress specifically enacted section 304 to deal with situations such as the case before the instant court. By declaring that section 304 is not an exclusive remedy, the instant court has made it possible for all United States courts to ignore the section 304 factors and base their decisions on the very subjective concept of comity. Arguably, Congress should not have left this issue to the discretion of the courts but should have required section 304 as an exclusive remedy.

Since the enactment of section 304, when a foreign bankruptcy case comes before a district court, the district court generally decides the case based solely on comity without explicitly looking at any other section 304 factors.[129] Conversely, when a foreign bankruptcy case comes before a bankruptcy court, the bankruptcy court evaluates all the section 304 factors.[130] Because the results may differ substantially, a rational foreign bankrupt might forum shop for the court most likely to recognize the foreign bankruptcy proceedings. In fact, in at least one case before a bankruptcy court, the result might have been different if the case had been before a district court.[131]

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126. *See supra* notes 70-75 and accompanying text.
127. *See supra* notes 76-93 and accompanying text.
128. *Cunard*, 773 F.2d at 460.
129. *See supra* notes 55-60 and 66-69 and accompanying text.
130. *See supra* notes 70-107 and accompanying text.
131. *See supra* notes 98-107 and accompanying text. In *Toga*, the court closely ana-

Because results may differ substantially, the Second Circuit should have remanded the case to a bankruptcy court and found it an abuse of discretion for the district court not to have done so. Because the instant court did not remand the case, it arguably violated congressional intent because Congress specifically established the Article I bankruptcy courts to address bankruptcy matters. Bankruptcy courts have more expertise in the bankruptcy area and are more familiar with foreign bankruptcy codes. They are therefore more likely to be both expedient and efficient.[132] In addition, the bankruptcy courts will be more inclined to focus on all the section 304 factors and not just on comity.

The instant court has quashed the efforts of Congress to deal with foreign bankruptcy problems and to establish bankruptcy courts to adjudicate bankruptcy issues. In doing so, the instant court has made it possible for courts to either revert to pluralism and protect United States creditors without really considering recognition of the foreign bankruptcy proceedings or, conversely, to rely on pure universality notions and defer to foreign proceedings without ever considering the effect on United States creditors. In the future, the district courts should defer these cases to the bankruptcy courts. Moreover, the appellate courts should find it an abuse of discretion if district courts do not defer to the bankruptcy courts. As a result of these changes, bankruptcy courts will analyze the section 304 factors, and consistency and fairness should be the result.

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lyzed each of the section 304 factors and found that under subsection (c)(4) the creditor would not receive substantially equal treatment compared to other creditors. If the *Toga* court had not used section 304 in its analysis and focused on comity, instead, it may not have considered the unequal treatment creditors might receive and might have granted comity on other grounds.

132. The district court in *Cunard* took almost four months to render a decision.