McClain Untarnished: The NSPA Shines Through the Phiale Controversy

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CASE NOTES AND COMMENTS

MCCLAIN UNTARNISHED: THE NSPA SHINES THROUGH THE PHIALE CONTROVERSY

Never forget where you came from, or you will lose sight of who you are.

-Cyril J. Dolan

INTRODUCTION

Consider for a moment a world without cultural history. Imagine an environment where little is known about the past. Cultures would have come and gone, with the present generation oblivious to prior existence. Each and every child born is scrutinized from day one; does she look like her father or her mother? Who in her family has those eyes? This is only the beginning, at seven she is unable to walk ten yards without falling, “ah, she’s clumsy, just like her grandmother.” At fourteen she buries herself in books, and is constantly analyzing the world around her, “she’s intense, just like her father.” And so it goes, a lifetime of comparisons, some to people who she has never had the opportunity to meet. History repeats itself, as the saying goes. Because of the cyclical nature of life, history facilitates understanding our place in the human timeline. Cultural property is one teacher that helps us comprehend this lesson, and in order to facilitate the learning process, many countries have developed rules to protect the cultural property found within their borders.

United States v. An Antique Platter of Gold, Known as a Gold Phiale Mesomphalos, C. 400 B.C.1 ("the Steinhardt case") is one of many stolen property cases raising international concern and salient questions about United States policy as it relates to foreign

1. 991 F. Supp. 222 (S.D.N.Y.); 184 F.3d 131 (2d Cir. 1999) [hereinafter An Antique Platter of Gold].
cultural property. The National Stolen Property Act ("NSPA") has been the focus of this debate for over twenty years, beginning with United States v. McClain, which established the United States' recognition of other nations' cultural property laws. This Note addresses the current state of foreign cultural property laws in light of the NSPA and the recently decided An Antique Platter of Gold.

In An Antique Platter of Gold, the United States Court of Appeals for the Second Circuit approved the seizure of an antique platter, better known as the Phiale, under a Customs forfeiture statute but withheld judgment on the validity of Italian patrimony law. The court also addressed the relevance of the McClain doctrine and the NSPA, effectively upholding the doctrine and the associated law, thus providing a concrete framework under which foreign patrimony claims are to be adjudicated.

In this Note, questions of the following nature will be addressed. When a foreign nation has a cultural property law, what is the United States' responsibility to adhere to that law, and to whom is

2. Id.
3. 545 F.2d 988 (5th Cir. 1977) [hereinafter McClain I]; 593 F.2d 658 (5th Cir. 1979) (hereinafter McClain II).
4. Id. Synonyms for cultural property include the terms "cultural patrimony" (national patrimony), "cultural heritage" and "antiquities." All of these words can be used interchangeably, however, the term cultural patrimony is often applied to objects that are of such significance that they form an integral part of the cultural heritage and identity of a particular cultural group. Karen J. Warren, A Philosophical Perspective on the Ethics and Resolution of Cultural Properties Issues, in ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY? 8 (Phyllis Mauch Messenger ed.) (quoted in Jason C. Roberts, The Protection of Indigenous Populations' Cultural Property in Peru, Mexico, and the United States, 4 TULSA J. COMP. & INT'L L. 327, 355 (1997)).
5. 18 U.S.C. § 2314 (1999) ("NSPA"). The NSPA provides, in pertinent part: "Whoever transports, transmits, or transfers in interstate or foreign commerce, any goods, [etc.]...of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud [shall be guilty of a crime]." Id.
6. The Customs statute is 19 U.S.C. § 545 (1999); its application in An Antique Platter of Gold is thoroughly discussed in Section II of this Note. See infra notes 91-193 and accompanying text.
7. An Antique Platter of Gold, 184 F.3d 131 (2d Cir. 1999).
any responsibility owed? Is the current owner of such property a legitimate owner, and if so, does it matter if the owner was aware of the true origin of the property? Which statute do courts apply to justify United States involvement in the seizure of stolen cultural property? What materiality standard should be applied under the Customs statute, and furthermore, how does it relate to foreign cultural property, McClain, and the NSPA? The latter question became the crux of the Second Circuit decision in An Antique Platter of Gold, and in responding to that question the court provided direction regarding all of the aforementioned issues.

Section I of this Note details the cases leading up to An Antique Platter of Gold, outlining the heavy, but fair, burdens imposed by the NSPA.8 Section II dissects both the district court and Second Circuit decisions of An Antique Platter of Gold.9 Section III discusses the fact that not only did the Second Circuit uphold the NSPA, but the court also reaffirmed the importance of honoring the cultural patrimony laws of other nations via the most applicable United States statute.10 Section IV discusses the future of the NSPA in light of yet another case affirming McClain.11 Section V concludes that it is important to honor cultural property in United States courts.

I. BACKGROUND

In order to fully understand the Steinhardt case, one must first understand a line of cases beginning with United States v. Hollinshead12 and shortly followed by McClain,13 which established the United States' recognition of foreign patrimony laws under the NSPA.14 The basic premise of these decisions is

8. See infra notes 12-89 and accompanying text.
9. See infra notes 90-192 and accompanying text.
10. See infra notes 193-229 and accompanying text.
11. See infra notes 230-237 and accompanying text.
12. 495 F.2d 1154 (9th Cir. 1974).
that the United States will honor another nation’s declaration of ownership over cultural property provided that the nation has established a clear law or declaration prior to an object’s removal from that country.

A. United States v. Hollinshead

In Hollinshead, the defendants were prosecuted under the NSPA for conspiracy to transport stolen property in interstate commerce and for being the cause of the transport of stolen property in interstate commerce. The court action arose when pre-Columbian artifacts, including one object known as Machaquila Stele 2, were found in a Mayan ruin in the jungle of Guatemala. The Stele had been cut into pieces, taken to Belize, packed, and sent to Hollinshead’s residence in California. Defendants were convicted for conspiracy to transport stolen property in interstate commerce and for causing the transportation of property in interstate commerce in the United States District Court for the Central District of California, and appealed. On appeal, the Ninth Circuit found eight of the defendants’ claims, all related to sufficiency of evidence, to be without merit. However, the court entertained the defendants’ ninth claim alleging that the lower court gave the jury an overbroad legal instruction.

The Ninth Circuit determined that the trial judge failed to instruct the jury to determine whether the defendants had knowledge of Guatemalan law. The court determined that although the trial judge’s jury instruction was erroneous, the judgment could be upheld because the trial judge instructed the jury to determine whether the defendants’ knew the Stele had been

15. See 495 F.2d at 1155.
16. See id.
17. See id.
18. See id.
19. See id. Defendants challenged the instruction on the grounds that the court failed to make clear to the jury that there is no presumption that individuals have knowledge of foreign law.
20. See id. at 1156
stolen. In reaching the conclusion, the court held that a defendant does not have to know from where an object was stolen or the law of the object’s place of origin; rather, a defendant need only realize that the object was stolen. Based on the evidence presented at trial, such as the fact that the defendants were present in Belize when Guatemalan officers were bribed and the packages were shipped to the United States, the Ninth Circuit held that the convictions were valid and affirmed the district court’s decision.

In 1977, the Fifth Circuit first considered, whether Mexican law established national ownership of pre-Columbian artifacts in *United States v. McClain.* The first appeal dealt with the trial court’s jury instruction that Mexico asserted ownership of cultural property in 1897. The *McClain* and *Hollinshead* cases were the first in a line of cases brought against individuals for their violations of foreign cultural property laws and subsequent import into the United States. The *McClain* case cuts to the heart of many issues involved in the national cultural property/common human culture debate.

**B. United States v. McClain**

1. The Facts

In *McClain,* a group of five conspirators were held criminally liable for stealing pre-Columbian artifacts from Mexico and selling them in the United States. The defendants were charged with conspiring to receive, conceal and/or steal goods in interstate

21. See *Hollinshead,* 495 F.2d at 1155-56. The trial judge’s instruction that “every person knows what the law forbids” may have been erroneous, but was not so overbroad as to constitute prejudicial error because the judge clearly instructed the jury to determine whether defendants knew the stele was stolen. *See id.* at 1155.
22. *See id.*
23. *See id.*
24. *McClain I,* 545 F.2d 988 (5th Cir. 1977).
25. *Id.* at 994.
27. *See McClain I,* 545 F.2d at 992.
commerce and for having received, concealed, and/or sold stolen goods in interstate or foreign commerce in violation of the NSPA.\(^{28}\) Defendant ringleader Joseph Rodriguez had "squads" unearthing artifacts in Mexico at a number of different archaeological sites.\(^{29}\) Rodriguez and his counterparts passed these objects into the United States and attempted to sell them. In the course of the investigation, FBI agents learned that each defendant was aware that his or her activities were illegal. In fact, one defendant described the operation to an undercover agent as a "conduit." The items were taken from their original sites to an archaeological institute in Mexico where they would obtain documents with either forged or backdated information.\(^{30}\) Another commented that the objects were stolen by "Indians" who were paid very little and did not know the true value of these objects.\(^{31}\) The objects were to be sold to anyone who would take them. Often, the goal of the defendants was to fly the objects to Europe in order to "auction" them off, giving the appearance that the objects came to the United States from European art dealers. The trip to Europe allowed the defendants to provide the dealers with artificial bills of sale, thus "legitimizing" the importation.\(^{32}\)

2. McClain I

At the first trial, the judge instructed the jury that Mexican law provided for Mexican ownership of pre-Columbian artifacts since 1897 unless Mexico licensed or otherwise permitted "private persons or parties or others to receive and export in their possession such artifacts to other places or other countries."\(^{33}\) The Fifth Circuit held that the jury instructions were erroneous because,

\[\text{References}\]

28. See id.
29. McClain II at 660, n. 2. Rodriguez was dismissed as a defendant due to incompetence prior to the second Fifth Circuit decision.
30. See id. at 663.
31. See id. One defendant told an undercover agent that the individuals stealing the artifacts "had no idea of their worth and were paid only a small sum to get the artifacts from the diggings." Id.
32. See id. at 660.
33. McClain I, 545 F.2d 988, 994 (5th Cir. 1977).
first, the jury was instructed that Mexican law established ownership of pre-Columbian artifacts in 1897 and then asked the jury to decide whether the defendants were guilty of knowingly transporting stolen property. According to the Fifth Circuit, such an instruction was "highly prejudicial" in the jury's determination that defendants had knowledge that the property was stolen because such a "legislative fiat" was not enacted in Mexico until 1972 rather than 1897.

The court explained that, prior to 1972, Mexican law pertained primarily to export restrictions, which, unlike explicit declarations of ownership, do not invoke the NSPA. The court analogized Mexican export restrictions to the police power in the United States. Any property within Mexico's borders may be subject to government control for any number of reasons. However, controlling an object's movement in and out of Mexico did not establish ownership, so the export restrictions were merely regulatory in nature. Thus, until 1972, pre-Columbian objects were subject to Mexican export regulation, but they were not property of the Mexican government. The issue to be considered then became whether the objects could be deemed stolen under the NSPA.

The court articulated the Congressional purpose in enacting the NSPA as an effort to discourage the taking and receiving of stolen goods. The court then discussed the definition of "stolen" under the NSPA. The court adopted a broad interpretation of stolen, and also held that the NSPA was not an appropriate action when property was illegally exported. The court determined that the

34. See id.
35. McClain I, 545 F.2d at 1000.
36. Id. The United States has never authorized seizure of property merely because the act of exporting the object from another nation violated that nation's export laws. In contrast, taking property that is subject to a foreign country's patrimony law is considered a theft, and is subject to seizure under the NSPA because of that theft.
37. See id. at 1002.
38. See id.
39. See McClain I, 545 F.2d at 1003.
40. See id. at 988.
41. See id. at 994.
NSPA applies only if a country has also declared ownership. The court explained that the term stealing is commonly understood to apply to "any dishonest transaction whereby one person obtains that which rightfully belongs to another and deprives the owner of the rights and benefits of ownership." Yet, in keeping with its broad definition of stolen, the Fifth Circuit acknowledged that a country can be an owner without ever actually possessing the property. The court explained that the NSPA applies to "art objects or artifacts declared to be the property of another country and illegally imported into this country." Thus, McClain I established that the NSPA may apply when property is removed without permission from a foreign nation when that nation has established a patrimony law.

The Fifth Circuit remanded the case to the district court, and the jury was directed to determine when the pre-Columbian artifacts had been taken from Mexico and whether this exportation violated Mexican law. According to McClain I, the critical question was whether the artifacts were taken prior to Mexico's 1972 declaration. If not, the artifacts would be considered illegally exported, but the activity would not rise to the level of "theft" under the NSPA. The case went back to trial, and the defendants were again found guilty on both the NSPA and the criminal conspiracy charges.

3. McClain II

In response to the petition for rehearing after McClain I, the Fifth Circuit instructed the district court to admit testimony on the
meaning of Mexican legislative enactments at the second trial, despite the first panel's determination that Mexico did not have an ownership law until 1972.\textsuperscript{50} At the district court level, the judge followed the Fifth Circuit's direction and allowed witnesses to testify regarding Mexican cultural patrimony laws. Although they were unable to cite specific language in Mexico's 1897, 1920, 1930, or 1934 legislation that would establish ownership of the types of pre-Columbian artifacts at issue in the case, witnesses were adamant that Mexico did have ownership rights over such objects prior to 1972.\textsuperscript{51} Thus, on remand the trial judge was again left to instruct the jury regarding Mexican law, this time with the added discrepancy between the Fifth Circuit's discussion of Mexican law and the witnesses' view of the law. Using his best judgment, the judge instructed the jury to determine whether Mexico had an ownership law when the artifacts were taken from Mexico.\textsuperscript{52} The defendants were convicted a second time, and again appealed to the Fifth Circuit.

On appeal, the defendants challenged: (1) the application of the NSPA to pre-Columbian artifacts; (2) the accuracy of the jury instructions with respect to Mexican law; and (3) the sufficiency of the evidence to support the convictions under the jury's determination of Mexican law.\textsuperscript{53}

With respect to their first argument, the defendants alleged that the NSPA was superseded by the 1972 Law on Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals.\textsuperscript{54}

\textsuperscript{50} See id. at 667 (citing U.S. v. McClain, 551 F.2d 52, 54 (5th Cir. 1977)).
\textsuperscript{51} See id. at 667-68, n 13.
\textsuperscript{52} See id. at 668-69.
\textsuperscript{53} See id. at 660.
\textsuperscript{54} See id. at 663-64; see also 19 U.S.C. §§ 2091-2095 (1999). This 1972 Act prohibits the importation of pre-Columbian monumental or architectural sculpture or murals into the United States from countries that have outlawed their exportation. See 19 U.S.C. §§ 2091-2095. For further discussion of this Act, see Aaron M. Boyce, \textit{A Proposal to Combat the Illegal Trafficking of Pre-Columbian Artifacts}, 3 \textit{HISPANIC L.J.} 91, 105 (1997); Paige Margules, \textit{International Art Theft and Illegal Import and Export of Cultural Property: A Study of Relevant Values, Legislation and Solutions}, 15 \textit{SUFFOLK TRANSNAT'L L.J.} 609, 628-31 (1992); Oliver Metzger, \textit{Making the Doctrine of Res Extra Commercium Visible in U.S. Law}, 74 \textit{TEX. L. REV.} 615, 619 (1996); Leslie S.
Under the doctrine of law of the case, the Fifth Circuit summarily rejected this challenge, refusing to consider an argument that was not presented initially. The McClain II panel explained that the NSPA is a valid claim, agreeing with the McClain I panel that the NSPA protects "ownership derived from foreign legislative pronouncements," in addition to common law ownership rights. Furthermore, the McClain II panel found that defendants had no grounds upon which to raise this argument as they presented no new evidence on the issue, no court decision or legislation had changed the ruling, and because the first panel’s decision was neither erroneous nor manifestly unjust.

The defendants further argued that criminal penalties imposed on the basis of violation of Mexican laws contravened due process because the Mexican laws were "vague and inaccessible except to a handful of experts who work for the Mexican government." After assessing the sufficiency of the evidence regarding the trial court’s decision on remand, the Fifth Circuit held that while early Mexican laws regarding pre-Columbian artifacts were indeed confusing and even misleading, the 1972 statute "is clear and unequivocal in claiming ownership of all artifacts . . . . We agree with the earlier panel that it is proper to punish through the National Stolen Property Act encroachments upon legitimate and clear Mexican ownership, even though the goods may never have been physically possessed by agents of that nation."

In determining the accuracy of the jury instructions regarding Mexican law, the Fifth Circuit held that asking the jury to decide whether and when the Mexican patrimony law took effect was erroneous. The Fifth Circuit therefore reversed defendants’

Potter, & Bruce Zagaris, Toward a Common Cultural Heritage: The Need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property, 5 TRANSNAT’L LAW 627, 634 (1992); Roberts, supra note 4 at 355-56.

55. See McClain II, 593 F.2d at 664. If the defendants had raised this challenge prior to the initial trial, the assertion would not have succeeded, as most of the artifacts the defendants took from Mexico did not fall within the limits of the statute. See id. at 664 n.5.

56. See id. at 664.

57. See id. at 664-65.

58. Id. at 663-64.

59. Id. at 670-71.
substantive charge of having received, concealed, and/or stolen
goods placed in foreign commerce. The Fifth Circuit held that
the trial court misinterpreted the question of whether it is for the
judge or jury to decide the terms of Mexican law, explaining that
the judge should decide questions of foreign law. However, even
if the lower court's error in presenting the question of Mexican law
was harmless, in this instance the defendants' substantive count
would still be overturned because the "most likely jury
construction of Mexican law upon the evidence at trial is that
Mexico declared itself owner of all artifacts at least as early as
1897." Given the first panel's determination that all of Mexico's
cultural property laws prior to 1972 were export controls rather
than ownership laws, such an instruction is problematic. Thus, the
second panel held that the pre-1972 laws were too vague to impose
criminal liability.

The court did, however, allow the conspiracy charge under the
NSPA to stand as the defendant's willful conduct provided
evidence of their knowledge of the existence of a patrimony law.
The Fifth Circuit thus affirmed the district court's determination
that the 1972 Mexican law constituted a sufficient declaration of
ownership to invoke the NSPA, stating, "the evidence is massive
that appellants knew and deliberately ignored Mexico's post-1972
ownership claims." Based on this, the court affirmed the
defendants' convictions on the conspiracy charge, concluding that
the defendants' were guilty of continuous illegal activity in the
trade of known stolen objects.

60. See McClain II, 593 F.2d at 667-69.
61. See id. at 669.
62. Id. at 670. Here, the court is referring to the 1897 Mexican law, "Ley
Sobre Monumentos Arqueológicos, Diario Oficial de Mayo de 1897." Id.
63. See id. at 671.
64. See id. at 671-72.
65. Id. at 671.
66. See McClain II, 593 F.2d at 672.
C. The McClain Progeny


Subsequent to the *McClain* decisions, many courts have also held that the United States will honor another country’s patrimony laws. While many of these decisions have recognized foreign patrimony laws during a preliminary motion, the courts acknowledge the presence of legislation and/or precedent when considering the issues involved. For example, in *Government of Peru v. Johnson*, the Government of Peru brought an action in the United States alleging that eighty-nine pre-Columbian artifacts seized from Benjamin Johnson were the property of Peru. After acknowledging that Peru is entitled to United States legal support in preventing and rectifying conduct “destructive of a major segment of the cultural heritage of Peru,” the district court held that the evidence presented was not sufficient to overcome the heavy legal and factual burdens required in national patrimony cases. The court explained that there was sufficient evidence that Johnson’s purchases were made in good faith, such as documentation showing that the objects were legitimately purchased. The court further determined that Peru did not meet its burden with respect to where or when the property was taken or in establishing the clarity of Peru’s patrimony laws.

First, the court explained that Peru’s principal witness, Dr. Francisco Iriarte, an archaeologist in Pre-Columbian artifacts, was not able to identify exactly where the artifacts originated. Iriarte’s testimony established that Pre-Columbian culture spread beyond the boundaries of modern-day Peru into modern-day Bolivia and Ecuador. The Court reasoned that the artifacts in question, while similar to those found in modern-day Peruvian excavation sites, could also be found in other archaeological monuments in

68. *Id.* at 812.
69. *See id.* at 814.
70. *See id.* at 810.
71. *See id.* at 812.
adjoining countries.72 Because Iriarte could not definitively identify Peru as the country of origin for the objects, the court was prevented from holding that they did in fact come from Peru.73

Second, the district court considered whether Peru had a cultural property law in effect at the time the objects were taken. The court examined various Peruvian laws and found that only one, established in 1985, provided Peru with ownership of Pre-Hispanic artistic objects.74 The district court then rejected Peru’s contention that Johnson received any objects after 1985, stating that even if Johnson had, the court was not “satisfied that Mr. Johnson received any of the items . . . with the knowledge that they were illegally removed from Peru.”75

Third, the court acknowledged that Peru does have a long history of preserving its historic interest in artistic objects, but argued that declarations asserting such interest have been limited and often ignored.76 The court likened Peru’s laws to those of pre-1972 Mexico, stating “the laws of Peru concerning its artifacts could reasonably be considered to have no more effect than export restrictions. . . they do not create ‘ownership’ in the state.”77 Relying on McClain II, the Court further declared Peruvian law unclear and agreed with the Fifth Circuit’s reasoning that a patrimony law must be understandable to Americans.78

Thus, Johnson established clear elements which must be met in order to establish a claim for theft under the NSPA. In addition to establishing a cultural property ownership law, a foreign nation must show: (1) the object was taken from the modern-day boundaries of the country; (2) the object was taken after the effective date of a national ownership law; and (3) the law stating national ownership is sufficiently clear to an American citizen.79

72. See id.
74. See id. at 813-14.
75. Id. at 814.
76. See id.
77. Id. (quoting McClain I, 545 F.2d 988, 1002 (5th Cir. 1977)).
78. Id. at 814-15.
2. Republic of Turkey v. OKS Partners

In Republic of Turkey v. OKS Partners, the Republic of Turkey brought an action demanding the return of the Elmali Hoard, a collection of approximately two thousand ancient Greek and Lycian coins. The court determined that Turkey’s antiquities laws sufficiently establish ownership of ancient artifacts, satisfying the clarity requirement set forth in Johnson. The issue at trial then became whether the coins were actually taken from present-day Turkey subsequent to Turkey’s national patrimony law. While the reported decision deals with rules of discovery, the case exemplifies the strict evidentiary standards a country must meet when seeking to recover an article of cultural significance from the United States. In order to obtain relief under the NSPA, a country must establish all three elements—any one alone will not result in a return of the property based on the NSPA.

3. Republic of Croatia v. The Trustee of the Marquess of Northampton 1987 Settlement

Similarly, in Republic of Croatia v. The Trustee of the Marquess of Northampton 1987 Settlement, the court held that regardless of Croatian patrimony law, Croatia failed to prove that the treasure was discovered within the country’s borders. In a case initially brought and subsequently dropped by Lebanon, neither Croatia nor Hungary was able to convince a jury that Roman silver believed to once have been owned by Roman General Sevso, was removed from their territory.

81. See id.
82. See supra note 79 and accompanying text.
83. See id. at 3.
84. 610 N.Y.S.2d 263 (1st Dept. 1994).
85. See id.
4. United States v. Pre-Columbian Artifacts and the Republic of Guatemala

Another case explicitly upholding the McClain interpretation of the NSPA is United States v. Pre-Columbian Artifacts and the Republic of Guatemala.\textsuperscript{87} In this case, the government filed an interpleader action to determine who was entitled to pre-Columbian artifacts seized from defendants. In response, defendants moved to strike Guatemala’s claim of possession of the artifacts. The court denied the motion assuming for the purposes of the motion that Guatemalan law sufficiently established ownership upon illegal export of pre-Colombian artifacts.\textsuperscript{88} The court adhered to McClain I’s broad interpretation of “stolen” under the NSPA and agreed with McClain II’s holding that a foreign declaration of ownership establishes ownership even when that government may never have actually possessed the object.\textsuperscript{89}

These cases not only provide support for the McClain doctrine (that cultural property taken from a country with clear national patrimony laws will be respected in the United States), they also illustrate the difficulties a country must overcome in order to establish such a claim.

\textsuperscript{87} 845 F. Supp. 544 (1993).

\textsuperscript{88} See id.

\textsuperscript{89} See id. at 546-47.
II. SUBJECT OPINION:

UNITED STATES V. AN ANTIQUE PLATTER OF GOLD

A. The Facts

Like many cases involving cultural property, the location of the Phiale was unaccounted for from its creation until 1980 when a private antique collector in Sicily decided to find out whether the Phiale was authentic. The collector, Vincenzo Pappalardo, went to Dr. Giacomo Manganaro, professor of Greek history and Numismatics, in search of the origins of the Phiale. Manganaro was able to determine, based upon an inscription along the edge of the Phiale, that the Phaile was indeed authentic and of Sicilian origin.90 Manganaro found that the inscription was written in a Greek Doric dialect, spoken in ancient Greek-Sicilian colonies.91

Later that year, Pappalardo traded the Phiale to Vincenzo Cammarata, a Sicilian coin dealer and art collector, for works of art valued at approximately $20,000.92 Apparently, the Phiale remained with Cammarata until 1991 when he showed it to Silvana Verga and Enzo Brai, telling them the Phiale was found near Caltavuturo, Sicily, where an Italian utility company was working.93 Cammarata gave a photograph of the Phiale to a personal friend and art dealer specializing in antiquities. The dealer, William Veres, owned an art dealership by the name of Stedron in Zurich, Switzerland.94 Cammarata and Veres exchanged the Phiale for approximately $90,000 worth of other artifacts.95

Veres then contacted Robert Haber, owner of Robert Haber & Company Ancient Art in New York City. In November of 1991,

91. See id.
92. See id.
93. See id.
94. See id. at 224-25.
95. See id. at 225.
Haber met Veres in Sicily where he viewed the Phiale in person.\textsuperscript{96} Based on this meeting, Haber became more interested in the Phiale, particularly on behalf of one of his clients, Michael Steinhardt. The two had a rather extensive dealer-client relationship, Haber having sold Steinhardt over twenty objects in the past with sales totaling $4-6 million.\textsuperscript{97} Haber informed Steinhardt that the Phiale was the twin of a platter that belongs to the Metropolitan Museum of Art in New York City.\textsuperscript{98} Haber further informed Steinhardt that he purchased the Phiale from a Sicilian coin dealer.\textsuperscript{99}

Steinhardt agreed to buy the Phiale, using Haber as an intermediary.\textsuperscript{100} Steinhardt agreed to pay $1 million for the Phiale in two separate installments, and an additional 15\% commission to Haber.\textsuperscript{101} As a condition of the sale, Haber drafted a document entitled “Terms of Sale” which provided: “If the object is confiscated or impounded by customs agents or a claim is made by any country or governmental agency whatsoever, full compensation will be made immediately to the purchaser. . . . A letter is to be written by Dr. Manganaro that he saw the object 15 years ago in Switz.\textsuperscript{[sic]}”\textsuperscript{102}

Steinhardt wired the first money transfer from his New York account to Veres’ account in Stedron.\textsuperscript{103} Four days later, Haber flew from New York to Zurich, then traveled to Lugano, Switzerland along the Italian-Switzerland border to meet Veres.\textsuperscript{104} Haber took possession of the Phiale on December 12, 1991, and the transfer was confirmed on a commercial invoice signed by Veres.\textsuperscript{105} On December 13, 1991, Haber sent a fax to his customs

\textsuperscript{96} See \textit{An Antique Platter of Gold}, 991 F. Supp. at 225.
\textsuperscript{97} See id.
\textsuperscript{98} See id.
\textsuperscript{99} See id.
\textsuperscript{100} See id.
\textsuperscript{101} See id.
\textsuperscript{102} \textit{An Antique Platter of Gold}, 991 F. Supp. at 225 (quoting Terms of Sale for the Phiale, Government Exhibit 5).
\textsuperscript{103} See id. at 225.
\textsuperscript{104} See id. at 225-26.
\textsuperscript{105} See id. at 226.
broker, Jet Air Services, Inc., at J.F.K. International Airport.\textsuperscript{106} Jet Air Service, Inc. prepared an Entry Form and Immediate Delivery Form to obtain the release of the Phiale by a Customs inspection.\textsuperscript{107} On this form, the Phiale’s country of origin was listed as Switzerland.\textsuperscript{108} Haber’s broker also completed an Entry Summary form where he stated the value of the Phiale at $250,000.\textsuperscript{109} The broker again listed the country of origin as Switzerland.\textsuperscript{109} On December 15, 1991, Haber entered the United States with the Phiale via Geneva, Switzerland.\textsuperscript{110} On January 6, 1992, either Haber or Steinhardt went to the Metropolitan Museum of Art to determine its authenticity.\textsuperscript{111} The Museum acknowledged the Phiale’s authenticity.\textsuperscript{112} Steinhardt then paid the second installment to Veres’ Stedron account on January 29, 1992, and paid Haber the $162,364 commission.\textsuperscript{113}

On February 16, 1995, the Italian Government submitted a Letters Rogatory Request to the United States pursuant to the Treaty on Mutual Legal Assistance in Criminal Matters.\textsuperscript{114} Italy wanted the Phiale back.\textsuperscript{115} On November 9, 1995, the United

\begin{itemize}
\item \textsuperscript{106} See id.
\item \textsuperscript{107} See id.
\item \textsuperscript{108} See An Antique Platter of Gold, 991 F. Supp. at 226.
\item \textsuperscript{109} See id.
\item \textsuperscript{110} See id.
\item \textsuperscript{111} See id.
\item \textsuperscript{112} See id.
\item \textsuperscript{113} See id.
\item \textsuperscript{114} See An Antique Platter of Gold, 991 F. Supp. at 226.
\item \textsuperscript{115} See id. at 226-27. See also Treaty on Mutual Legal Assistance in Criminal Matters, November 9, 1982, US-Italy, 24 I.L.M. 1539 (1985). Under the Letters Rogatory Request, Italy asked the United States to assist them in determining the circumstances of the Phiale’s export from Italy. See Respondent’s Brief at 7, U.S. v. An Antique Platter of Gold, 184 F.3d 131 (2d Cir. 1999). Italy also requested that the Phiale be confiscated and returned to Italy. See id. Italy asserted that the Phiale was removed from an excavation site in Italy, and through private hands was transferred to Haber. See id. The request further informed the United States that the export violated Articles 35, 36, 66, and 67 of Italy’s law of June 1, 1939, No. 1089 (illegal export and possession of antiquities) and Article 648 of the Italian penal code (receiving stolen property). See id.
\item \textsuperscript{116} See An Antique Platter of Gold, 991 F. Supp. at 226-27.
\end{itemize}

https://via.library.depaul.edu/jatip/vol10/iss2/6
States Customs Service seized the Phiale from Steinhardt’s home pursuant to a warrant. On December 13, 1995, the United States government filed a civil forfeiture action under 18 U.S.C. § 545 and 19 U.S.C. § 1595(a)(c), alleging the Phiale had been illegally imported into the United States based on materially false statements regarding the Phiale’s country of origin.

B. The Decisions

In the Southern District of New York, both the United States and Steinhardt sought summary judgment. The court granted summary judgment to the United States, finding that the statement on the Customs form claiming Switzerland as the country of origin was false and material and that 18 U.S.C. § 545 does not provide for an innocent owner defense. The court also held that the Phiale was stolen under the meaning of the NSPA, the importer knew the Phiale was stolen, and forfeiture of the platter did not violate the Excessive Fines Clause of the Eighth Amendment. The Second Circuit affirmed the district court decision, agreeing that the false designation on the Customs form was a material false

117. See id. at 227.
118. See id.; 18 U.S.C. § 545 provides, in relevant part: Whoever fraudulently or knowingly imports or brings into the United States any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported into the United States contrary to law [shall be guilty of a crime]. . . . Merchandise introduced into the United States in violation of this Section. . . .shall be forfeited to the United States. 18 U.S.C. § 545 (1999). 19 U.S.C. § 1595a(c) provides, in relevant part: Merchandise which is introduced or attempted to be introduced into the United States contrary to law shall be. . .seized and forfeited if it. . .is stolen, smuggled or clandestinely imported or introduced. . .
119. See An Antique Platter of Gold, 991 F. Supp. at 224; An Antique Platter of Gold, 184 F.3d at 133.
120. See id.
121. See id.
The Second Circuit also agreed that no innocent owner defense exists under 18 U.S.C. § 545, and there was no excessive fine under the Eighth Amendment. The Second Circuit, however, did not address the implications of the NSPA as a separate issue. Rather, the Second Circuit acknowledged that the existence of the NSPA supported the importance of truthfulness in making statements to Customs.

1. Materiality

The district court held that importing the Phiale violated 18 U.S.C. § 545 which prohibits the importing of merchandise "contrary to law." Further, 18 U.S.C. § 545 allows the government to forfeit merchandise that has been determined imported contrary to law. The district court found that the importation of the Phiale was "contrary to law" because naming Switzerland as the Phiale’s country of origin, and lying about the value of the Phiale, were false statements in violation of 18 U.S.C. § 542.

Section 542 of title 18 U.S.C. prohibits importing merchandise by means of a false statement, and allows for seizure of the object

122. See An Antique Platter of Gold, 184 F.3d 131, 132 (2d Cir. 1999).
123. See id.
124. See id.
125. See id.
127. See id.
128. See An Antique Platter of Gold, 991 F. Supp. at 226, 230. Section 542 provides in relevant part:

Whoever enters or introduces... into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper or by means of any false statement, written or verbal... or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement [shall be guilty of a crime]... Nothing in this Section shall be construed to relieve imported merchandise from forfeiture under other provisions of law.

Thus, a false statement in violation of 18 U.S.C. § 542 constitutes an act "contrary to law," and that act therefore triggers 18 U.S.C. § 545. Customs then has authority to forfeit the illicit merchandise. In order to find that the Phiale was subject to forfeiture, the district court had to first determine the scope of materiality.

While United States’ courts are in agreement that a false statement must be material to violate 18 U.S.C. § 542, the courts are split regarding what constitutes a material misstatement. The Fifth and Ninth Circuits have opted to apply a but-for standard, where misstatements on Customs forms are considered material only if but for those statements the merchandise would not have been permitted into the country. In contrast, the First Circuit applies what is known as the "natural tendency test," giving a broader meaning to materiality. Under this broad definition, a statement is material either if in making the statement the importer hoped to introduce goods that would otherwise not be admitted, or, if the misstatement affected or facilitated the importation of incoming merchandise. Under the natural tendency test, a trial court is asked to determine "whether the false statement had a natural tendency to influence the actions or decisions of the Customs Service."

While acknowledging the split, the district court adopted the First Circuit’s "natural tendency test." The district court explained that the language "by means of" in the statute should be

130. See An Antique Platter of Gold, 991 F. Supp. at 229-30; see also United States v. Holmquist, 36 F.3d 154, 157 (1st Cir. 1994); United States v. Bagnall, 907 F.2d 432, 435 (3d Cir. 1990); United States v. Teraoka, 669 F.2d 577, 578 (9th Cir. 1982).
131. An Antique Platter of Gold, 991 F. Supp. at 229. For further review of the but for test, see Teraoka, 669 F.2d 577; United States v. Corcuera-Valor, 910 F.2d 198, 199-200 (5th Cir. 1990).
132. An Antique Platter of Gold, 991 F. Supp. at 229. For further review of the natural tendency test, see Holmquist, 36 F.3d at 158-61.
133. See Holmquist, 36 F.3d at 158-61.
134. See An Antique Platter of Gold, 991 F.Supp. at 229.
135. Id. at 229-30.
136. Id. at 229-31.
read to mean that a false statement has been made at a significant stage in the importation process.\textsuperscript{137} The statute should not be interpreted to mean that without the false statement importation could not have occurred.\textsuperscript{138} The district court further noted that courts in other jurisdictions have applied the natural tendency standard in cases dealing with other false statement issues.\textsuperscript{139} For this reason, the court considered whether the false statement had a natural tendency "to influence the actions or decisions of the Customs Service."\textsuperscript{140} Applying that standard, the court held that the statements made by Haber's Customs broker, which were presented to Customs at the moment of import, were materially false because the Phiale's country of origin was clearly Italy, yet the form indicated Switzerland.\textsuperscript{141}

In further agreement with the First Circuit, the district court found that a false statement is material "if it has the potential significantly to affect the importation process as a whole."\textsuperscript{142} The court reasoned that, in addition to following the language of 18 U.S.C. § 542, the natural tendency test is consistent with the purpose of the statute, which is to ensure full disclosure in customs statements and to maintain the integrity of importation.\textsuperscript{143} The court further explained that the natural tendency test is also consistent in its application of the materiality standard as applied in other false-statement instances.\textsuperscript{144}

The Customs Service considers country of origin for a number of reasons, one of which is to determine whether an object is subject to national ownership laws (i.e. Mexico's Act of 1972). Notably, Italy has such a law while Switzerland does not. Had Haber named the true country of origin, Customs inspectors would have been on notice that an object of antiquity was being exported from a country with specific antiquity-protection laws, and Customs

\textsuperscript{137} See id. at 229.  
\textsuperscript{138} See id. at 229.  
\textsuperscript{139} See id.  
\textsuperscript{140} An Antique Platter of Gold, 991 F.Supp. at 229-30.  
\textsuperscript{141} See id. at 230.  
\textsuperscript{142} Id. at 229 (citing Holmquist, 36 F.3d at 159).  
\textsuperscript{143} See id. at 229.  
\textsuperscript{144} See id.
would have investigated the description of the Phiale more carefully.\textsuperscript{145} In this case, however, Customs was led to believe the object came from Switzerland. Customs was unaware of a potential NSPA violation because of the misstatement on the Customs form.\textsuperscript{146}

Following the reasoning of the district court and the Government's urging, the Second Circuit agreed that the natural tendency test is in line with the underlying goal of 18 U.S.C. § 542, to promote honesty in statements made during importation.\textsuperscript{147} The Second Circuit agreed with the district court's reasoning that the ordinary meaning of the statute merely requires the false statement be "integral" to the importation process rather than the sole vehicle by which the object is imported.\textsuperscript{148} The Second Circuit further explained, based on Supreme Court reasoning, that the common way to determine materiality is to determine whether a false statement "has a natural tendency to influence or [is] capable of influencing, the decisionmaking body to which it [is] addressed."\textsuperscript{149} In developing a materiality test, the court cited \textit{United States v. Holmquist}.\textsuperscript{150} The \textit{Holmquist} court stated, "a false statement is material under 18 U.S.C. § 542 if it has the potential significantly to affect the integrity or operation of the importation process as a whole, and that neither actual causation nor harm to the government need be demonstrated."\textsuperscript{151}

The district court rejected the but for standard adopted by the Fifth and Ninth Circuits.\textsuperscript{152} The court explained that applying such a rigid standard would discourage full disclosure in importation, because the standard only acknowledges statements as material

\begin{itemize}
\item \textsuperscript{145} \textit{See id.} at 230.
\item \textsuperscript{146} \textit{See An Antique Platter of Gold}, 991 F. Supp. at 231.
\item \textsuperscript{147} \textit{See An Antique Platter of Gold}, 184 F.3d at 136.
\item \textsuperscript{148} \textit{See id.} at 135-36.
\item \textsuperscript{149} \textit{Id.} at 136 (citing Kungys v. United States, 485 U.S. 759, 770, 108 S.Ct. 1537 (1988)).
\item \textsuperscript{150} 36 F.3d 154 (1994).
\item \textsuperscript{151} \textit{Id.} at 159.
\item \textsuperscript{152} \textit{An Antique Platter of Gold}, 991 F. Supp. at 229-30.
\end{itemize}
when a true statement would entirely prevent importation.\textsuperscript{153} "[B]y preventing prosecution of many statements that unquestionably are false and deleterious to the importation process, but nonetheless cannot be proven to be the crucial factor in an object's admission through Customs," the but for standard prevents the statutory goal of full disclosure in importation from being met.\textsuperscript{154}

The Second Circuit agreed with the district court and rejected the but for standard, as a but for test places too heavy a burden on the government.

Under a but-for test, lying would be more productive because the government would bear the difficult burden of proving what would have happened if a truthful statement had been made. Moreover, under such a test, liability would not attach for misstatements in cases where truthful answers would still have enabled the goods to enter the United States. Importers have incentives to lie for reasons not related to achieving actual entry of the goods – e.g., to reduce the duties payable or to obtain expeditious customs treatment. . . . The statutory purpose would thus be frustrated by the narrow reading suggested by appellant.\textsuperscript{155}

Section 542 of 18 U.S.C. is a broad statute that covers any type of imported merchandise. The but for test is inadequate to protect foreign cultural property laws from importers whose sole purpose is to mischievously introduce an object into this country in circumvention of those laws. Furthermore, the but for test would not stop importers who are seeking entry for objects in

\textsuperscript{153} See id. at 229 (stating that under the but for standard, "statements in the Customs forms are not material unless the Government can show that but for those statements the Phiale would not have been permitted to enter the country")

\textsuperscript{154} Id.

\textsuperscript{155} Id. at 136. Here, the Second Circuit refers to importers who make false statements for purposes other than obtaining entry, such as reducing the duty they will have to pay or to expedite the Customs process.
contravention of trade agreements or safety standards. 156 Both the First and Second Circuits have explained that accepting the but for test simply encourages importers to cry "immaterial!" when faced with an 18 U.S.C. § 542 charge. 157 The but for test does not adequately emphasize the importance of honesty in Customs forms, and as the Government successfully argued in this particular case "country of origin goes to the heart of Customs enforcement activity, and is the subject of routine inquiry by most Customs officers."158 Thus, Haber’s misstatements on the Customs forms were "far from 'trivial.'”159

2. The District Court and the NSPA

On appeal, the Second Circuit upheld summary judgment based primarily on the ground that the importation of the Phiale violated 18 U.S.C. § 545 and not on the basis of Italian law. 160 The court justified its application of the 18 U.S.C. § 545 claim by finding that the district court found summary judgment under either the 18 U.S.C. § 545 claim or the NSPA. 161 "We hold that the importation of the Phiale violated 18 U.S.C. § 545 because of the false statements on the Customs form. We need not, therefore, address whether the NSPA incorporates concepts of property such as those contained in the Italian patrimony law." 162 In this brief statement, the Second Circuit seems to circumvent a major area of cultural property law and disregard the arguments for and against holding the Phiale "stolen" under the NSPA. Later in the decision,

156. See Holmquist, 36 F.3d 154 (1994) (convicting firearms importer for understating the price of imported merchandise).
157. An Antique Platter of Gold, 184 F.3d at 136.
159. Id.
160. See An Antique Platter of Gold, 184 F.3d at 134. The court also upheld the district court's finding that the forfeiture was not excessive under the Eighth Amendment. See id.
161. See id.
162. Id. at 134.
however, the court cautiously explained that the NSPA is applicable by virtue of Customs Directive No. 5230-15.163

Before discussing the Second Circuit’s use of the NSPA to strengthen the claim for forfeiture because of the material false statement under 18 U.S.C. §545, it is important to understand the lower court’s interpretation of the NSPA.164 At the district court level, in order to further justify Customs’ forfeiture of the Phiale, the Government argued that the Phiale was subject to forfeiture under 19 U.S.C. § 1595a(c) because it is stolen property imported contrary to law, violative of 18 U.S.C. § 2314 and the NSPA.165 Under the NSPA, anyone who imports merchandise worth $5,000 or more with the knowledge that it is stolen is subject to criminal sanction.166 And, if merchandise is found to be in violation of the NSPA, such merchandise is subject to forfeiture under 19 U.S.C. § 1595a(c) which permits seizure of merchandise that is stolen or introduced contrary to law.167 In its analysis, the district court focused on whether the Government had probable cause to believe that Haber, rather than Steinhardt, knew the Phiale was stolen at the time of importation.168

Under the NSPA and the McClain line of cases, if a foreign sovereign has declared national ownership over its patrimony, the United States will assist that country in retrieving any object

164. For a discussion of the impact of the Second Circuit’s treatment of McClain and the NSPA, see infra notes 193-229 and accompanying text.
166. 18 U.S.C. § 2314.
168. See An Antique Platter of Gold, 991 F. Supp. at 231. The question of who made the false statements or clandestinely imported the Phiale is irrelevant, as the seizure and forfeiture were “in rem” rather than “in personam” proceedings, meaning that “the thing” was taken because its existence in the United States was illegal, and the artifact is therefore contraband (i.e. the Phiale was not taken to punish, but to rectify the situation). See id. at 232-33; An Antique Platter of Gold, 184 F.3d at 138-139; One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (holding forfeiture of contraband serves a remedial rather than a punitive purpose as it prevents forbidden merchandise from entering the United States).
brought into this country in contravention of the foreign declaration of ownership. The district court first acknowledged that Italy’s Law of June 1, 1939, No. 1089, Article 44, established ownership of the Phiale. Based upon Haber’s careful negotiations in purchasing the Phiale (such as Haber’s insistence on a clause allowing for a full refund if the Phiale was taken by a country or governmental agency), and his indirect route to obtain the Phiale, the court drew “an adverse inference against Haber that he knew the Phiale was stolen at the time he imported it.” Therefore, the district court found that the government had shown probable cause to believe Haber knew the Phiale was stolen when he crossed the United States border, a clear violation of 18 U.S.C. § 2314, the NSPA. The district court allowed the Government’s summary judgment motion under both the Customs statute and the NSPA.

3. The Second Circuit Illuminates McClain

The Second Circuit’s decision not to consider Italian concepts of property under the NSPA is not a refusal to apply the NSPA in cases of civil forfeiture. To argue otherwise would be to ignore the court’s analysis of three sources authorizing such forfeiture: (1) Customs Directive 5230-15; (2) the NSPA; and (3) McClain. The Second Circuit interweaves these sources to explain that naming Italy as the country of origin was relevant to the seizure of the Phiale. Steinhardt argued that listing Switzerland as the country of origin was irrelevant to importing the Phiale. The court disagreed, explaining that whether a misstatement is material is relevant at many stages in the importation process, from considering potential violations of import law to the manner in which the object is processed. The court explained that the Customs Directive in fact requires Customs officials to look at the country of origin and

169. See supra Section II and accompanying text.
171. Id. at 232.
172. See id.
173. See An Antique Platter of Gold, 184 F.3d at 136-37.
determine whether that country could potentially make a claim of ownership, and, if so, Customs should seize the object. Hence, the object’s true origin is obviously material to a Customs official’s determination.174

From a Customs perspective, country of origin is always a significant importation issue for many legal and law enforcement reasons. In international trade, an item’s country of origin can affect the merchandise’s dutiable status. One example is the Generalized System of Preferences, where certain countries that have been given special status do not pay duty on their imports. Customs inspectors must know the true country of origin in order to apply appropriate tariffs for merchandise, depending on the nature of the product and its origin.175 Tariffs, quotas, and other trade restrictions are also applied on the basis of whether a country is a party to an international trade agreement or treaty (such as the North American Free Trade Agreement “NAFTA” or the General Agreement on Tariffs and Trade/World Trade Organization “GATT/WTO”). Drug enforcement depends on Customs’ attention to everything that enters the United States, whether via air, sea, or land. Antidumping orders require careful consideration of country of origin as well. As one can see, country of origin tells the Customs inspectors a great deal about imported merchandise, and, in paying attention to such information, Customs is continuously fulfilling their obligation to patrol our nation’s borders.

Customs Directive 5230-15, which advises Customs officials: (1) to decide whether an object is subject to foreign cultural property law; and (2) if an object is subject to such a law to seize the property under the NSPA, emphasizes yet another reason why country of origin information is important.176 With respect to this

174. See id. at 137.
particular directive, the country of origin puts Customs officers on notice as to which cultural property law is most appropriate given an object's origin. A country with a cultural property law, such as Italy, will be scrutinized in a different manner than an object coming from Switzerland, a country with no such patrimony law. When an item enters the United States from Switzerland or a country with similar laws, the Customs inspector does not consider an NSPA violation; rather, the inspector knows to be cognizant of the potential for violations of other laws, such as the Cultural Property Implementation Act. 177

In response to Steinhardt's argument that the Directive did not apply to the Phiale, the court indicated that the Directive is the basis upon which to justify seizing cultural property under the NSPA. 178 Relying on the Directive, the Second Circuit pointed out that "[a]n item's country of origin is clearly relevant to [the] inquiry [of which law to apply]." 179 The Directive outlines a number of public laws that carve out Customs' responsibility in this area, including the NSPA and the CPIA. 180 Furthermore, according to the Second Circuit and the Directive, such authority under the NSPA is derived from McClain I. 181

The Second Circuit interpreted the Directive as providing "a basis for seizing cultural property under the NSPA in the seizure provisions of 19 U.S.C. § 1595a(c)." 182 In fact, the intended purpose of the Directive is "[t]o clarify the procedures for the detention and/or seizure of cultural property." 183 This particular Directive provides background on the treatment of cultural property and Customs' current policies with respect to cultural

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2091-2095 (1999); the Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613(1999); the NSPA and McClain.

177. See 19 U.S.C. §§ 2601-2613 [hereinafter CPIA]. For further discussion of the differences between the NSPA and the CPIA, see infra Section IV.A and accompanying notes.

178. See An Antique Platter of Gold, 184 F.3d at 137.

179. Id.


181. See An Antique Platter of Gold, 184 F.3d at 137.

182. Id.

property and the laws of foreign nations.\textsuperscript{184} Thus, the Second Circuit applied the information in the Directive to explain that the country of origin is material to the importation of antiquities.\textsuperscript{185}

To further strengthen the point that the Directive is a link between seizure and the NSPA, the Second Circuit explained that Customs' seizure of the Phiale was authorized in the NSPA by virtue of McClain.\textsuperscript{186} The Second Circuit interpreted the Directive as saying, "a reasonable customs official would certainly consider the fact that McClain supports a colorable claim to seize the Phiale as having possibly been exported in violation of Italian patrimony laws."\textsuperscript{187} The Second Circuit further noted that the Directive explicitly mentions the McClain line of cases, "and informs officials that if they are unsure of the status of a nation's patrimony laws, they should notify the Office of Enforcement."\textsuperscript{188} This instruction clarifies the point that in this case, "[k]nowing that the Phaile was from Italy would, therefore, be of critical importance."\textsuperscript{189} This statement links materiality to McClain and the NSPA because disclosure of the true country of origin is critical to Customs' conduct. The Second Circuit goes even further to associate materiality and the NSPA by stating, "the test of materiality applies not only to the [Customs inspector's] decision to admit an item but also to decisions as to . . . expediting importation."\textsuperscript{190} By linking the Customs authority in dealing with importation to the country of origin, the Second Circuit alerted dealers and foreign nations that the mere existence of a cultural property law sensitizes Customs to a potential NSPA violation. Whether that potential violation will ultimately be cause for the return of the property depends on the nature of the claiming

\textsuperscript{184} See id.
\textsuperscript{185} See id.
\textsuperscript{186} See An Antique Platter of Gold, 184 F.3d at 137.
\textsuperscript{187} Id. The Second Circuit noted that the Customs Directive is proper, "[r]egardless of whether McClain's reasoning is ultimately followed as a proper interpretation of the NSPA..." but goes on to support the Customs Directive, McClain, and the NSPA. Id. at 137.
\textsuperscript{188} See id.
\textsuperscript{189} Id. (emphasis added).
\textsuperscript{190} Id. at 136.
country’s cultural patrimony law (i.e. does it meet the three NSPA elements of being stolen from that country’s modern-day boundaries, after the effective date of the patrimony law, in addition to being sufficiently clear to an American?). While the initial decision to allow importation is made by a Customs officer, the final determination regarding seizure and/or forfeiture will be made by a court, following the Second Circuit decision.

In *An Antique Platter of Gold*, the court did not have to wrestle with the burdens of the NSPA because Haber betrayed Customs not once, but three times, on various Customs forms. Haber, in all his efforts to deceive, gave the government two causes of action, under two separate forfeiture statutes, and made seizure easy. Regardless of Haber’s cunning clauses in the bill of sale, the Phiale is back in Italy, and his client is without one million dollars.

III. THE SECOND CIRCUIT’S ANALYSIS OF THE NSPA UPHOLDS *MCCLAIN* AND ITS UNDERLYING PURPOSE

A. An Antique Platter of Gold Makes Clear -- The CPIA Does Not Overshadow the NSPA

One of the most important benefits that comes from the Second Circuit’s decision in upholding the NSPA is that the court implicitly agrees with the Respondents and amici curiae, Archaeological Institute of America (“AIA”), that the CPIA does not preempt the NSPA. An interesting issue raised by Steinhardt, the Government, and the amici curiae is what impact the 1982 adoption of Sections of the 1970 UNESCO Convention

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191. *See infra* Section III and accompanying notes.
192. Steinhardt has already filed a petition for remission or mitigation with the U.S. Attorney General’s office for compensation due to the seizure and forfeiture of the Phiale. This is a non-legal, private action considered by the Attorney General. *See Steinhardt Seeks $1.2 Million Refund*, WALL ST. J., Mar. 3, 2000 at W12.
has had on *McClain* and the NSPA. Congress did not intend to preempt the NSPA with the adoption of the CPIA. The CPIA is limited in nature. Legislative attempts to overrule *McClain* by amending the NSPA have been futile, and the Second Circuit has effectively upheld *McClain*. Since a government official has the discretion to apply the most appropriate of two similar statutes, it follows that the CPIA is a law separate and distinct from the NSPA and in no way undercuts *McClain*’s authority.

In urging the court to overturn or affirm the district court’s decision that the Phiale was stolen under the NSPA, Steinhardt and amici curiae American Association of Museums ("AAM") argued that the NSPA was preempted in 1982 when Congress adopted the CPIA. As its title suggests, the CPIA is comprised of selected Sections of the 1970 UNESCO Convention. In short, the CPIA


196. The CPIA adopts only articles 7(b) and 9 of the 1970 UNESCO Convention. Article 7(b) reads:

The Parties to this Convention Undertake: to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution;

i. at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party. Convention on the Means of
authorizes the President to enter into agreements with UNESCO State Parties to apply import restrictions on certain archaeological and ethnological property of that state party. The CPIA also allows the President to impose import restrictions in emergency situations at the request of a state party when “cultural property is being plundered from a specific area.” In addition, the CPIA authorizes the seizure and return of property stolen from the inventory of a museum, religious institution, or secular public


Article 9 reads:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property Done at Paris, 17 November 1970.

197. Section 2602(a) reads, in pertinent part:

If the President determines, after request is made to the United States... by any state party that the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party; that the State Party has taken measures consistent with the Convention to protect its cultural patrimony...remedies less drastic...are not available; and that the application of the import restrictions set forth in Section 2606 of this title... is consistent with the general interest of the international community. ...the President may, subject to the provisions of this chapter... enter into a bilateral [or multilateral] agreement with the State Party to apply the import restrictions set forth in Section 2606. 19 U.S.C. § 2606.

19 U.S.C. § 2606 (1999) provides customs with the authority to refuse the release of objects that fall under the CPIA.

monument located within a State Party’s jurisdiction. Recall that the NSPA prohibits the interstate or foreign transport of stolen property, and is not limited to signatories of a particular treaty or convention.

In arguing that the CPIA does preempt the NSPA, Steinhardt asserted that 19 U.S.C. § 2607 limits United States law honoring foreign cultural property to only the cultural property stolen from such an institution, rather than property owned or exported in violation of a country’s cultural property law. The AIA and the government’s brief contend, however, that Congress wanted to avoid preempting previous laws such as the NSPA. The Customs Directive supports such a contention, as it acknowledges the propriety of using either the NSPA or the CPIA, whichever is most appropriate in a given situation.

The CPIA is limited in its coverage as it “only deals with situations in which State Parties have identified specific thefts, looting areas, or particular designated classes of materials,” and not

199. 19 U.S.C. § 2607 (1999); Respondent’s Brief at 37.
200. See supra note 5.
201. See Appellant’s Brief at 29, U.S. v. An Antique Platter of Gold, 184 F.3d 131 (2d Cir. 1999). Section 2607 provides: No article of cultural property documented as appertaining to the inventory of a museum or religious institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party, whichever is later, may be imported into the United States.” 19 U.S.C. § 2607 (1999).
202. The AIA amici curiae represented the AIA, the American Anthropological Association (“AAA”), the United State Committee for the International Council on Monuments and Sites (“US/ICOMOS”), the Society for American Archaeology (“SAA”), the American Philological Association (“APA”), and the Society for Historical Archaeology (“SHA”). The AIA amici curiae submitted a brief “to urge the Court to uphold the decision below, which recognizes the cultural rights in historic objects of countries of origin, will aid in efforts to discourage the looting and pillaging of archaeological sites and resources, and work toward proper respect for United States, as well as international, cultural heritage.” Brief of Amici Curiae AIA U.S. v. An Antique Platter of Gold, 184 F.3d 131 (2d Cir. 1999).
"items that are clandestinely excavated." According to the Government, the CPIA is not so expansive as to hinder the enforcement of laws such as the NSPA, which prohibits "the unlawful excavation in cultural property, particularly where no such property was unearthed before a foreign government knew of its existence."

In addition to the limited nature of the CPIA, under general rules of statutory construction, one's conduct can violate more than one statute, and the Government has the choice of which statute to apply in prosecuting an offense. In support of this argument, the Government and the AIA provided legislative history indicating that the CPIA does not preempt State law or modify Federal or State remedies in the cultural property realm. The AIA pointed out that, since the CPIA's adoption, efforts to legislatively overrule McClain have been thwarted. In 1985, Senator Moynihan campaigned to amend the NSPA in such a way that would effectively overturn McClain. Moynihan's attempts were futile, thanks in part to a persuasive argument by the AAM in favor of the McClain decisions.

In the 1985 hearings, amicus AAM, who supported Steinhardt in the Phiale controversy, advocated the NSPA in stating that McClain II "removed the concerns of many in the Museum

204. Respondent's Brief at 38. See James A.R. Nafziger, Seizure and Forfeiture of Cultural Property by the United States, 5 Vill. Sports & Ent. L.J. 19, 26-27 (1998) ("Unlike other parties, the United States entered a reservation on the Convention through which it refused to enforce export controls of foreign countries solely on the basis of illicit trafficking of cultural property.").

205. Respondent's Brief at 39.

206. Id. at 38.

207. See id. (quoting S. Rep. No. 564, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S.C.C.A.N. 4078, 4099) ("[the CPIA] neither pre-empts State law in any way, nor modifies any Federal or State remedies that may pertain to articles to which provisions of this bill apply.").

208. See Brief of Amici Curiae at 22-25. For further information on the futile attempts to overrule McClain in the legislature, see Jonathan S. Moore, Enforcing Ownership Claims in the Antiquities Market, 97 Yale L.J., 466, 476, n.54 (1988).

209. See Brief of Amici Curiae AIA at 23.
community,' removing the ambiguity of the earlier decisions and upholding 'the validity of the national declarations of ownership as a basis for prosecution.'

Furthermore, at the hearing, the AAM argued that the CPIA was not to be the only remedy for "theft or illegal exportation of archeological or ethnological material, but one of a number of means of discouraging their illicit trade." Relying on McClain II, the Government pointed out that while no court has had the opportunity to address the relationship between the NSPA and the CPIA, McClain II held that neither the UNESCO Convention (the basis on which the CPIA was established) nor historical policy of encouraging art importation narrowed the NSPA in such a way that it could not prohibit the importation of cultural property which belongs to another country based on a patrimony law. The CPIA and NSPA protect different aspects of cultural property law. The two Acts may overlap, but they are not mirror images of one another. The CPIA needs the NSPA to strengthen cultural property protection, as "the UNESCO Convention (and therefore the CPIA) has not and will not be effective on its own in protecting works of art from illegal trafficking." In affirming the district court's decision, the Second Circuit upheld this logic and upholds the correct policy -- cultural property ought to be protected. The CPIA in no way undercuts the progress the NSPA and McClain have made, and the Second Circuit ensured this by affirmatively acknowledging the NSPA's validity and the importance of the McClain doctrine.

210. Id. at 23 (quoting Testimony of the AAM before Hearings on S. 605 before the Subcomm. on Crim. Law Comm. 99th Cong., 1st Sess., 131 CONG. REC. 2611 (1985) (emphasis added)).
211. Id.
212. Respondent's Brief at 39.
Another key underpinning of the Second Circuit’s decision is that it reinforces the fact that there is a true distinction between export controls and laws prohibiting the importation of stolen property. The differentiation between illegal export and “stolen” property has not, as many commentators have argued, been eliminated. The United States has acknowledged the patrimony laws of Mexico and Guatemala because they are clear, were in effect prior to the theft in question, and because the objects were obviously taken from the present day countries. In An Antique Platter of Gold, the Second Circuit agreed that the United States will honor such laws under the NSPA. An Antique Platter of Gold is yet another example with which to disprove the contention that the NSPA is a vehicle through which to prosecute illegal export. The NSPA is only invoked when a claim in the United States, for return of an object to its country of origin, is based on a property interest, not illegal export. Recall, in contrast, that foreign export laws, because they are regulatory in nature, are not enforceable in the United States. As McClain distinguished, export restrictions are regulatory—not possessory—in nature.

As the Government explained, the McClain I court determined that applying Mexico’s cultural property law was not, as the defendants in McClain argued, improper enforcement of an export ban. In addressing the issue, the Fifth Circuit explained:

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215. See U.S. v. Hollinshead, 495 F.2d. 1154 (9th Cir. 1974) and U.S. v. McClain, 545 F.2d 988 (5th Cir. 1977), 593 F.2d 658 (5th Cir. 1979).


The question posed, then, is not whether the federal government will enforce a foreign nation’s export law, or whether property brought into this country in violation of another country’s exportation law is stolen property. The question is whether the NSPA covers property of a very special kind – purportedly government owned, yet potentially capable of being privately possessed when acquired by purchase or discovery.218

Thus, the Fifth Circuit acknowledged that the NSPA is not an export control, nor is it a misuse of investigatory power by Customs.

"Illegal export is not a crime under the NSPA or any other U.S. law,"219 and the act of illegal export—alone—does not give rise to such a claim in United States courts. In fact, the United States adheres to the general rule that illegal export does not automatically constitute theft. Illegal export is not subject to legal action in the United States solely because of the act of illegal export from another country.220 This can best be understood under the facts of McClain. In McClain, the defendants were ultimately not held liable for the substantive count of the NSPA violation because of the discrepancy in the effective date of Mexican law. Had the Mexican law clearly been in effect prior to the defendants’ activities, they would have been guilty of criminal theft. However, because Mexican cultural property law did not clearly proclaim ownership until 1972, the court faced a difficult task in determining whether the defendants’ conduct occurred before or after the law was enacted. Had the defendants only brought the pre-Columbian artifacts into the United States prior to 1972, their looting would only have risen to the level of illegal export, because prior to the Mexican law taking effect, the United States had no

218. McClain I, 545 F.2d at 996.
220. See id. at 526-27.
power to seek action against the McClain defendants. However, in McClain, the court was able to uphold the conspiracy count as the defendants' activities continued past 1972, and evidence sufficiently showed the defendants were aware that their activities constituted illegal conduct, and continued looting the artifacts.

Since McClain, many commentators have noted that McClain and the NSPA "abrogate" or "erode" the distinction between illegally exported material and stolen property. The Second Circuit disproves such contentions. Illegal export can mean a number of things that have nothing to do with taking a Mayan stele or a Greek-Sicilian platter. Illegal export can occur simply by removing an item from a nation without notifying that nation (i.e. lying on a duty free form). In the case of a country asserting a cultural proprietary interest over an object, taking the object constitutes theft, and this is a violation of the NSPA. In An Antique Platter of Gold, the misstatement on the customs form compounded the problem by preventing Customs from realizing that there may have been an NSPA issue involved in the importation of the Phiale. The Second Circuit identified just such a mistake when Haber lied on the Customs form by linking materiality and McClain in order to uphold the Phiale's return to Italy.

Illegal export and stolen property are distinct ideas. When a foreign country enacts legislation clearly stating that cultural objects found in that country are not to be removed, as they are the property of that country, they are asserting ownership, not merely protecting, say, the widget industry from losing out on an unpaid tariff or facilitating dumping. Under the NSPA, the United States has agreed to honor these cultural protections, not in the hopes of avoiding a WTO or NAFTA dispute, but rather out of respect for a nation's interest in its history. Through careful analysis, the Second Circuit facilitates such respect.

221. See Bator, supra note 214, at 346-50; Waterman, supra note 26, at 515-
B. Why Apply the Customs Statutes?

Because the Second Circuit ultimately upheld McClain and the NSPA, why did the court first determine that the seizure of the Phiale could be upheld under 18 U.S.C. §§ 542 and 545? This occurred for a number of reasons. As cases such as Johnson, Republic of Turkey and Republic of Croatia indicate that foreign law is sometimes simply insufficient to justify seizure under the NSPA.222 Contrary to what many commentators seem to imply, burdens under the NSPA are not easily met.223 Thus, the Second Circuit took what may appear at first glance to be the easy route. In fact, the Second Circuit wrote a sound legal opinion, allowing Italy to retrieve the Phiale in spite of the difficult evidentiary standards of the NSPA.224

In order to warrant forfeiture under 18 U.S.C. § 545, the government need only show probable cause.225 In lying on the Customs form, Haber made the case much easier for the government to prove under 18 U.S.C. §§ 542 and 545. From a burden of proof standpoint, "[t]he seizure was made legally simple... because the dealer who sold the Phiale to Steinhardt falsified the import documents, misrepresenting both the Phiale's country of origin and its value."226 As one will recall, in contrast to the Customs statutes, the NSPA requires that the government or foreign country prove that the object was taken from a country with a cultural property law, that the object was taken after the patrimony law took effect, and that the law is sufficiently clear in


223. See Bator, supra note 214, at 346-50.


establishing its ownership of cultural patrimony. These factors must be met in addition to the general NSPA standard that an individual must knowingly transport or facilitate the transport of merchandise in foreign or interstate commerce with a value of over $5,000.227 Even if the NSPA is not as specific as the CPIA, countries still have to meet “heavy legal and factual burdens,” which are only alleviated by evidence of geographic origin, eyewitness testimony, defendant admissions and other evidentiary proof.228

The Second Circuit declined to consider the Italian patrimony laws with little explanation beyond the decision to grant the government’s motion for summary judgment based on the Customs statutes. Yet the court goes on to discuss the NSPA. One possibility as to why the court did not entertain Italian law under the NSPA was because the court would not have felt comfortable making a determination on foreign law prior to trial despite the fact that the judge, not the jury, is to decide questions of foreign law.229

Another possibility is that, after review of Italian law, the court was afraid the law would not stand up to the NSPA’s tough standard. In any event, the court circumscribed analysis of Italian law but ultimately upheld the NSPA and McClain.

IV. IMPACT:

THE SECOND CIRCUIT LAYS THE GROUNDWORK FOR CONTINUED APPRECIATION OF FOREIGN CULTURAL PATRIMONY LAWS

As Lawrence M. Kaye has explained, “the success achieved by foreign claimants in a number of cultural property cases in the United States should have a deterrent effect on the illicit trade in cultural property.”230 The Second Circuit is in line with this

227. Recall McClain and its progeny. See supra Section II and accompanying notes.
228. See Kaye, supra note 86, at 12-16; Johnson, 720 F.Supp. at 812.
229. See, supra note 61, U.S. v. McClain, 593 F.2d 658, 669 (5th Cir. 1979).
observation. The decision in *An Antique Platter of Gold* is positive for Italy, as the Phiale has been returned to Italy, regardless of which seizure provision of the United States Code facilitated the return. *An Antique Platter of Gold* will have a positive impact on other countries with cultural patrimony laws as well. The decision signals yet another Circuit’s acceptance of the NSPA, and foreshadows success for countries who can meet the burdens imposed by the *McClain* line of cases. In fact, Kaye has cited examples of such effect, including an action brought under the CPIA.231 Therefore, as these laws work together, the impact on the protection and preservation of cultural property, and the cooperation between nations with respect to cultural property, will ideally only increase.

Many commentators have argued, and will continue to argue, that laws like the NSPA, particularly those post-*An Antique Platter of Gold*, leave American art collectors without a fair playing field in the antiquities market, as artifacts often go to Europe because art poor countries in Europe do not have extensive cultural property protection laws.232 The response to this is two-fold. First, when objects that should not have left their country of origin in the first place are making their way to Europe instead of the United States, Americans are no longer contributing to an illicit trade. Second, the United States can set an example for other countries by enforcing laws that discourage such trade. United States laws are often referred to when other nations are developing policy and legislation, and have a great deal of impact on multilateral agreements. “[T]he participation or non-participation of the United States in any international effort to control the cultural property trade is ultimately determinative of its success or failure.”233 By having clear, effective laws such as the NSPA, the United States, particularly after the Second Circuit’s decision, allows the

American courts to set an example for others and also exemplifies a reasonable manner with which to facilitate such recognition.234

The Second Circuit, instead of contributing to the vast amount of illicit art dealing, treats other countries’ property laws in the same manner which the Untied States treats its own patrimony.235 Making antiquities an “exploitable natural resource” does nothing to ensure the safety of the objects, nor enrich the country of origin’s cultural heritage.236 “Mining” artifacts as if they were a natural resource like oil or aluminum may provide the impoverished, who are now unwitting assistants in the illicit trade, with a “legitimate” income (meaning they will no longer be paid in cash), yet it is doubtful that their pay will increase by any significant amount.


The black market in cultural property thrives because the clandestine trade is overlooked rather than regulated in many nations. Prevention of the illegal purchase of cultural property would result in a loss of trade for the looters, and therefore sites go untrammeled. Clear laws, such as the NSPA, along with the precedent of protecting cultural property, encourage the study of unharmed sites. Once sites have been adequately studied in their original state, the artifacts will be made available for public use. This is better than the current practice of some who obtain objects clandestinely and share them only with dinner guests and potential purchasers. This, in turn, will result in greater access to cultural art for those who otherwise do not have the opportunity to view such beauty or obtain such information. If archaeologists have had an opportunity to understand the works within their original environment first, we will better understand what these artifacts signify and why they are important, as participants in the common human culture. "[A]rtifacts, no matter how beautiful, cannot tell a story unless they are properly excavated."237 The Second Circuit contributes to such a tale.

V. CONCLUSION

In An Antique Platter of Gold, the Second Circuit carefully analyzed the McClain line of cases in light of relevant United States legal doctrine, statutory enactments, and departmental rulings. In so doing, the court emphasized the importance of cultural property protection, and reinforced the fact that the United States will honor cultural patrimony laws out of respect for other nations and appreciation of the human condition, both now and before. Without the benefit of understanding the culture of those who have come before us, we lose a valuable tool that enables us to make proper choices about how to handle what lies ahead. Hazel eyes are, like golden platters, merely an aesthetic wonder when

they are left without the context of, and appreciation for, who before you valued them as well.

Ann Brickley