Civil Forfeiture, Customs Law, and the Recovery of Cultural Property

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CIVIL FORFEITURE, CUSTOMS LAW,
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PROPERTY

I. INTRODUCTION

An 18-carat bookmark that once belonged to Adolf Hitler; two paintings worth $150 million that were allegedly involved in bank fraud schemes; six ancient artifacts looted from Iraq; a silver pendant bearing the image of Peter the Great, stolen from a Russian museum. These are examples of cultural property works seized by United States customs authorities in recent years.\(^1\) And, as long as the United States remains a lucrative destination for these types of goods, these examples will only expand in number and prominence. As such, the United States Government will be increasingly tasked with intercepting and forfeiting these works to their rightful owners. It will do so under a series of codified laws and procedures, the intricacies and uncertainties of which will form the basis of this article.

For much of the history of customs law, provisions have existed under the United States Code for the seizure and forfeiture of materials introduced illegally into the United States. These provisions include a wide range of sections under a number of statutes of the United States Code. Forfeiture laws apply to personal property used in the commission of crimes, such as automobiles, boats, currency, and electronics. Forfeiture of goods introduced in violation of law serves a vital end objective of separating wrongdoers from both the means of committing and the proceeds accruing from those violations of law.

These provisions also apply—in a rather interesting and exceptional way—to works of cultural property, such as paintings, sculptures, and archaeological remnants. As an example, the exceptional treatment of cultural property under forfeiture laws is demonstrated by the fact that lack of non-cultural property case law where the forfeiture provision of the customs statute (19

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U.S.C. § 1595a) is combined with the National Stolen Property Act (18 U.S.C. §§ 2314-2315) to forfeit works entering the country. Whether such treatment is simply coincidental, or perhaps the product of something closer to design, will be the focus of the following inquiry. The purpose of this article is to provide an overview on the customs forfeiture statute, Section 1595a, and to examine some areas in which application of this provision is unclear as it applies to forfeiture of cultural property works.

This article will begin with a summary of forfeiture statutes generally, as well as those used specifically in cultural property forfeitures, with specific emphasis on 19 U.S.C. §1595a (hereinafter “Section 1595a”) of the customs statute and its development throughout the twentieth century. It will then examine seminal or representative case law under these statutes involving both cultural property and non-cultural property cases and will analyze similarities and differences in treatment by the courts of these types of property under Section 1595a.

This article will then examine specific areas in which the law is either unsettled or unclear on these forfeiture provisions. The first such issue examined will be the applicable burden of proof under Section 1595a, including both the initial burden on the Government to seize property and the pleading burden on the Government when pursuing forfeiture in federal court. The second issue addressed will be the possibility of a knowledge, or scienter, requirement under Section 1595a and the availability of an innocent-owner defense under this provision.

This article will then examine whether the National Stolen Property Act encompasses something other than “theft,” and whether Section 1595a can encompass the law of a foreign nation in lieu of the National Stolen Property Act. The final issues examined will address whether, as a matter of policy, Section 1595a should be used only in concert with an ongoing criminal investigation, and whether the United States Attorneys’ use of Section 1595a in cultural property forfeitures is proper.

This article will conclude by summarizing the state of the law in this area and will offer several proposals for amendment or reform in order to further clarify areas of abuse or uncertainty.
II. THE MECHANICS OF FORFEITURE PROCEDURES

This article will begin with an introduction into general forfeiture procedure, with an emphasis on Title 19, Section 1595a of the United States Code. In the United States Code, a number of statutes exist containing forfeiture provisions. Each statute’s provisions are unique from that of another. Some statutes seek to recover the actual subject matter of a crime (e.g., illicit narcotics),\(^2\) some permit confiscation of the instrumentality of a crime (e.g., the gun used in a murder),\(^3\) some target categories of property used to aid in a crime (e.g., an aircraft used to smuggle narcotics),\(^4\) and some target the actual proceeds of a crime (e.g., currency).\(^5\) Regardless of the means employed by a forfeiture statute, however, two overarching goals underlie all such provisions: (1) separating the wrongdoer from the property or proceeds linked to a crime, and (2) returning the subject property either to its rightful place or to the Government.\(^6\)

A. Types of Forfeiture Provisions

Procedures for forfeiture also vary considerably across the types of forfeiture statutes. Three broad types of forfeiture actions are available under federal law: (1) administrative, (2) civil, and (3) criminal. Administrative forfeiture is undertaken by a federal agency, such as the Drug Enforcement Administration (DEA) or the Bureau of Customs & Border Protection (CBP), and requires only notice of seizure and notice of a forfeiture hearing to be held within a specified period of time, usually 35 days. If no claimant contests forfeiture before the expiration of the 35-day period, the property is forfeited and the relevant agency becomes its legal owner without the matter ever reaching court.\(^7\)

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3 Id. § 924(d)(1).
7 Id. at 131-32.
Civil forfeiture is an *in rem* proceeding in which the government files a complaint against the property itself in federal court. In civil forfeiture proceedings, the Government can confiscate property regardless of whether the property was owned by the wrongdoer or by some third party, illustrating one of the peculiarities and controversies of a civil forfeiture.

Criminal forfeiture is an *in personam* action in which the personal property of the defendant on trial can be forfeited. In a criminal forfeiture, if the Government can establish that the relevant property is "missing" or unaccounted for, the Government can obtain a money judgment equal in value to the lost property. Procedures for forfeiture depend largely on the category of forfeiture undertaken.

**B. Customs Forfeiture In General**

Seizure and forfeiture procedures under the customs statute (Title 19) are unique. Forfeitures under Title 19 often commence as administrative forfeitures and become civil forfeitures when a claimant files an action in court opposing seizure. Seized property, assuming such property is not intrinsically illegal (for example, a narcotic), bearing an appraised value of less than $10,000, can be released to a person with "substantial interest" in the work if that person pays the appraised value of the merchandise and does so within 20 days after notice of seizure. If no claim is made within 20 days, CBP can gain title to that merchandise through adminis-

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8 Id. at 132. Prior to passage of the Civil Asset Forfeiture Reform Act (CAFRA) in 2000, the Government, for any civil forfeiture, needed to prove only by probable cause that a nexus existed between the property and the crime at issue. See Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000) (raising the burden of proof in civil forfeiture actions and creating an innocent-owner defense in such proceedings).

9 Cassella, supra note 6, at 133.

10 Id. at 133-34.

11 Id. at 139.

trative forfeiture and may auction the property, or dispose of it as provided by law.\textsuperscript{13} If seized property is appraised at $10,000 or more, CBP must file a report with the United States Attorney’s Office in the district in which the property was seized; a claim is then filed against the property in federal court and a civil forfeiture action commences.\textsuperscript{14} Prior to seizing the property, however, the Government must demonstrate probable cause that the property is subject to seizure and forfeiture.\textsuperscript{15} Provided that the Government has met this burden, the burden shifts to the claimant to prove that the property was not subject to forfeiture under the heightened preponderance-of-evidence standard.\textsuperscript{16}

\textbf{C. CAFRA Changes Everything}

In 2000, Congress passed the Civil Asset Forfeiture Reform Act (CAFRA), which raised the burden of proof for the Government to seize and forfeit property from probable cause to the heightened preponderance-of-evidence standard.\textsuperscript{17} The Government is now required to give notice of forfeiture to occur within 60 days.\textsuperscript{18} Claimants of seized property are also entitled to an innocent-owner defense under CAFRA.\textsuperscript{19} However, while CAFRA explicitly states that it applies to all civil forfeiture actions,\textsuperscript{20} the “customs carve-out” in this statute excludes “the Tariff Act of 1930 and any other provision of law codified in Title 19” from its scope.\textsuperscript{21} Courts have explicitly held that Title 19 contains no innocent-owner defense (i.e. the right of a claimant to allege that he or she actually possesses good title) for civil forfeiture actions arising under that statute.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{13} \textit{Id.} § 1609(a).
\item \textsuperscript{14} \textit{Id.} §§ 1604, 1610.
\item \textsuperscript{15} \textit{Id.} § 1615; United States v. Davis, 648 F.3d 84, 88 (2d Cir. 2011).
\item \textsuperscript{16} 19 U.S.C. § 1615, preempted in part by United States v. Mondragon, 313 F.3d 862 (4th Cir. 2002).
\item \textsuperscript{17} 18 U.S.C. § 983(c)(1) (2012).
\item \textsuperscript{18} \textit{Id.} § 983(a)(1)(A)(i).
\item \textsuperscript{19} \textit{Id.} § 983(d).
\item \textsuperscript{20} \textit{Id.} § 983(i)(1).
\item \textsuperscript{21} \textit{Id.} § 983(i)(2)(A).
\item \textsuperscript{22} United States v. Davis, 648 F.3d 84, 95.
\end{itemize}
D. Forfeiture Under 19 U.S.C. § 1595a

Section 1595a of the customs statute allows CBP to seize property imported illegally. In relevant part, Section 1595a(c) provides: "Merchandise which is introduced or attempted to be introduced into the United States contrary to law shall be treated as follows: (1) the merchandise shall be seized and forfeited if it . . . (A) is stolen, smuggled, or clandestinely imported or introduced . . . ."\(^\text{23}\) Generally, the law under which the "contrary to law" portion of Section 1595a(c) may be satisfied in cultural property forfeitures is the National Stolen Property Act (NSPA).\(^\text{24}\) The "contrary to law" portion may also be satisfied by a provision prohibiting failure to properly complete customs documents.\(^\text{25}\) The NSPA requires the property at issue to be valued at a minimum of $5,000 and provides for an innocent-owner defense to the extent that the Government must show that the owner "knowingly" violated the law.\(^\text{26}\)

In theory, "every vessel, vehicle, animal, aircraft, or other thing used in, to aid in, or to facilitate . . ." the importation of an item introduced into the United States contrary to law is subject to forfeiture\(^\text{27}\) and any person "who directs, assists financially or otherwise, or is in any way concerned in any . . ." activities contrary to law is liable to a penalty equal to the appraised value of the seized item.\(^\text{28}\)

E. Forfeiture Under 18 U.S.C. § 545

Another relevant statute used by the Government is Section 545 of the criminal statute. That statute states:

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces or attempts to introduce into the Unit-

\(^{23}\) 19 U.S.C. § 1595a(c) (2012).
\(^{25}\) Id. § 542.
\(^{26}\) Id. §§ 2314, 2315.
\(^{27}\) 19 U.S.C. § 1595a(a) (2012).
\(^{28}\) Id. § 1595a(b).
ed States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass through the customhouse any false, forged, or fraudulent invoice, or other document or paper [shall be prosecuted] . . . .

Section 545 is another powerful means of seizing and forfeiting cultural property, often used specifically in relation to material falsities on a customs entry form.

**F. Summary of Forfeiture Procedures**

The Government possesses a range of statutory provisions to seize goods illegally introduced into the United States. These provisions can be administrative, civil, or criminal in nature and can occur under several different statutes, including the criminal statute and the customs statute. Section 1595a of the customs statute, in particular, represents one of the Government’s most powerful civil forfeiture mechanisms because it is not subject to the heightened requirements imposed on the Government by the amendments in CAFRA.

**III. A BRIEF HISTORY OF 19 U.S.C. § 1595A**

Section 1595a of the customs statute has had an illustrious history and has been tied to several key developments in the United States government’s efforts to curtail illegal entry of materials into the country. That history has spanned much of the twentieth century and has undergone key developments in recent decades. The legislative history of this forfeiture device reveals the evolution of this provision over the past century.


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and was passed on June 17, 1930. While economists have criticized the high duty rates imposed by this law as contributing to reduced exportation and a worsening of the Great Depression, the law also contains several novel provisions relating to importation of materials into the country. The overall purpose of this bill was, among other things, to “provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, [and] to protect American labor.”

Section 305 of this Act, entitled “Immoral Articles – Importation Prohibited,” allowed customs authorities to seize, inter alia, pornography, obscene books and pictures, lottery tickets, medicine to induce abortions, and seditious literature, which reflects an intent to use customs authorities as a barrier for materials that are likely to have a pernicious impact on the American public in general. The Tariff Act of 1930 also expresses concern for domestic commerce, seen through the presence of provisions barring, for example, importation of merchandise bearing counterfeit American trademarks or otherwise infringing on intellectual property rights in the United States. Section 615 of this Act establishes that the burden of proof in all relevant forfeiture matters shall be probable cause.

The embryonic form of the modern Section 1595a is Section 593 of the Tariff Act of 1930, entitled “Smuggling and Clandestine Importation.” That section provided in full that:

(a) Fraud on Revenue – If any person knowingly and willfully with intent to defraud the revenue of the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customs house any false, forged, or fraudulent invoice, or other docu-

31 Id. ch. 497, tit. IV, pmbl.
32 Tariff Act of 1930 § 305.
33 See id. § 526.
34 Id. § 615.
35 Id. § 593.
ment or paper, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding $5,000, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court.

(b) Importation Contrary to Law — If any person fraudulently or knowingly imports or brings into the United States, or assists in so doing, 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 or brought into the United States contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both.

(c) Presumptions — Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury.36

Section 593(b) of the Tariff Act of 1930 provides the ancient incarnation of modern Section 1595a.37 Early forfeitures under this provision, and its forfeiture precursor 19 U.S.C. § 483,

36 Id.
37 Note that Section 593(a) provides the initial basis for 18 U.S.C. § 545. Although the modern Section 545 was not initiated in legislation until 1948 with passage of chapter 645, 62 Stat. 716, Section 593(a) and (b) were amended contemporaneously in 1954 with passage of chapter 1213, Title V, § 507, 68 Stat. 1141 and chapter 1213, Title V, § 502, 68 Stat. 1140, respectively.
generally involved seizure and disposition of alcohol and vehicles used to transport alcohol into the United States during prohibition.  

Section 593(b) was amended in 1954 and the section number was changed to 596. The relevant provision then read:

(a) Except as [specified elsewhere], every vessel, vehicle, animal aircraft, or other thing used in, to aid in, or to facilitate, by obtaining information or in any otherway, the importation, bringing in, unloading, landing, removal, concealing, harboring, or subsequent transportation of any article which is being or has been introduced, or attempted to be introduced, into the United States contrary to law ... shall be seized and forfeited together with its tackle, apparel, furniture, harness, or equipment.

This provision replaces the word “merchandise” with “article” and removes the “fraudulently or knowingly” language in the 1930 provision.

Section 596 was subsequently amended in 1986 as part of the Government’s War on Drugs. The amendments struck “shall be seized” in the 1954 Act and changed that to a permissive “may be seized” and added a new section stating that, “(c) Any merchandise that is introduced or attempted to be introduced into the

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38 See, e.g., United States v. One Reo Coupe Automobile, 46 F.2d 816 (D.C. Mass. 1931) (involving seizure and forfeiture of car used to smuggle whiskey into the country from Canada); United States v. Hunter, 80 F.2d 968 (5th Cir. 1936) (involving seizure and forfeiture of an airplane used to smuggle forty cases of liquor from the British Virgin Island to Florida); 19 U.S.C. § 483 was repealed by the Customs Simplification Act of 1954, Pub. L. No. 768, 68 Stat. 1140 (1954), and consolidated with Section 596 to become the modern Section 1595a.


40 Id. § 596.

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United States contrary to law . . . may be seized or forfeited.  

Section 1595a also took its current statute number under these amendments. The fact that modern Section 1595a was amended as part of a seminal statute in the War on Drugs suggests that the statute was beginning to be viewed as a tool of broader and more coordinated criminal enforcement, rather than simply enforcement of customs measures. Section 1595a took its current structure during amendments to the Customs Statute during the passage of the North American Free Trade Agreement in 1993 and was then amended again in 1996 and 2006 as part of efforts to curb international terrorism and protect national security.

IV. CASE STUDIES INVOLVING SECTION 1595A

The development of Section 1595a of the customs statute over the last eight decades reveals an evolution of this provision from a measure to protect industry and wellbeing to a measure used as part of law enforcement globally. This evolved standard is illustrated in some of the following case law. This section will illustrate the Government’s application of Section 1595a in cases involving both non-cultural property and cultural property forfeitures and will then compare Section 1595a’s usage in both instances.

A. Non-Cultural Property Forfeiture Cases

Before examining application of Section 1595a in cultural property forfeitures, it will be beneficial to first examine forfeitures under this provision as applied in non-cultural property cases.

42 Id. § 3123.
As this section will demonstrate, non-cultural property cases seem to be more concerned with broader societal concerns, such as preventing drug importation and closely regulating importation of weapons and other dangerous substances, while cultural property forfeitures seem focused on making the rightful owner of the property whole again. Non-cultural property forfeitures under Section 1595a are also, oddly, much less common than cultural property forfeitures in the case law.

1. The Lobster Vessel Case

Section 1595a has occasionally been used to forfeit vessels used to import illicit drugs. An illustrative case is United States v. One Defender Lobster Vessel Named Betty II. Customs agents received a tip that a docked vessel in Florida was being used to smuggle marijuana into the country by means of a special fitted compartment installed in the vessel. Agents searched this compartment and found 12-15 grams of marijuana, along with a large amount of spoiled fish that was believed to be subterfuge in the event that the Coast Guard ever searched the vessel. The claimant and owner of the vessel in that case asserted that he was innocent given that he had merely leased the vessel out to other parties.

The Southern District of Florida in the Lobster Vessel case found that the marijuana residue found in the secret compartment was sufficient to initiate forfeiture proceedings under Section

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46 See, e.g., United States v. DeGregory, 480 F. Supp. 2d 1302 (S.D. Fla. 2006) (finding that forfeiture under 19 U.S.C. § 1595a was proper where the claimant had been found to have been using a plane to import Iridium 192, a dangerous substance, into the country in violation of 49 U.S.C. § 46312, which regulates transportation of hazardous materials).
47 See, e.g., Doherty v. United States, 500 F.2d 540 (Ct. Cl. 1974) (involving seizure of a pickup truck used to smuggle marijuana from Mexico).
49 Id. at 34.
50 Id. at 35.
51 Id.
1595a and 21 U.S.C. § 881, a drug forfeiture statute. The presence of a secret compartment on this vessel was sufficient to constitute concealment for the purposes of smuggling under Section 1595a. The claimant was also not entitled to reprieve as an innocent owner because he had failed to pursue due diligence in ascertaining the identity of the individual or individuals who leased the vessel, in determining where the vessel went when it was leased, and in properly inspecting the vessel upon return. The vessel was forfeited under both the customs statute and the drug forfeiture statute.

2. The DeGregory Case

The Lobster Vessel case presents a generic example of a court utilizing Section 1595a as a means to curtail ongoing criminal activity and to prevent great harm to society that might result from importation of materials that pose a physical danger to the public. A much more recent but still similar example is the case United States v. DeGregory, which is also from the Southern District of Florida. In DeGregory, the Government sought forfeiture of an airplane used to import Iridium 192 into Florida in violation of 49 U.S.C. § 46312, which regulates transportation of hazardous materials. The court there found that sufficient grounds existed for forfeiture under Section 1595a for violating laws relating to transport of hazardous materials. The application of Section 1595a in the DeGregory case and in the Lobster Vessel case re-

52 Id. at 36.
53 Id.
54 One Defender Lobster Vessel Named Betty II, 606 F. Supp. at 36. It is curious that the court examined the possibility of an innocent-owner defense under Section 1595a since it had been held in the 1930s that the customs statute did not provide for such a defense. See General Motors Acceptance Corp. v. United States, 286 U.S. 49, 57 (1932).
55 480 F. Supp. 2d 1302 (S.D. Fla. 2006).
56 Id. at 1303-04.
57 Id. at 1306. The court’s decision in this case does not specify which subsection of Section 1595a was violated, although presumably it was either the “smuggled” or the “clandestinely imported or introduced” portion of Section 1595a(c)(1)(A).
veals an intent to use customs laws to protect the basic health and safety of the public. The customs statute may be a useful means of fulfilling these kinds of health and safety concerns if some nexus with international travel can be established.

3. The Douglas Aircraft Case

Section 1595a has also been used to impose forfeiture of weapons and related components that were imported contrary to law. In the case of United States v. One Douglas AD-4N Skyraider Aircraft, the Government sought forfeiture of both an aircraft and related armaments that were imported contemporaneously and then seized. A company in Alabama arranged to have an aircraft and cannons for that aircraft imported separately from France. Invoices for the aircraft indicated that it was not to be used for any type of military purpose and the invoice for the cannons labeled the shipment merchandise as “Aircraft Parts: Other.” The Government sought forfeiture of both the aircraft and the cannons on two grounds: (1) that the aircraft and the cannons did not possess the required permits necessary under 22 C.F.R. § 121.1 (the United States Munitions List) in violation of 19 U.S.C. §1595a(c)(2)(B), which criminalizes importing merchandise without required documentation or permits; and (2) that the aircraft and cannons were “clandestinely imported” as a result of material misrepresentations on importation documents in violation of 19 U.S.C. § 1595a(c)(1)(A) with the underlying law encompassing 18 U.S.C. §§ 542 and 545.

The court in that case ultimately found that forfeiture could be fully obtained under Section 1595a(c)(2)(B) for failing to obtain

59 Id. at 1245-46.
60 Id. at 1245.
61 19 U.S.C. § 1595a(c)(2)(B) provides that, “Merchandise which is introduced or attempted to be contrary to law ... may be seized and forfeited if ... its importation or entry requires a license, permit or other authorization of an agency of the United States Government and the merchandise is not accompanied by such license, permit, or authorization.”
required permits and did not reach the issue of the applicability of
Section 1595a(c)(1)(A) for clandestine importation contrary to
law. The Government’s motion for summary judgment was
thereafter granted.

The material misstatements in the Douglas Aircraft case
above, namely failing to properly classify the aircraft as a military
aircraft and failing to label the cannon components properly, are
substantially similar to those made in the case United States v. One
Triangular Fresco Fragment (hereinafter “Paestum Fragment”) that
will be discussed in the section on cultural property cases be-
low. As will be shown below, the misstatements made in that
cultural property forfeiture related to classification of the frescos
as “personal” items rather than as items for sale. This perhaps
suggests that misclassification in itself can constitute a form of
smuggling for purposes of Section 1595a(c)(1)(A), although the
Douglas Aircraft case never reached this analysis and the property
in the Paestum Fragment case was eventually abandoned and will
not be adjudicated.

4. The 3,527 Firearms Case

A similar case to that of Douglas Aircraft is United States
v. Three Thousand, Five Hundred, and Twenty-Seven (3,527)
Firearms, one also involving forfeiture of weapons under Section
1595a. The Bureau of Alcohol, Tobacco, and Firearms (ATF)
searched the property of a firearms licensee and discovered ma-
chinegun barrels from Hungary illegally attached to a number of
weapons on the premises; the Government subsequently seized
these weapons and moved for forfeiture.

The Government brought forfeiture proceedings under two
sub-sections of Section 1595a: (1) Section 1595a(c)(2)(B) on the
grounds that the licensee had failed to state specifications on re-

\[63\] Id. at 1254.
\[64\] Id.
\[65\] Complaint at 7, United States v. One Triangular Fresco Fragment, No.
\[66\] Id.
\[68\] Id. at *1.
quired ATF forms relating to gun capabilities, origin of components, etc., in violation of 22 U.S.C. § 2778(c); and (2) Section 1595a(c)(1)(A) on the grounds that the components had been clandestinely imported contrary to law in violation of 18 U.S.C. § 925(d)(3), which prohibits importation of gun components that would render the assembled gun illegal. The licensee-claimant moved to dismiss on the grounds that the complaint failed to allege a specific “contrary to law” provision violated under either one of these sub-sections and had otherwise failed to allege that the components were imported clandestinely or without proper licenses.

The court in 3,527 Firearms held for the Government on both counts of the complaint finding that evidence was sufficient to find that the components were “clandestinely imported or introduced” contrary to law under Section 1595a(c)(1)(A), coupled with 18 U.S.C. § 925(d)(3) criminalizing introduction of illegal gun components, and were not accompanied by required licenses or permits as required under Section 1595a(c)(2)(B) coupled with 22 U.S.C. § 2778(c). Unfortunately, the court did not go into a detailed explanation as to how it arrived at these legal conclusions.

5. Summary of Non-Cultural Property Forfeiture Cases

The Government’s treatment of the preceding non-cultural property forfeiture cases illustrates an executive branch that is concerned with protecting the health and welfare of its people against the importation of harmful goods. The cultural property case studies in the following section will reveal a very different approach to Section 1595a by the Government.

B. Cultural Property Forfeiture Cases

The number of forfeitures involving cultural property has increased dramatically over the past fifteen years. Many of these cultural property forfeitures, as illustrated by the three cases ana-

69 22 U.S.C. § 2778 states the registration and license requirements needed to import weapons into the United States.
71 Id. at *4, *8-*9.
72 Id. at *9.
lyzed in this section, were undertaken under Section 1595a in particular. These cases illustrate a variety of ways in which treatment of cultural property under forfeiture laws is distinct from treatment of other types of property.

1. The Gold Phiale Case

The Gold Phiale case is one of the most iconic cases in cultural property law. In 1999, the Second Circuit Court of Appeals decided the case United States v. An Antique Platter of Gold (hereinafter “Gold Phiale”).\(^\text{73}\) This case stands for the proposition that false statements on a customs importation form alone constitute grounds for forfeiture of cultural property. The cultural property at issue in that case was a fourth-century B.C.E. gold platter from Sicily. In 1991, the platter was sold by its Sicilian possessor to a Swiss art merchant, who, in turn, brought it to the attention of New York art dealer Robert Haber.\(^\text{74}\) Haber purchased the platter for $1.2 million on belief that a client, Michael Steinhardt, would be interested in purchasing the platter.\(^\text{75}\) Haber traveled to Switzerland and took possession of the platter on or around December 12, 1991 in Lugano, near the Italian border.\(^\text{76}\)

Haber listed the country of origin for the platter as Switzerland and valued the work at $225,000.\(^\text{77}\) The platter then entered the United States at the Port of New York and was turned over to Michael Steinhardt, who soon consigned the platter to the Metropolitan Museum of Art to verify the work’s authenticity.\(^\text{78}\) The Italian government requested return of the piece in February 1995 and agents seized the platter on November 9, 1995.\(^\text{79}\) The United States Attorney’s Office filed civil forfeiture proceedings under two separate statutes: (1) 18 U.S.C. § 545 with 18 U.S.C. § 542 satisfying the “contrary to law” provision of that statute for false statements on importation forms, and (2) 19 U.S.C. § 1595a with

\(^{73}\) 184 F.3d 131 (2d Cir. 1999).
\(^{75}\) Id. at 225.
\(^{76}\) Id. at 226.
\(^{77}\) Id.
\(^{78}\) Id.
\(^{79}\) Id. at 226-27.
the NSPA (18 U.S.C. § 2314) satisfying the "contrary to law" provision of that statute for introduction of stolen goods. 80 Michael Steinhardt was the relevant claimant contesting forfeiture.

The district court found the Government had met its burden of showing probable cause under both counts. 81 The district court was satisfied that Italy's cultural patrimony laws could satisfy ownership as a predicate to establish that the platter was "stolen" under the NSPA. 82 The district court also adopted the Government's interpretation of Section 542's materiality requirement as "natural tendency to mislead," as opposed to the higher "but-for" standard advocated for by Michael Steinhardt. 83 The Government met its burden under this standard by pointing out that the country of origin listed (Switzerland) would not have raised any red flags with Customs agents, but the actual country of origin (Italy) would have. 84 This material misrepresentation was sufficient to satisfy importation contrary to law under Section 545 with Section 542 as the underlying law.

The district court also found that the Government had shown probable cause to forfeit the platter under Section 1595a and the NSPA. 85 Various facts established that Haber knew the platter was stolen when he took possession of it and introduced it into the United States. Haber took possession of the platter near the Italian border and drove across Switzerland to Zurich to fly back to New York, when it would have been geographically more practical to fly back from Milan. 86 Haber had also informed Steinhardt that the platter's twin was located at the Met and its original owner was a Sicilian coin dealer. 87

On appeal, the Second Circuit affirmed the district court's "natural tendency" interpretation of Section 542 and found that

81 Id. at 230, 232. This case was decided pre-CAFRA and probable cause was the government's burden of proof under Section 545 as well as Section 1595a.
82 Id. at 232.
83 Id. at 230.
84 Id.
85 Id. at 232.
87 Id.
this provision alone was sufficient for forfeiture under Section 545. The Government had sufficiently established probable cause under its Section 545 claim; therefore, it was not necessary to reach the issue of Section 1595a on appeal.

Given that CAFRA in 2000 raised the Government’s burden of proof from probable cause to preponderance of evidence, it is debatable whether the Government would have been able to sustain its forfeiture case under Section 545 with the evidence presented. However, the district court’s finding that Section 1595a was satisfied under probable cause is probably nonetheless sufficient given that Section 1595a was untouched by CAFRA. Gold Phiale represents one of the seminal cases in which Section 1595a was applied in a cultural property forfeiture proceeding. This case has also influenced subsequent cases involving civil forfeiture of cultural property, including the following case involving a sandstone sculpture from Cambodia.

2. The Cambodian Sandstone Sculpture Case

More recently, the Southern District of New York had cause to examine Section 1595a’s application in a forfeiture action against a Cambodian sculpture. This case is relevant, in part, because it demonstrates the Government’s treatment of cultural property forfeitures post-CAFRA. Sotheby’s auction house became embroiled in this forfeiture action as claimant in the case of United States v. A 10th-Century Cambodian Sandstone Sculpture (hereinafter, “Cambodian Sandstone Sculpture”). That case involved a mounted warrior sculpture believed to have originated in Cambodia and to have been looted from the Koh Ker site in that country in 1972. The Complaint in that case alleged that the Sculpture had been sold to a collector shortly after 1972 and who

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88 United States v. An Antique Platter of Gold, 184 F.3d 131, 134 (2d Cir. 1999). The appeals court rendered no opinion on whether Italy’s cultural patrimony laws would be applicable under Section 545. Section 545 could presumably have been invoked to establish that the platter’s provenance had been obscured to facilitate smuggling.

had reason to believe that the work had been looted from Koh Ker. The Belgian businessman purchased the Sculpture from this collector and that businessman’s wife tried to sell the work through Sotheby’s.

The Government sought forfeiture of that work on three bases: (1) 18 U.S.C. § 981(a)(1)(C) as proceeds of illegal activity under the NSPA (18 U.S.C. § 2314), (2) Section 545 and the NSPA (18 U.S.C. § 2314) as objects illicitly transported in international commerce with Sotheby’s knowledge that the works were stolen, and (3) Section 1595a and the NSPA as objects illicitly transported in interstate commerce with Sotheby’s knowledge that the works were stolen.

In denying Sotheby’s motion to dismiss, the district court stated that the government under such theories must plead (1) that the statue was stolen, (2) that the statue remained stolen at the time of import into the United States, and (3) that Sotheby’s knew that the statue was stolen. The district court denied Sotheby’s motion to dismiss because (1) the Government had shown sufficient evidence that the Sculpture qualified as stolen to survive a motion to dismiss; (2) the Government met its burden under a motion to dismiss of showing that the Sculpture was stolen at the time of import and that Sotheby’s had been unable to rebut that presumption; and (3) the Government sufficiently pled facts to establish that Sotheby’s knew that the Sculpture was Khmer, was missing its ankles (which suggested illicit looting), and appeared on the market at the time of known looting within the art community.

The district court’s opinion emphasized the fact that Sotheby’s was an expert on Southeast Asian art and must have known that the Sculpture at issue had been looted and then illegally introduced. The Government also alleged that Sotheby’s also knew that the collector had sold the work in 1975 and was aware of the

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90 Id. at 8. The looting at Koh Ker was apparently widely known within the international art community.
91 Id. at 9.
94 Id.
95 Id. at 8-10.
96 Id. at 10.
Sculpture’s inaccurate provenance. These facts accepted as true were sufficient to defeat Sotheby’s motion to dismiss. The Government’s allegations in the Cambodian Sandstone Sculpture case present an example of the Government fulfilling its burden of proof to defeat a motion to dismiss in a cultural property case from New York.

3. The Paestum Fragment Case

Most recently, the United States Attorney’s Office for the Eastern District of New York filed forfeiture proceedings in relation to a fresco fragment allegedly from the archaeological site of Paestum in Italy that was recovered upon entry into the United States. This case also represents another post-CAFRA example of the Government’s use of forfeiture provisions in a cultural property case. In United States v. One Triangular Fresco Fragment (hereinafter, “Paestum Fragment”), the Government alleged that the fragment was subject to forfeiture under Section 1595a(c)(1)(A) with the “contrary to law” provision satisfied by both Section 542 and the NSPA. The fragment was shipped from Switzerland to New York by a dealer named Schwarz on April 19, 2013 on behalf of a citizen of Lichtenstein to be purchased by Michael Steinhardt. The airway bill filled out by Schwarz declared the fragment’s country of origin as Morocco and its intended use as “personal” rather than “for sale.” CBP agents seized the fragment on April 20, 2013 at Newark International Airport and requested further provenance information from Schwarz. Schwarz supplied an affidavit of provenance, which stated that the fragment was being shipped to New York to display to a potential purchaser, that the fragment’s country of origin was Macedonia, and that it had been in Switzerland since 1959. Both

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97 Id.
98 Id.
100 Id. at 7. Michael Steinhardt was also the relevant claimant in the Gold Phiale case mentioned previously.
101 Id.
102 Id.
statements were inconsistent with statements made on the airway bill.\textsuperscript{103}

Investigators subsequently showed photographs of the fragment to an art expert who identified the fragment as similar to other works from the Paestum archaeological site in Italy.\textsuperscript{104} The Italian Carabinieri/TPC concurred and identified the fragments as part of a section of the Paestum site that had been excavated in 1969, ten years after the affidavit of provenance reported the work in private ownership in Switzerland.\textsuperscript{105} The TPC also noted that thefts had occurred from the Paestum site and no export permits had ever been issued for the Paestum site by the Italian government.\textsuperscript{106}

The Government’s Complaint alleges that the facts established above are sufficient to show that both the country of origin declaration and the affidavit of provenance were false.\textsuperscript{107} The false declarations of country of origin indicate that the fragment’s importers were aware of Italy’s cultural patrimony laws and were trying to circumvent those laws.\textsuperscript{108} The Government also sought forfeiture under Section 1595a(c)(1)(A) as “stolen” in violation of Italy’s cultural patrimony laws and the NSPA.\textsuperscript{109}

The Government’s attempt to couple Section 1595a-c(1)(A) with Section 542 of the criminal statute is interesting as it implies that the Government may also be seeking recovery under the “smuggled” or “clandestinely imported or introduced” portions of Section 1595a-c(1)(A), although the Government only ever alleges that the fragment was “stolen.”\textsuperscript{110} It seems somewhat redundant to pursue forfeiture for false statements made on import documents under Section 542 when forfeiture would be guaranteed if the Government could establish that the work was stolen. The in-

\textsuperscript{103} Id.
\textsuperscript{104} Id. at 8, United States v. One Triangular Fresco Fragment, No. 13 Civ. 6286 (E.D.N.Y. Nov. 13, 2013).
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 9.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 5-6.
\textsuperscript{109} Id. at 5-6, 10.
\textsuperscript{110} See Complaint at 6, 10, United States v. One Triangular Fresco Fragment, No. 13 Civ. 6286 (E.D.N.Y. Nov. 13, 2013).
clusion of Section 542, in addition to a claim under the NSPA, seems to be more of a guaranteed safeguard given the ease of establishing the falsity of a statement on a customs document compared to establishing whether property was stolen from a foreign country.

4. A Comparison of Cultural Property and Non-Cultural Property Forfeiture Cases

These cultural property cases, when examined against some of the non-cultural property cases discussed in the previous section, indicate some ways in which Section 1595a is treated differently between these two categories of property. First, as mentioned previously in this section, many of the extant non-cultural property cases seem to reflect the behavior of a government that is concerned with protecting the health and safety of its citizens by curtailing importation of such things as illicit drugs, hazardous chemicals, and weapons. This seems to suggest that the Government is viewing Section 1595a as a means of using the customs statute to counter harmful importation of dangerous items even after those items have been in the country for some time. This seems to be a correct public policy result given the importance of curtailing abuse of drugs, hazardous materials, and weapons. In contrast, the public policy concerns underlying Section 1595a cultural property forfeitures seem somewhat less compelling. Furthermore, seizing cultural property that has been in the country for some time seems to implicate less-compelling governmental interests than seizing property that involves a fundamental public health or safety concern.

Second, in the non-cultural property forfeitures examined previously, the Government did not readily rely on multiple forfeiture statutes in the same complaint, such as 18 U.S.C. § 545 or § 981, but instead used only Section 1595a, albeit sometimes different sub-sections of that provision. This result makes sense in light

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111 The most commendable purpose for forfeiting cultural property would be to right an ongoing wrong and to prevent the United States, a key market for such materials, from gaining a reputation for lax enforcement of cultural property misuse.
of CAFRA because the Government is subject to a lower burden of persuasion under the forfeiture provisions of Title 19 than under the forfeiture provisions of Title 18.\textsuperscript{112} Given this course of action in non-cultural property forfeitures, it is curious that the Government would nonetheless choose to pursue multiple forfeiture statutes under different titles of the United States Code simultaneously in cultural property cases, as it did, for example, in the \textit{Cambodian Sandstone Sculpture} case.\textsuperscript{113} It may be possible that the Government views non-cultural property cases as more standard and predictable in result, while cultural property cases may retain an element of novelty and uniqueness for prosecutors.

The absence of a great many non-cultural property cases in the case law referencing Section 1595a is also somewhat puzzling. This may well be because interested parties in non-cultural property forfeitures are more likely to simply walk away from seized property and never file a claim (many parties here are, indeed, criminals), while interested parties in cultural property forfeitures may have a greater personal stake in the seized property and are thus willing to see a claim through to disposition.\textsuperscript{114} Assuming this hypothesis is true, it may be due to key differences in the value of the property at issue, either monetarily or sentimentally, or perhaps due to a greater belief among owners of cultural property materials that they have not violated any laws by introducing these items into the United States.

Cultural property forfeiture cases under Section 1595a present an interesting contrast to the use of that provision in the context of non-cultural property cases. With that background into

\textsuperscript{112} See 18 U.S.C. § 983(i)(2)(A) (2012) (a/k/a the “Customs Carveout”).


\textsuperscript{114} Claimants in cultural property cases do walk away from forfeited property, for example in the \textit{Paestum Fragment} case. \textit{See Paestum Fragment}, No. 13 Civ. 6286 (E.D.N.Y. Nov. 13, 2013). However, claimants in more high-profile cases involving cultural property, for example \textit{Gold Phiale} and \textit{Cambodian Sandstone Sculpture}, generally do not walk away from the property. \textit{See United States v. An Antique Platter of Gold}, 184 F.3d 131; \textit{Cambodian Sandstone Sculpture}, No. 12 Civ. 2600, 2013 WL 1290515 (S.D.N.Y. Mar. 28, 2013).
Section 1595a in mind, it will be helpful to now explore areas and issues that remain either ambiguous or unknown with regard to the treatment of Section 1595a in cultural property forfeitures.

V. UNRESOLVED ISSUES

Having examined the mechanics of civil forfeiture provisions, in particular Section 1595a of Title 19, the history of Section 1595a, and case law applying Section 1595a in both cultural property and non-cultural property contexts, this article will now explore issues involving customs forfeiture provisions that remain unclear under the law. These issues include: (1) the burden of proof under Section 1595a, (2) the possibility of a scienter requirement under Section 1595a, (3) whether or not the NSPA provides for something other than theft, (4) whether the "contrary to law" language in Section 1595a encompasses foreign law as well as U.S. law, (5) whether civil forfeiture of cultural property works should be used only in ongoing criminal investigations, and (6) whether Section 1595a is being used appropriate by the United States Attorneys.

A. Burden of Proof Under Section 1595a

As mentioned briefly in Section III of this article, forfeiture statutes differ in the burdens of proof they require the Government to meet prior to forfeiture. Section 1595a of the customs statute requires a mere showing of probable cause on the part of the government in order to forfeit property; the burden then shifts to the claimant to rebut this probable cause showing by presenting evidence that the property is not subject to forfeiture, or that the claimant is entitled to some defense, under the heightened preponderance-of-evidence standard.\(^\text{115}\) Hearsay evidence may be used to establish probable cause in civil forfeiture actions.\(^\text{116}\)

As a result of CAFRA, all forfeiture statutes not included under Title 19, such as Section 545 of the criminal code, require


\(^{116}\) Id. at 1378.
the Government to show proof under the heightened preponderance-of-evidence standard prior to forfeiture.\(^{117}\) The statutes affected by CAFRA now also contain an innocent-owner defense as a means to further rebut this presumption.\(^{118}\) If the Government’s theory is that the property was used to “commit or facilitate a criminal offense, or was involved in the commission of a criminal offense,” the Government may seize that property but must first show a nexus between the property and the underlying criminal offense.\(^{119}\) A claimant must first establish standing before being able to rebut a showing by the government under either standard.\(^{120}\)

When Congress was creating the modern Section 1595a as a forfeiture provision under the customs statute as part of the amendments made in the Anti-Drug Abuse Act of 1986, commentators in the customs field observed that the burden of proof under such a standard would be probable cause, as opposed to the criminal beyond-a-reasonable-doubt standard used under Title 18 provisions.\(^{121}\) These commentators, working in the government sector in 1986, also speculated that the Government would be more likely to pursue forfeiture under Section 1595a “if for no other reason than to avoid questions about burdens of proof.”\(^{122}\) This suggests that, from its modern inception through amendment in the 1980s, Section 1595a has been understood by practitioners within the Government as a provision that can be utilized to avoid the heightened burden of proof to be established in criminal forfeiture provisions. It also suggests that debate existed as to the applicable bur-

\(^{117}\) 18 U.S.C. § 983(c)(1) (2012); United States v. Davis, 648 F.3d 84, 94. Forfeitures under Title 19 utilizing provisions of the criminal code as the underlying law, for example Section 1595a coupled with the National Stolen Property Act, still appear to require a lower probable cause burden even though a criminal statute is utilized in such a proceeding.

\(^{118}\) 18 U.S.C. §983(d); Davis, 648 F.3d at 94.

\(^{119}\) 18 U.S.C. §983(c)(3).

\(^{120}\) United States v. One 18th Century Colombian Monstrance, 797 F.2d 1370, 1374-1375 (5th Cir. 1986).


\(^{122}\) Id.
dens of proof under the criminal code prior to the passage of CAFRA.

The case of *United States v. Mask of Ka-Nefer-Nefer* presents a unique situation in which the Government failed to meet its burden of pleading facts sufficient to support a claim under Section 1595a in a cultural property case.\(^{123}\) The cultural property at issue in that case was a 3,200-year-old Egyptian mask.\(^{124}\) Evidence indicates that the Mask was excavated from its resting site in 1952, stored until 1959, sent to Cairo and then to a town called Saqqara and then back to Cairo in 1966, and then kept in storage until 1973 when it was discovered missing.\(^{125}\) The Government sought recovery of the Mask, now in St. Louis, under Section 1595a(c)(1)(A) on the basis that the Mask was stolen from Egypt. The district court in that case found that Section 1595a requires a two-prong pleading standard establishing “(1) facts relevant to whether the Mask was ‘stolen, smuggled or clandestinely imported or introduced’ and (2) facts related to some predicate unlawful offense, presumably a law with some ‘nexus’ to international commerce from which the Title 19 customs regulation arises.”\(^{126}\)

The court held in *Mask of Ka-Nefer-Nefer* that the Government had failed to meet this pleading standard by not connecting “missing” from Egypt in 1973 to “stolen” and then exported.\(^{127}\) The court provided five factors that were missing from the Government’s assertion that the Mask was stolen and then illegally exported: “(1) an assertion that the Mask was actually stolen; (2) factual circumstances relating to when the Government believes the Mask was stolen and why; (3) facts relating to the location from which the Mask was stolen; (4) facts regarding who the Government believes stole the Mask; and (5) a statement or identification

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\(^{123}\) The current federal pleading standard to withstand a motion to dismiss requires a showing of “plausibility” in the underlying claim. See Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Iqbal v. Ashcroft, 556 U.S. 662 (2009).


\(^{125}\) *Id.*

\(^{126}\) *Id.* at *2-3.

\(^{127}\) *Id.* at *3.
of the law which the Government believes applies under which the Mask would be considered stolen and/or illegally exported."  

The *Mask of Ka-Nefer-Nefer* case presents an unusual example of the Government failing to satisfy its pleading burden in a forfeiture action involving cultural property. The court in that case provided useful and specific guidance as to the scope of the pleading standard required under this burden. Thus, the Government’s burden of proof under Section 1595a, as case law has interpreted, remains the lower probable-cause standard.

**B. Scienter**

A similar unresolved issue under Section 1595a is the possible existence of a knowledge, or scienter, requirement. Many forfeiture statutes contain some requirement that the person introducing the property into the country did so with knowledge of the wrongness of his or her actions or with intent to commit a crime. For example, the National Stolen Property Act of Title 18, (which, as this article has demonstrated, is often used as the underlying law in the “contrary to law” section of forfeiture statutes such as Section 1595a) contains the following relevant language:

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, *knowing* the same to have been stolen, converted or taken by fraud [is subject to prosecution].

Title 18, Section 545 of the Criminal Code provides a similar knowledge requirement:

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128 *Id.* at *3. The law to be identified under the fifth factor mentioned by the court would logically have been the NSPA and it seems quite odd that the Government failed to include such an important provision under a Section 1595a forfeiture.

129 The court in the *Ka-Nefer-Nefer* case refused to allow the Government leave to amend its complaint. The Government appealed this point, but the appellate court affirmed the district court’s dismissal. *See* United States v. Mask of Ka-Nefer-Nefer, 752 F.3d 737 (8th Cir. 2014).

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces or attempts to smuggle or clandestinely introduce into the United States any merchandise . . . [or] 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 or brought into the United States contrary to law . . . shall be fined under this title or imprisoned not more than 20 years, or both . . . \(^{131}\)

Criminal intent, or mens rea, is a prerequisite for prosecution under most criminal statutes and the above provisions are no exception. The inclusion of language requiring a possessor of stolen or otherwise illegally introduced property to have known that he or she did not lawfully own the property at issue is in keeping with standards of criminal prosecutions that require defendants to have actually known that their actions were wrong.

1. Scienter and Section 1595a

Interestingly, it is the subject of some debate whether the forfeiture clause under the customs statute, Section 1595a, contains any knowledge requirement. Section 1595a provides seizure and forfeiture of merchandise that is "stolen, smuggled, or clandestinely introduced."\(^{132}\) Section 1595a omits Section 545's scienter language ("knowingly and willfully with intent"), suggesting that it has not incorporated any such standard.\(^{133}\) However, the plain meaning of the terms "smuggled" or "clandestinely imported or introduced" seem to suggest some form of intent to prevent customs agents from detecting these items.\(^{134}\)

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\(^{131}\) Id. § 545 (emphasis added).


\(^{134}\) Id.; see also United States v. Kurfess, 426 F.2d 1017, 1019 (7th Cir. 1970) (stating that the terms "smuggle" and "clandestinely introduce" entail "any method of introducing goods into the country surreptitiously by concealment or fraud").
a. A Painting Called Hannibal

The recent case *United States v. A Painting Called Hannibal* addressed the issue of scienter under Section 1595a. That case involved the shipment of two works of art, one a painting and the other a Mediterranean sculpture. The relevant purchaser had paid $1,000,000 for the painting and $600,000 for the sculpture. Upon shipment into the Port of New York, the relevant customs documents stated that both works were worth no more than $100. Upon seizure by customs agents, the combined pieces were appraised at $8,000,000. The Government brought forfeiture action for these works under Section 1595a on theory that both pieces were smuggled by way of false invoices.

The District Court for the Southern District of New York found for the Government and the Second Circuit Court of Appeals remanded solely to introduce further evidence as to whether or not the works were smuggled. On remand in that case, the Southern District of New York sought to determine whether Section 1595a contained a scienter requirement. The court in that case found that the issue was ambiguous and ultimately unimportant as the Government would prevail in its forfeiture action regardless of whether or not scienter was required. Given that the invoices, on which customs agents were to determine whether or not to introduce the works into the country, did not contain a “detailed description of the merchandise” nor an accurate purchase price paid for either item, the Government could sufficiently estab-

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136 *Id.* at *1.
137 *Id.*
138 *Id.*
139 *Id.*
141 *Id.* at *2.
142 *Id.* at *3.
143 *See id.* at *4; *c.f.* United States v. Davis, 648 F.3d 84, 93-95 (holding that Section 1595a clearly did not contain a scienter requirement nor did it provide for any type of innocent-owner defense).

https://via.library.depaul.edu/jatip/vol25/iss2/4
lish that the property had been smuggled within the meaning of Section 1595a. The act of materially misrepresenting key details on a customs invoice by itself seems to be satisfactory to constitute smuggling under Section 1595a.

b. The Portrait of Wally

In the Portrait of Wally litigation, the Government sought seizure of a 20th-century painting by artist Egon Schiele that was in the United States on loan from a Viennese museum owned and operated by Dr. Rudolph Leopold. The painting at issue had belonged to a Jewish woman from Vienna named Lea Bondi who was forced to sell the painting to Friedrich Welz, a Nazi Party official, during the Holocaust. Following the Second World War, Bondi contacted Dr. Leopold to assist her in recovering the Wally painting. Bondi informed Leopold that she was the owner of Wally. Leopold, in turn, purchased Wally and kept it for himself. While Wally was on loan in New York, the Government brought a forfeiture action under Sections 545 and 1595a on the theory that Wally had been stolen or converted under the NSPA.

The district court in that case, in denying Dr. Leopold's motion to dismiss the case, found that the Government had sufficiently pled facts to establish that Dr. Leopold had the requisite mens rea to support a finding that he knew Wally was stolen or converted when he took possession of it. The fact that Lea

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145 Under this reasoning, the Government in the Gold Phiale case could also have brought a claim under the “smuggled” portion of Section 1595a(c)(1)(A) in addition to its “theft” claim.
147 Id.
148 Id. at *3.
149 Id.
151 Id. at *4.
152 Id. at *25-26.
Bondi had informed Dr. Leopold on several occasions that she owned Wally, coupled with Dr. Leopold’s efforts to disguise Wally’s provenance to evade periods of disputed title, constituted sufficient allegation of mens rea to defeat a motion to dismiss. In later proceedings in this case, that district court precluded the Government’s summary judgment motion for forfeiture finding that evidence was insufficient that Dr. Leopold actually knew the work was stolen or converted. A trial was ordered to determine this issue of fact, but no ruling was ever issued due to a settlement in the case.

The Portrait of Wally litigation, which spanned several court decisions and many years, serves as useful analysis as to the applicability of scienter under Section 1595a. It is fair to conclude, as a result of this litigation, that the Southern District of New York imputes some scienter requirement into this statute. However, this author is not aware of any case law suggesting that any other district court imputes such a requirement as well.

2. Scienter and the Innocent-Owner Defense

Closely related to the subject of scienter is the possible existence of an innocent-owner defense under Section 1595a. This issue was examined by the Second Circuit Court of Appeals in the United States v. Davis case. The claimant’s company in that case purchased Camille Pissarro’s monotype, “Le Marché,” for the work’s market value in 1985, unaware that the work had been stolen from a French museum in 1981. The claimant, Davis, took personal possession of the work in 1992 and remained in possession for more than 10 years until she consigned the work to Sotheby’s for sale; the Government seized the monotype at the request of French authorities and initiated forfeiture proceedings in 2006. The Government alleged forfeiture under three theories, the most relevant one being a claim under Section 1595a that the

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153 Id.
155 648 F.3d 84 (2d Cir. 2011).
156 Id. at 87.
157 Id.
work was stolen in violation of the NSPA.\textsuperscript{158} Davis asserted that she was entitled to an innocent-owner defense under Section 1595a.\textsuperscript{159}

The Second Circuit held that Section 1595a did not contain an innocent-owner defense.\textsuperscript{160} The court first found that because the action here was a civil \textit{in rem} forfeiture, proceedings were subject to lesser procedural and substantive deference than a true criminal prosecution.\textsuperscript{161} The court specifically found that Section 1595a's explicit language ("shall be seized and forfeited") was unambiguous and indicates intent to forfeit illicit materials as a "matter of course."\textsuperscript{162} The court also cited to early customs laws' exclusion of an innocent-owner defense\textsuperscript{163} and the general view at the time of its adoption that penalties under the Tariff Act of 1930, of which Section 1595a is part, could be asserted even against innocent parties.\textsuperscript{164} This result may be harsh, but it is necessary, the court found, to ensure the effectiveness of customs regulation.\textsuperscript{165} Furthermore, the CAFRA "carve-out" of Title 19 is explicit in its refusal to impute an innocent-owner defense onto the customs statute and no provision examined by the court indicates a contrary intent.\textsuperscript{166} The \textit{Davis} decision clearly states that an innocent owner of cultural property cannot use his or her lack of knowledge as a defense under Section 1595a.

3. Summary of Scienter

Scienter is an important part of a quasi-criminal civil forfeiture proceeding and may arguably be imputed onto the customs

\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.} at 87-88.
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{United States v. Davis}, 648 F.3d 84, 92.
\textsuperscript{162} \textit{Id.} at 93.
\textsuperscript{163} \textit{Id.} (citing \textit{United States v. Bajakajian}, 524 U.S. 321, 330 (1998)).
\textsuperscript{164} \textit{Id.} (citing \textit{Gen. Motors Acceptance Corp. v. United States}, 286 U.S. 49, 57 (1932)).
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.} at 94-95.
statute.\textsuperscript{167} Criminal intent is a required element in a criminal prosecution. Customs and border protection measures, in contrast, would not generally require intent as a prerequisite to seize and forfeit an item because the overall concern of such measures is to ensure the integrity of the United States border, rather than to impose criminal sanctions for violation of a law. However, it seems that offenses such as smuggling or clandestine importation, as used in provisions such as Section 1595a of the customs statute, contain an element of either knowledge or intent to commit these types of wrongs. The case law remains unsettled on this point.

In addition to scienter, another unresolved issue involving civil forfeiture of cultural property is whether such actions could be pursued under the National Stolen Property Act for crimes such as conversion or a taking by fraud, in addition to theft.

\textbf{C. Does the National Stolen Property Act Encompass Something Besides Theft?}

One interesting facet of the \textit{Portrait of Wally} litigation, described in the previous section, is the applicability of conversion as a means of recovering cultural property under civil forfeiture statutes. The National Stolen Property Act criminalizes transporting property with knowledge that that property is "stolen, converted, or taken by fraud."\textsuperscript{168} "Conversion" within the meaning of the NSPA is defined as "[u]nauthorized and wrongful exercise of dominion and control over another’s personal property, to the exclusion of or inconsistent with the rights of the owner."\textsuperscript{169} Conversion may encompass both unlawful possession from inception and unauthorized exercise of dominion even after possession of the property is lawfully obtained. Conversion and theft can often arise in tandem as well.


\textsuperscript{168} 18 U.S.C. § 2314 (2012); \textit{see also} United States v. Portrait of Wally, 663 F. Supp. 2d 232, 250.

\textsuperscript{169} \textit{Portrait of Wally}, No. 99 Civ. 9940 (MBM), 2002 WL 553532, at *23 (S.D.N.Y. April 12, 2002) (quoting United States v. Smith, 686 F.2d 234, 242 (5th Cir. 1982)).
Forfeiture of cultural property under a statute using the NSPA as its enabling law has traditionally relied upon the "theft" prong of the NSPA as its basis. Courts have held that "stealing" for purposes of "stolen" or "theft" under statutory law "is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another and deprives the owner of the rights and benefits of ownership." This is most likely due to substantial evidence of theft in cases involving cultural property illegally imported into the United States. Facts supporting a claim for conversion alone seem unlikely to arise in practice. However, the Southern District of New York in the *Portrait of Wally* case left open the possibility that art may be seized under the "converted" prong of the NSPA. Expanding forfeiture law in the cultural property context to encompass conversion as well as theft would provide for an even more expansive standard for seizing such property under these provisions. Indeed, the Government's failure to satisfy its pleading burden in the *Mask of Ka-Nefer-Nefer* forfeiture case may have been decided differently had the Government also pursued forfeiture under a theory of conversion in addition to theft. As a result of the court's analysis in that case, it may have been easier for the Government to allege facts sufficient to establish that the possessor had wrongfully detained the mask sufficient to deprive the rightful owner of dominion over the mask. This may be an easier standard to meet under the facts of that case, as opposed to alleging facts sufficient to establish that the mask had actually been stolen.

170 See, e.g., *Gold Phiale*, 184 F.3d 131.
171 United States v. McClain, 545 F.2d 988, 995 (5th Cir. 1977) (citing Crabb v. Zerbst, 99 F.2d 562, 565 (5th Cir. 1939); accord United States v. Bottone, 365 F.2d 389 (2d Cir. 1966)).
174 Id. at *3.
D. Does "Contrary to Law" in Section 1595a Encompass Foreign as well as U.S. Law?

In the past decade, the question has arisen in civil forfeiture actions under Section 1595a as to whether that provision encompasses the substantive laws of another nation as a basis for customs forfeiture. Section 1595a(c)(1) provides that, “Merchandise which is introduced or attempted to be introduced contrary to law . . . shall be seized and forfeited if it - (A) is stolen, smuggled, or clandestinely imported or introduced.” The relevant issue becomes whether “contrary to law” within the meaning of this provision requires that the law be part of the United States Code, or whether the law could be the substantive laws of another nation.

The case United States v. One Lucite Ball of Lunar Material first raised this issue in the context of a cultural property forfeiture proceeding. In 1973, U.S. President Richard Nixon gave the Republic of Honduras a piece of lunar rock attached to a plaque as a diplomatic gesture; the rock was then stored in that nation’s presidential palace. The American claimant in the case purchased this object from a retired Honduran colonel in Honduras, who claimed that the rock had been given to him after a coup in that nation in 1973. The colonel did not possess any ownership documents for the rock, but the claimant still paid $50,000 for the object and took possession near the Miami International Airport in April of 1996. The U.S. government eventually seized the rock during a sting operation by NASA officials in 1998. The Honduran government issued to U.S. customs officials a formal letter requesting return of the rock because its export was in violation of a number of Honduran national laws.

A law professor working for the district court in that case stated in an expert report that (1) the rock disappeared from the Honduran presidential palace between 1990 and 1994; (2) the rock

176 Id. at 1369.
177 Id.
178 Id.
179 Id. at 1370-1372.
was part of Honduran national patrimony since 1973; (3) the rock was property of Honduras as “national property of public use” under Article 617 of the Civil Code of Honduras, and as such could not be sold, owned, or prescribed legally by any private person; (4) whoever took the rock from the presidential palace committed larceny under Honduran law; and (5) no legal theory could be asserted that the claimant or any of his associates in Honduras could have acquired good title to the rock.\footnote{Id. at 1373-1376.}

The district judge held that evidence was sufficient to show that the moon rock plaque was stolen in Honduras and then introduced into the U.S. in violation of Section 1595a(c)(1)(A).\footnote{Id. at 1378-1379.} Interestingly, the court does not specify which law it relied upon when determining that introduction into the U.S. was “contrary to law.” If an object is “stolen” within the meaning of another nation’s laws, it would also constitute stolen property under the NSPA in the United States and would be subject to forfeiture under Section 1595a with the NSPA satisfying the “contrary to law” provision. However, the opinion in Lunar Material does not explicitly cite to the NSPA, nor does it indicate the relevant U.S. law that had been violated.\footnote{The complaint in the Ka-Nefer-Nefer case was dismissed because the Government had failed to specify the NSPA as the underlying law. No. 4:11 CV 504 HEA, 2012 WL 1094658, at *3, affirmed 752 F.3d 737 (8th Cir. 2014). This suggests that either the United States Attorney’s Office or the United States District Court for the Eastern District of Missouri, or both, require some citation to the NSPA.} This is problematic because the United States would have authority under Section 1595a to seize property classified as stolen under the laws of another nation, but it would not have authority to seize property that violated some other provision of another nation’s laws, for example export controls or cultural patrimony laws.

In an even bolder example, the United States Attorney’s Office for the Southern District of Florida recently filed a complaint to forfeit an Egyptian sarcophagus seized in Miami under Section 1595a(c) and seems to clearly cite to Egyptian law in order
to do so.\textsuperscript{184} The complaint in \textit{United States v. One Ancient Egyptian Yellow Background Wooden Sarcophagus Dating to the Third Intermediate Period} alleges that the seized sarcophagus was constructed in Egypt between 1070 and 946 B.C.E., was authenticated in 2007, and was then shipped from a Barcelona gallery to Florida in 2008.\textsuperscript{185} The provenance document stated that the sarcophagus had been in a private collection in Spain before 1970.\textsuperscript{186} The Government contacted an Egyptian official who stated that he was unaware that the Egyptian government had ever granted permission for the sarcophagus to leave the country.\textsuperscript{187} 

The Government’s complaint cited a variety of Egyptian laws dating from 1874 declaring, \textit{inter alia}, government ownership of antiquities found in the ground of Egypt, banning export of antiquities, requiring that permits be granted by the government for all excavations done within Egypt, and stating that antiquities are to be public property of Egypt and cannot therefore be sold or prescribed.\textsuperscript{188} The Government relied on these factors, in addition to the fact that no evidence could be produced that the defendant had been allowed to leave Egypt, to establish its case for forfeiture under Section 1595a(c).\textsuperscript{189} 

The United States Attorney’s Office in the \textit{Egyptian Sarcophagus} case was undoubtedly applying Egypt’s law as the “contrary to law” provision in Section 1595a. Unlike the \textit{Lunar Material} case, the United States has no comparable laws, namely cultural patrimony laws, to those invoked on behalf of Egypt. The fact that the complaint here does not cite to a U.S. law that was violated suggests, even more clearly than in the \textit{Lunar Material} case, that the Government was applying Egypt’s own cultural patrimony laws as the “contrary to law” provision under Section 1595a. This is problematic because the United States has no authority to enforce a foreign nation’s cultural patrimony laws domestically. It

\begin{footnotesize}
\begin{enumerate}
\item[184] Complaint, United States v. One Ancient Egyptian Yellow Background Wooden Sarcophagus Dating to the Third Intermediate Period, No. 09-23030-CIV-HUCK (S.D. Fla. Oct. 8, 2009).
\item[185] \textit{Id.} at 1-2.
\item[186] \textit{Id.} at 3.
\item[187] \textit{Id.} at 4.
\item[188] \textit{Id.} at 4-5.
\item[189] \textit{Id.} at 6.
\end{enumerate}
\end{footnotesize}
could be argued that the court in *Lunar Material* was reading the NSPA into the Government’s complaint given that it was obvious that the ball had been stolen from Honduras; the same could not be done in the *Egyptian Sarcophagus* case because it was much less clear when and even if the sarcophagus had been stolen from Egypt.\(^{190}\) Unfortunately, an observer does not have the benefit of determining the legal sufficiency of this issue in the *Egyptian Sarcophagus* case because the district court judge entered default judgment on December 30, 2009.\(^{191}\)

A final and ongoing case from the Southern District of Florida also clearly utilizes the law of another nation under the “contrary to law” provision of Section 1595a. In *United States v. Three Artifacts Constituting Cultural Property From Peru*, the United States Attorney’s Office for that district filed an *in rem* forfeiture action under Section 1595a(c)(1)(A).\(^{192}\) In 2010, customs authorities at Miami International Airport seized thirty-three artifacts from a Peruvian man traveling to the United States.\(^{193}\) Forfeiture action against twenty-nine of those artifacts was brought pursuant to the Cultural Property Implementation Act,\(^{194}\) while the three artifacts at issue were forfeited under Section 1595a(c)(1)(A) as merchandise imported contrary to law that was either stolen,

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\(^{190}\) See *United States v. Broadening-Info Enters. Inc.*, 462 Fed. App’x 93, 97 (2d Cir. 2012) (finding that “contrary to law” and “stolen, smuggled, or clandestinely imported or introduced” are separate elements and must be examined separately); but see *United States v. One Tyrannosaurus Bataar Skeleton*, No. 12 Civ. 4760 (PKC), 2012 WL 5834899, at *6 (S.D.N.Y. Nov. 14, 2012) (stating that although “contrary to law” and “stolen, smuggled, or clandestinely imported or introduced” are separate elements they may still be satisfied by the same statutory provision in some instances, for example with regard to stolen property).


\(^{193}\) Id.

smuggled, or clandestinely imported or introduced.\textsuperscript{195} The complaint in this case cites a 1997 memorandum of understanding between Peru and the United States that designates certain classes of objects as the cultural property of Peru, criminalize destruction or unauthorized exportation of such objects from Peru, and provide that ownership in such objects shall revert back to the nation of Peru if any attempt is made to export such objects.\textsuperscript{196} The complaint in this case cites no provision of the United States Code establishing that these three artifacts were stolen within the meaning of the NSPA or under any provision obligating the United States to enforce the export controls or cultural property laws of Peru.\textsuperscript{197} The complaint is explicitly referring to Peruvian law when it states, “Based on all of the foregoing allegations ... The defendant property constitutes merchandise which has been introduced into the United States contrary to law, because it was unlawfully exported from Peru, is now the property of the government of Peru, and has been stolen, smuggled, or clandestinely imported or introduced into the United States.”\textsuperscript{198} The Southern District of Florida, in recent years and perhaps uniquely among federal district courts, has implied that the phrase “contrary to law” under Section 1595a(c) extends to the substantive laws of another nation.

The Southern District of Florida’s interpretation of Section 1595a(c)’s “contrary to law” language as applying to foreign law is troubling because laws are generally not thought to be given extraterritorial jurisdiction unless explicitly provided for by statute.\textsuperscript{199} If the phrase “contrary to law” as it is used in Section

\textsuperscript{195} Complaint, \textit{supra} note 192, at 1-2; see also United States v. Twenty-Nine Pre-Columbian & Colonial Artifacts From Peru, No. 1:13-CV-21697-XXXX (S.D. Fla. 2013).

\textsuperscript{196} Complaint, \textit{supra} note 192, at 3, No. 1:13-CV-22585-JAL.

\textsuperscript{197} The Government did not cite to the NSPA in its complaint, but presumably under the \textit{Lunar Material} precedent the Government could have proven a violation of the NSPA simply by establishing that the works were stolen under the laws of a foreign nation.

\textsuperscript{198} \textit{Id.} at 5.

\textsuperscript{199} See \textit{Morrison v. Nat. Australia Bank Ltd.}, 561 U.S. 247, 253-54 (2010) (stating the general presumption that a law should not be read to
1595a(c) is to be found to extend to the law of a foreign nation, this further broadens the already expansive scope of forfeiture law. Unlike provisions for restitution of antiquities under laws such as the Cultural Property Implementation Act, Section 1595a is not generally thought of as a means of returning wrongfully exported cultural property to its country of origin. As the United States does not have authority under its customs laws to enforce the export controls or patrimony laws of another nation, it is incumbent upon the Government and the district courts to explicitly state the U.S. law being violated under the “contrary to law” requirement of Section 1595a.

E. Should Civil Forfeiture of Cultural Works Be Used Only In Ongoing Criminal Cases?

A further issue of policy involves examining whether application of Section 1595a should be limited solely to a remedial measure in ongoing criminal investigations. Civil forfeiture of cultural property presents a unique situation under forfeiture law. The stated policy underlying statutes such as Title 18, Section 545 and Title 19, Section 1595a is to separate criminals from both the instruments used to commit and the material gains of crimes. However, forfeiture of cultural property is generally aimed at returning this property to the victims of crimes that occurred decades or even centuries before the forfeiture action. This seems an odd result if the intent of forfeiture is to prevent ongoing criminal activity. This oddity is further compounded by the prevalent application of Section 1595a in these types of proceedings. Section 1595a is part of the customs statute and customs laws, in theory, are aimed at regulating entry of goods at the border. Application

provide extraterritorial jurisdiction as a matter of statutory construction unless such an intent is explicit).

202 See id.
of customs laws to recover cultural property that has been in the country for some time seems somewhat counterintuitive.

The counterargument to this would be that the National Stolen Property Act, for example, is intended to both deter the original crime and to prevent subsequent transfers of that property, which can enhance efforts of foreign nations to recover stolen works. Another counterargument would be the policy underlying the return of cultural property lost during the Holocaust to its lawful owner, as in the Portrait of Wally case. There the theft in that case happened more than fifty years before seizure and forfeiture of the portrait and the title-holder, Lea Bondi, passed away in the 1960s. However, that case stood as an example of righting a still-ongoing crime of the Holocaust.

Civil forfeiture proceedings can occur in tandem with a criminal prosecution seeking forfeiture of the wrongdoer's property as well. While nothing in the law prohibits conducting two forfeiture proceedings simultaneously, prosecutors have expressed concern regarding the administrative obstacles of such a posture. The ultimate question remains, in addition to the specific inquiries into unsettled or unclear aspects of this statute, whether the Government, through its United States Attorney's offices, is using Section 1595a appropriately.

F. Is Section 1595a Being Used Appropriately?

The customs forfeiture statute, Section 1595a, is primarily a means of preventing materials from entering the United States that are not permitted for entry. Some argument can be made that it is intuitive and necessary to extend the theoretical concept of the "border" to encompass people or goods that have recently entered the country, but are some distance or time removed from a physical border. It becomes less intuitive, however, when this concept is used to seize objects that have been in the United States for more than a short period of time (for example, for more than 20 years in the Davis case).

203 United States v. McClain, 545 F.2d 988, 994.
204 See Stefan D. Cassella, Overview of Asset Forfeiture Law in UNITED STATES ATTORNEYS' BULLETIN, Vol. 55, No. 6 (Nov. 2007).
Case law under Section 1595a includes a conspicuous absence of non-cultural property cases. This may perhaps be due to the fact that many non-cultural-property cases do not reach the litigation stage, but the disparity is nonetheless curious. As mentioned in the section entitled “Case Studies – Non-Cultural Property Forfeitures” in this paper, this absence may be attributable to claimants in non-cultural property cases being less willing to contest a forfeiture, while claimants to cultural property may be more willing to contest and seek return of the property. This may perhaps be due to expectations of increased value of cultural property works that does not correlate to non-cultural property objects.

Based on some of the characteristics of Section 1595a mentioned above, such as a lower burden of proof and lack of an explicit scienter requirement, it may be reasonable to suggest that this provision is used as a sort of safeguard for cases involving cultural property. Given that such cultural property often travels internationally and is often owned by some foreign state, or some foreign state party has an interest in the case (as was the situation involving Austria in the Portrait of Wally case), it may be incumbent upon Assistant United States Attorneys prosecuting these types of forfeitures to include “the whole kitchen sink” of relevant forfeiture provisions in order to be assured of a win for the Government. 205

Given that the policy aim behind the enactment of CAFRA was to curtail overzealous seizure and forfeiture by the Government, the treatment of Section 1595a in cultural property forfeiture cases begs the question whether anything has actually changed with regard to overall aims, concerns, and policies behind civil forfeiture. Congress clearly intended to exempt customs provisions from the heightened requirements of CAFRA, but is this result correct as a matter of policy when the subject matter of a civil forfeiture under the customs statute is a work of cultural property? Would extending the provisions of CAFRA, such as a preponderance-of-evidence burden of proof on the part of the Government and the right to an assertion of innocent ownership on the part of

the claimant, place too much of a burden on prosecutors in cultural property forfeitures under the customs statute? Evidence available offers no clear answer to these questions.

VI. CONCLUSION & PROPOSALS

For much of its history, Section 1595a of the customs statute has been interpreted as a broad and useful tool to seize and forfeit cultural and non-cultural property alike imported into the United States in violation of customs law. This paper addressed some of the ways in which Section 1595a and other provisions relating to cultural property forfeitures have been controversial, unclear, or unique.

The history of Section 1595a reveals that this provision of customs law began as a tool focused on preserving domestic commerce, health, and morality and has evolved into a law with a much more global focus. A comparison of cultural property and non-cultural property forfeitures suggests that the underlying purpose in the cultural property cases is to return the property to its rightful owner or nation. Cultural property forfeitures appear to have a more international focus. The policy underlying non-cultural property forfeitures, in contrast, seems to articulate the original purpose behind Section 1595a, namely protecting domestic health, safety, and wellbeing.

The applicable burden of proof the Government must assert in a Section 1595a forfeiture remains the probable cause standard. Some federal courts, for example the Eastern District of Missouri in the Mask of Ka-Nefer-Nefer case, require heightened specificity in the Government’s complaint in a proceeding to forfeit cultural property under Section 1595a, or, in the alternative, are unwilling to grant the Government any slack when it fails to allege facts sufficient to meet this more lenient standard.

Section 1595a arguably contains a scienter requirement, which is suggested by language such as “smuggle” and “clandestinely imported or introduced.” The case law on this provision’s scienter requirement remains unsettled, however the Davis case clearly stated that Section 1595a does not provide an innocent-owner defense.
The case law further remains unsettled as to whether the National Stolen Property Act provides for something other than "theft" – for example, "conversion." Such a possibility, however, would greatly ease the burden of proof on the Government given that it seems easier to prove that a work of cultural property was converted rather than stolen. Whether or not such a possibility constitutes sound policy is a matter for debate.

It is curious that Section 1595a may be satisfied, at least in the Southern District of Florida in the *Lunar Material* case and its progeny, by reference to foreign law alone and not also the National Stolen Property Act or some other U.S. statute. Other district courts, such as the Eastern District of Missouri and the Southern District of New York, would disagree that such an approach is permissible. This is a prosecutorial issue in need of standardization.

As a matter of policy, asserting Section 1595a in cultural property forfeitures only as part of an ongoing criminal investigation may or may not be a wise course of action. Given that it is possible that a work of cultural property may be in the United States for some time without being challenged, it seems odd that such presence would implicate the general policy behind forfeitures of curtailing ongoing criminal activity. The rebuttal to such an argument is that the presence of the cultural property in the country is often an ongoing crime in itself. Furthermore, the frequent use of Section 1595a in cultural property forfeitures calls into question the motivation and propriety involved in the litigation strategy of United States Attorneys. Room for both reform and clarification of the law certainly exists in the cultural property realm of civil forfeiture law.

In addition to cultural property, another hot topic area in civil forfeiture law is forfeiture of digital assets, such as domain names. Seizure of digital assets by the Government raises a number of concerns complementing those addressed in this article. The primary concerns of digital asset forfeitures are that they exist in a sort of legal "grey" area and are thus not subject to traditional forfeiture procedure. These types of forfeitures can also be too far-reaching regarding the quantity of assets that can be simultaneously seized and do not provide enough protections under the law for
innocent third parties.\textsuperscript{206} Proposals to curb abuse of digital asset forfeitures generally recommend greater protection for third parties, including the possibility of providing digital copies of seized works to innocent users and to allow continued use of seized domain names by innocent users.\textsuperscript{207}

Many of the proposals for legal change in this area of the law could be accomplished administratively through the Department of Justice or the Customs & Border Protection bureau; further legislation is likely not required. For example, in this paper’s discussion of Section 1595a(c)’s “contrary to law” provision being satisfied by reference to foreign law, it is worth pointing out again that the only United States Attorney’s Office in the country that appears to be pursuing this type of legal theory is the Southern District of Florida. The suitability of applying foreign law to satisfy the requirement of Section 1595a(c) could be addressed by an advisory opinion from the Justice Department informing United States Attorneys around the country of the state of the law in this area and recommending posture for further prosecution. It is unlikely, in the opinion of this author, that the Justice Department as a whole would take the position that enforcing another nation’s laws via the customs provisions of the United States is a permissible, or at least advisable, course of action.\textsuperscript{208} Harmonization in this field of prosecution nationally would be a productive step to establish greater clarity in this area of the law and could be undertaken by the Justice Department itself.

Another potential proposal may be an amendment to the customs carve-out in CAFRA, which would allow for the possibility of a limited innocent-owner defense under Title 19 cultural property forfeitures. This proposal largely mirrors that proposed to curtail abuse of digital asset forfeiture and would fulfill a similar

\textsuperscript{206} Elizabeth Friedler, Note, Protecting the Innocent – The Need to Adapt Federal Asset Forfeiture Laws to Protect the Interests of Third Parties in Digital Asset Seizures, 32 CARDOZO ARTS & ENT. L.J. 283, 311-15 (2013).

\textsuperscript{207} Id. at 310, 313-14.

\textsuperscript{208} This opinion assumes that no agreement exists between the United States and the relevant foreign nation that would be subject to the Cultural Property Implementation Act, which is also part of the U.S. customs statute.
objective with regard to forfeiture of cultural property under Section 1595a.209 This provision would be essentially a carve-out to the carve-out. The provision would be worded to allow a claimant to property that is artistic or ethnographic in nature, and which has been in the possession of the claimant or his or her heirs for some significant amount of time (say 20 years), to assert his or her innocence in the forfeiture proceeding. Although potentially burdensome, allowing innocent holders of cultural property works to assert lawful ownership during forfeitures under the customs statute may provide the system with a greater sense of fairness. It may also curtail abuse of power that may, in theory, be present in cultural property forfeitures under the customs statute. While the contours of such a proposal are difficult to determine, a specified future amendment allowing for assertion of innocent ownership may provide an additional check on the Government’s power in these types of civil forfeitures.

Section 1595a of the customs statute remains one of the Government’s most effective tools for seizing and returning cultural property. While the Government’s treatment of this provision entails a number of questions of law perhaps warranting both greater scrutiny and amendment to limit abuse of power, use of this provision will likely continue in effectiveness for some time.

Kyle Brennan

209 Friedler, supra note 206, at 311-15.

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