

## Emerging United States Policy With Regard to the International Movement of National Cultural Property

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### Recommended Citation

Cyd B. Wolf, *Emerging United States Policy With Regard to the International Movement of National Cultural Property*, 7 Md. J. Int'l L. 166 (1981).

Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol7/iss1/12>

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## EMERGING UNITED STATES POLICY WITH REGARD TO THE INTERNATIONAL MOVEMENT OF NATIONAL CULTURAL PROPERTY

### PROLOGUE

"The mountain in the Paramount logo fades into a purple mountain of Peru as the renegade archaeologist and adventurer, Indiana Jones, leads a gang of Spanish Peruvians and Indians through the underbrush in pursuit of ancient Incan treasure. Surrounded by the natives' [crouching] figures, Indy is . . . the imperial white explorer . . . the world's his oyster. An argument ensues, Indy flicks his whip . . ."<sup>1</sup>

The opening scene from the blockbuster film, *Raiders of the Lost Ark*, is remarkable for its accurate and affecting characterization of what has become one of today's most hotly debated international legal controversies — the international movement of national art treasure. Today the problem has become so acute that the cultural legacy of entire civilizations is in danger of obliteration at the hands of highly organized and well-financed pillagers.<sup>2</sup>

### BACKGROUND

Until recently, it has been entirely lawful under U.S. law to acquire ancient, oriental and primitive art, even if it was not exported from another country in compliance with that country's export restrictions. A canvass of the historical development of the formal U.S. legal response to the illicit movement of cultural property underscores a reversal of the official U.S. position from one of traditional indifference to active participation and international cooperation. This change has been brought about in large measure by an acceleration of the volume, intensity and value of illicit traffic in art. Another factor has been the increasing awareness on the part of a better-educated and politically aware Latin American people that their heritage is being systematically destroyed. The political pressure exerted on the State Department by these art-rich nations to address this problem has coincided with an increasing U.S. need for Latin American political and economic cooperation. To date, this nation's diplomatic efforts have been limited to tacit acknowledgment of the interests of the art-rich nations to

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1. *Raiders of the Lost Ark*, ROLLING STONE, Movie Reviews. June 25, 1981 at 20, 21.

2. Rogers, THE LEGAL RESPONSE TO THE ILLICIT MOVEMENT OF CULTURAL PROPERTY, 5 LAW & POL. IN INT'L. BUS. 932, 933 (1973).

preserve their national patrimony and of an urgent need to preserve and protect art works from wholesale pillage and mutilation. Meanwhile, an art-hungry American public and a powerful lobby of art dealers insist on exercising their legitimate interests in the free international flow of art. Attempts to accommodate these competing interests have resulted in unilateral, bilateral, and multilateral agreements — articulately and meticulously worded, but lacking in practical effect. The 1970 Treaty of Cooperation with the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties,<sup>3</sup> aimed at ensuring legitimate international commerce in art objects, has been undermined by a 1972 Mexican law that forbids all export of cultural property.<sup>4</sup> A similar agreement between the United States and Peru effected this past September is also likely to have limited operational impact.<sup>5</sup> The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>6</sup> has remained inoperative in the United States, while awaiting passage of the necessary implementing legislation by Congress. The only authoritative statute in effect provides for import restrictions of pre-Columbian sculpture and murals.<sup>7</sup> Conspicuously absent is a formal U.S. declaration explicitly forbidding the importation of movable artifacts such as gold and silver objects, colonial-era paintings, tribal masks and pottery. The multi-billion dollar trade in these stolen treasures will require a formal legal response from the United States in the near future.

While U.S. efforts to address this controversy reflect an awareness of the competing values inherent in formulation of a viable legal response, U.S. policy regarding the international movement of national art treasures remains unclear and non-assertive. Art dealers, museum directors and

3. TREATY OF CO-OPERATION WITH THE UNITED MEXICAN STATES PROVIDING FOR THE RECOVERY AND RETURN OF STOLEN ARCHAEOLOGICAL, HISTORICAL, AND CULTURAL PROPERTIES, July 17, 1970, (1971) 1 U.S.T. 494, T.I.A.S. No. 7088.

4. Law of May 6, 1972, Concerning Archaeological, Artistic and Historic Monuments and Zones, Art. 27, (1972), 312 D.O. 18 (Mexico).

5. Agreement Between the United States and the Republic of Peru for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, September 15, 1981.

6. United Nations Educational, Scientific, and Cultural Organization's (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, November 14, 1970, — U.N.T.S. —, 10 INT'L LEGAL MAT'LS 289 (1971).

7. THE ACT TO PREVENT IMPORTATION OF PRE-COLUMBIAN SCULPTURE AND MURALS, ACT OF OCTOBER 27, 1972, PUB. L. NO. 92-587, TIT. II, 86 STAT. 1297 (CODIFIED AT 19 U.S.C. §§ 2091-95 (Supp. II 1972)).

private collectors read into this murky inaction, a *laissez-faire* attitude. The American Association of Dealers in Ancient, Oriental, and Primitive Art has expressed the understanding that

While the United States has been willing to take steps through treaty and statute to discourage the importation of ancient art in select crisis situations, it has not been willing to deprive its museum-going public of the enjoyment of a wide range of ancient, oriental and primitive art on the basis of policies of other governments.<sup>8</sup>

Under increasing pressure from Mexico, Peru, Guatemala and other art-rich countries to curb questionable art importing, the Customs Service has interpreted Congressional silence as tacit approval of recent attempts to control this traffic through a novel application of the National Stolen Property Act (NSPA) which provides for criminal sanctions. A recent article in *The New York Times* reported customs officials as saying they are still debating a policy on material deemed stolen under foreign cultural property laws, but brought into the United States in accordance with American laws and regulations.<sup>9</sup>

As precedent, Customs attorneys cite a Texas case, *U.S. v. McClain*<sup>10</sup> in which five persons dealing in pre-Columbian artifact were convicted of conspiracy to receive, conceal and/or sell stolen goods in interstate or foreign commerce. The U.S. Court of Appeals for the Fifth Circuit held that the National Stolen Property Act can apply to illegal exportation of cultural artifacts declared by a foreign country's law to be the property of that nation.<sup>11</sup> Since both Mexico and Peru have national patrimony laws, this ruling would provide Customs with the necessary enforcement mechanism to curb the escalating illicit traffic in pre-Columbian treasures.

In a recent case involving more than \$1 million worth of gold, silver, pottery and other pre-Columbian artifacts, a Peruvian cargo bound for a New York art dealer was impounded at Dulles International Airport because the artifacts were, in the view of customs agents, underdeclared — a violation of American law.<sup>12</sup> Further investigation by customs agents resulted in a raid

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8. *U.S. v. McClain*, 545 F.2d 988, 991 (5th Cir.), *aff'd. in part, rev'd. in part on other grounds*, 593 F.2d 658 (5th Cir. 1979).

9. *U.S. Acts to Curb Questionable Art Importing*, N.Y. Times, September 1, 1981 at 1.

10. *U.S. v. McClain*, 545 F.2d 988 (5th Cir.), *aff'd. in part, rev'd. in part on other grounds*, 593 F.2d 658 (5th Cir. 1979).

11. *U.S. v. McClain*, 545 F.2d at 1000.

12. N.Y. Times, September 1, 1981, *supra* note 9.

on the apartment of a private New York art dealer operating from his residence.<sup>13</sup> Consequently, more than 700 pieces described as "spectacular" in quality are being held in Customs warehouses as a result of the seizures at the airport and in New York.<sup>14</sup>

Peru has claimed ownership and forbidden unauthorized export of antiquities since 1929;<sup>15</sup> however, the law has failed to stop a boom in the trading of gold and silver objects, colonial-era paintings and centuries-old pottery. According to Frederick J. Truslow of the law firm of Lane & Edson, who represents the Peruvian Government in U.S. courts, scores of sites have been stripped to feed between 40,000 and 80,000 pieces a year into the U.S. art market.<sup>16</sup>

American art dealers are outraged by the government's recent seizures and are greatly concerned about the foreign policy implications. They contend that:

1. No U.S. law explicitly forbids imports of small movable art treasures, such as those involved in the recent seizure;
2. The Customs Service has no business enforcing the laws of other countries;
3. The agency is trying by administrative fiat to impose law that Congress has specifically declined to pass for nearly a decade.<sup>17</sup>

The purpose of this Note is to respond to these assertions. What follows is a critical review of the Fifth Circuit's decision in *U.S. v. McClain* and an assessment of its consistency with the formal U.S. legal response thus far expressed and of its potential impact on evolving American policy with regard to the illicit traffic in national art treasures. The Note concludes with a recommendation for affirmative action on the part of the United States to participate in an international resolution of this controversy.

#### APPLICATION OF THE NATIONAL STOLEN PROPERTY ACT TO ILLEGALLY EXPORTED ART AND ARTIFACTS

The National Stolen Property Act (NSPA) prohibits the transportation "in interstate or foreign commerce of any goods . . . of the value of \$5,000.00 or more," with knowledge that such goods were "stolen, converted or taken by

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13. *Id.*

14. *Id.*

15. *Peru Acts to Stem Trade in Stolen Art Works*, N.Y. Times, October 4, 1981 at 23.

16. N.Y. Times, September 1, 1981, *supra* note 8.

17. *Id.*

fraud.”<sup>18</sup> The Act also subjects to criminal liability “whoever receives, conceals, stores, barter, sells, or disposes of any goods . . . of the value of \$5,000.00 or more . . . moving as, or which are part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken . . .”<sup>19</sup>

The Court in *U.S. v. McClain* held

[T]hat a declaration of national ownership of patrimony is necessary before illegal exportation of an article can be considered “stolen” within the meaning of the National Stolen Property Act. Such a declaration combined with a restriction on exportation without consent of the owner (Mexico) is sufficient to bring the National Stolen Property Act into play.<sup>20</sup>

This criteria was established by the court through analysis of the policy considerations articulated by Congress in enacting the NSPA. As a starting point for its construction, the court defined the term “stolen” in the conventional sense as “depriving an owner of its rights in property.”<sup>21</sup> An unambiguous statement by a nation acknowledging ownership of its patrimony is the *sine qua non* before the NSPA can be invoked to prosecute Americans who illegally export antiques and artifacts claimed by that nation to be part of its cultural heritage. The court distinguished between varying types of government control over property within the borders of a state and determined that the state’s power to regulate (the police power) does not constitute ownership.<sup>22</sup> Furthermore, ownership cannot be based on unclear pronouncements by a foreign legislature. “The state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner; the declaration is an attribute of sovereignty.”<sup>23</sup>

Application of the NSPA to this case involving illegal exportation of pre-Columbian movable artifacts from Mexico required a precise determination of the controlling Mexican law at the time of exportation. The United States had to prove beyond a reasonable doubt that the Mexican government

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18. The National Stolen Property Act, 18 U.S.C. § 2314 (1934).

19. *Id.* § 2315.

20. 545 F.2d at 1000.

21. *Id.* at 1002.

22. *Id.*

23. *Id.*

had adopted valid laws vesting ownership of such artifacts in the government, and that those laws were in existence at the time of the exportation. The court found that since 1897, Mexican law has been concerned with the preservation and regulation of pre-Columbian artifacts; however, ownership of all pre-Columbian objects by legislative fiat did not arrive until 1972. Accordingly, if the exportation occurred after the effective date of the 1972 law, and if the artifacts were not legitimately in the seller's hands as a result of prior law, the artifacts may have been stolen.<sup>24</sup> If the exportation occurred before 1972 but after the effective date of the 1934 law, it would be necessary to show that the artifact was found on or in an immovable archaeological monument.<sup>25</sup> If the exportation occurred before the effective date of the 1934 law, the artifact could not have been owned by the Mexican government and illegal exportation would not subject the receiver of the article to the sanctions of the NSPA.<sup>26</sup> By focusing on the date of exportation, the court sought to clarify that the issue was not whether the federal government would enforce a foreign nation's export law, but whether the NSPA covered the property in question.<sup>27</sup> The court also found that illegal exportation constituted a sufficient act of conversion to be deemed a theft.<sup>28</sup>

Once the jury has determined when the pre-Columbian artifacts were exported (either in fact or by a reasonable inference), the jury must decide whether the defendants knew that the artifacts were stolen. This scienter requirement makes it impossible for a defendant to be convicted of a crime he could not have understood to exist. Despite the scienter requirement and the prerequisite of a declaration of national ownership of patrimony for illegal exportation to be considered theft, the radical effect of this decision is to make importation of illegally exported works of art a criminal violation of American law — an unprecedented departure from the traditional legal approach.

The court characterized its decision otherwise. According to the *McClain* court, the purpose of Congress in enacting the National Stolen Property Act was to discourage both the receiving of stolen goods and their initial taking.<sup>29</sup> It was intended as an aid to the states which were hindered by jurisdictional limitations in their efforts to prosecute receivers of stolen property.<sup>30</sup> The

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24. *Id.* at 1003.

25. *Id.*

26. *Id.*

27. *Id.* at 996.

28. *Id.* at 1003 n. 33.

29. *Id.* at 994.

30. *Id.*

ultimate beneficiary of the law is the property owner.<sup>31</sup> Sections 2314 and 2315 extended application of the Act to foreign commerce; thus, when stolen property is moved across the Mexican border, the Republic of Mexico is to be accorded the same protection as a U.S. state when stolen property is moved across state boundaries.<sup>32</sup>

In concluding that the NSPA could be applied to illegally exported art, the court relied on comments by the U.S. Department of State to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. According to the Convention, countries were to provide importation restrictions for property "stolen from a museum or a religious or secular public monument or similar institution" and provide penal or administrative sanctions against violators of such restrictions.<sup>33</sup> The State Department responded that "the laws of the United States, and presumably the laws of most states, prohibit the theft and the receipt and transportation of stolen property . . ."<sup>34</sup> The court cited this statement as an endorsement of the applicability of the NSPA to unlawfully exported art works.<sup>35</sup> Significantly, the United States succeeded in substituting the provisions calling for compulsory import restrictions with a provision calling for concerted international action, including import controls only when needed in "crisis" situations. The Senate approved the Convention, as revised, on August 11, 1972, subject to a number of reservations.<sup>36</sup> It is not clear why the court chose to give more weight to the State Department's comments in response to the preliminary draft of the convention, rather than to the active participation of the United States in revising the draft, the final draft itself, or to the fact that the Senate approved the Convention as revised subject to carefully formulated conditions.

It is also not clear why the court chose to overlook Representative Byrnes' statement made during the Congressional debates leading up to enactment of the 1972 Law on the Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals<sup>37</sup> as indicative of the direction of U.S. policy in this area. He specifically stated, "there is no

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31. *Id.*

32. *Id.*

33. Preliminary Draft UNESCO Convention, Concerning the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property, UNESCO Doc. SHC/MD/3 Annex (1969).

34. S. EXEC. REP. NO. 29, 92ND CONG., 2D SESS. 17, at 21 (1972), *cited in* 545 F.2d at 1001 n. 29.

35. 545 F.2d at 1000 n. 29.

36. *Id.* at 997 n. 14.

37. *See supra* note 7.



prohibition in this country about bringing in these articles, the prohibition is against taking these articles out of the country in which they are found, and thus this is an attempt to cooperate with these countries to avoid the exploitation that is taking place.<sup>38</sup> Representative Byrnes made explicit reference to the "narrow class of very valuable archaeological objects from the pre-Columbian period in South America,"<sup>39</sup> indicating that our cooperation with these countries had not yet extended to the regulation of imported movable pre-Columbian artifacts (emphasis supplied). The court avoided a direct answer as to why Congress specifically provided for coverage of immovable objects and declined to legislate restrictions on the importation of movable artifacts.

Instead, the court found nothing in the legislative history to suggest a Congressional desire to prevent application of criminal sanctions for dealing in items classified as stolen because a particular country has enacted national ownership of its patrimony.<sup>40</sup> The *McClain* court, although stressing, "We do not base this conclusion on illegal exportation of the antiquities,"<sup>41</sup> continued

[W]e cannot say that the intent of any statute, treaty, or general policy of encouraging the importation of art more than 100 years old was to narrow the National Stolen Property Act so as to make it inapplicable to art objects or artifacts declared to be the property of another country and illegally imported into this country.<sup>42</sup>

An even-handed reading of the legislative history leads one to conclude that Congress never anticipated that the National Stolen Property Act would be used to reach these items. Consistent with the court's position, the 1972 law<sup>43</sup> cannot be read as superceding the NSPA. According to the court, the 1972 statute was enacted as an addition to the NSPA in order to provide a more meaningful deterrent to the devastation of pre-Columbian sites. Such a finding ignores the fact that the incremental deterrent effect of a civil penalty is minimal when criminal penalties are already in force. It is more accurate to read the *McClain* decision as suggesting that the Customs Service may now use the NSPA to restrict the importation of cultural artifacts which a foreign country declares to be its property.

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38. 118 CONG. REC. 70977 (1972), cited in 593 F.2d at 665 n. 9.

39. *Id.*

40. 545 F.2d at 997.

41. *Id.* at 996.

42. 545 F.2d at 997.

43. *A Tougher Policy on Imports*, N.Y. Times, September 6, 1981 § E, at 18.

The problems with the court's approach are manifold. The *McClain* holding that a declaration of national ownership of patrimony is necessary to bring the NSPA into play presents two immediate difficulties: 1) the possibility of conflicting readings of other countries' statutes, and 2) unavoidable variance in application of diverse national laws. Where there is the potential for differing opinions on the presence of controlling foreign laws the scienter requirement will be less capable of proof. The unpredictable and indefinite manner in which the law will be applied to illicit traffic in national cultural property undermines its usefulness as a prescriptive measure. Customs officials must have some concrete guidelines for applying the law — they are not likely to be familiar with the legislative history of foreign countries.

As a proscriptive measure, the NSPA fails since those to whom it is directed are least likely to understand or have knowledge of the appropriate foreign laws upon which application of the statute will be founded. The value and appropriateness of the criminal penalties provided by the NSPA should also be reconsidered. Under the American smuggling act the crime is punishable by a \$10,000 fine and/or five years in prison. Since most of the traffic in stolen art treasures is engaged in by highly organized and well-financed looters, the deterrent effect of these sanctions is questionable. In light of all of these inconsistencies it is evident that the NSPA is not well-suited to operate as an effective measure in the alleviation of the problem of illicit international traffic in national art treasure.

Furthermore, Customs lawyers are unsure as to how far they should extend the *McClain* concept.<sup>44</sup> If an art dealer legitimately buys objects of Peruvian or Mexican origin in a third country, is it the responsibility of the United States to seize that material and return it to Peru or Mexico? Are such far-reaching measures as the criminal sanctions of the NSPA needed? More significantly, will this novel use of the NSPA effectively put an end to the pillaging and mutilation of pre-Columbian historical and archaeological sites, or will such restrictive controls only increase black market trade in antiquities?

The above discussion makes it clear that the NSPA is an inappropriate weapon for combatting the international problem of illicit traffic in national art treasures. A more serious criticism was levelled at the court by the

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44. See *supra* note 7.

American Association of Dealers in Ancient, Oriental, and Primitive Art in their *amicus curiae* brief:

[I]n essence, the decision . . . has the . . . effect of converting the importation into the United States of art works exported without authorization from another country — an act never before regarded as culpable under the law of the United States — into a criminal violation of a federal statute.<sup>45</sup>

Therefore, in arriving at its conclusions in *McClain*, the court did not merely construe existing law, it made new law — a power expressly reserved for Congress. It is precisely for this reason that the *McClain* decision cannot be considered a valid legal response to the illicit movement of national cultural property.

#### RECOMMENDED LEGAL RESPONSE

The court's opinion and the questions it raises underscore the need for affirmative action on the part of the United States to participate in an international resolution of the controversy surrounding the illicit traffic in national art treasures. Additionally, Congress should authoritatively declare the position of the United States on the importation of illegally exported movable works of art. Policy considerations could most practicably be formulated in a statute fashioned after the 1972 Act to Prevent Importation of Pre-Columbian Sculpture and Murals.<sup>46</sup> Civil penalties, such as forfeiture, with provisions for recovery and return paralleling the scheme of the 1972 Act may be sufficient to enforce import restrictions. The previous discussion of the inappropriateness of the NSPA should not be read as negating the possibility that criminal sanctions would ever be appropriate; rather, what is needed is a set of clearly-defined circumstances under which such penalties would be effective and desirable.

The competing interest groups whose legitimate concerns will be most affected by forthcoming legislation in this area should be given adequate notice and a meaningful opportunity to participate in the development of the new law. Any effective legal response must reflect and accommodate their competing interests. Once a statute is enacted, the Customs Service can adopt regulations pursuant to the Federal Administrative Procedure Act, which at all times providing a forum in which competing interests can be

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45. 545 F.2d at 991 n. 1.

46. See *supra* note 7.

expressed. This method of policy-making, in which the prescriptive and proscriptive components of legislation reflect the interests of the particular parties whose conduct is the subject of the regulation, is much preferred over the approach taken by the Fifth Circuit Court of Appeals in *U.S. v. McClain*.

The 1972 Act has been successful in preventing the importation of stelae<sup>47</sup> into this country. Collectors and museum directors, alerted to the need for government action in this crisis situation, have been more discerning in their purchases. In many instances buyers have provided a measure of self-regulation by requiring that a pedigree accompany such art objects. There is every reason to believe that a statute embodying a formal declaration of American policy on the importation of smaller movable objects will achieve equally favorable results. With the American position formally set forth, customs officials will be able to carry out the provisions of our respective treaties with Mexico and Peru with greater certainty. This measure will also reflect our good-faith adherence to the principles of cooperation expressed in the UNESCO Convention. Although enactment of such a statute would by no means be determinative of the preservation of historical and cultural art objects, it is suggested as a viable legal response that would be both sensitive to the competing legitimate interests of those affected by such a government action and effective in reducing the volume of illicit traffic in national art treasure.

*Cyd B. Wolf*

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47. Stelae are huge stone shafts which were erected in front of pyramids and temples; they contain hieroglyphics representing the deities, priests and rulers of the Mayan people and are key to understanding the ancient civilization. Through a process known as thinning, robbers remove the face of the stelae and often the inscriptions along the sides. Finally, the face is cut into quarters for convenient shipping and sale of the pieces. The incredible loss in the economic value of the objects is far outweighed by the excruciating loss to mankind of the historical insight careful excavation of such treasure-laden sites could ensure.