
Kelly Elizabeth Yasaitis*

INTRODUCTION

The conviction of Frederick Schultz is the most recent turn in a storm of controversy that began 25 years ago and does not appear to be dying down. Schultz is currently serving a prison term and owes a fine of $50,000 to the United States government. He was convicted under the National Stolen Property Act (NSPA) for conspiring to purchase Egyptian antiquities that, according to Egyptian law, were owned by the Egyptian government. The Schultz case is the latest in an emerging trend whereby the NSPA, enacted to permit criminal federal prosecution for stolen cars taken across state borders, has been applied to help foreign governments with national ownership laws to keep antiquities within their borders.

Many archaeologists believe Schultz’s conviction to be a “significant step in the fight to protect the world’s cultural heritage.” Egyptian authorities hailed the decision as a “message” of the United States’ intent to prosecute illicit art dealers worldwide, especially those dealing in stolen Egyptian artifacts. The decision, however, also shocked both the museum and international antiquities communities, and some scholars argued that Schultz’s conviction will scare museum officials and art collectors because they can no longer feel “entirely safe” purchasing cultural items.

Schultz’s case reveals the many arguments surrounding whether the United States should recognize national ownership laws, such as Egyptian Law 117, to find an object “stolen” under the NSPA. Schultz argued to dismiss the indictment by claiming that the Egyptian law is merely a regulatory law and not a substantive investment of property rights; the United States has no real interest in upholding the Egyptian law; and, finally, if a case should be brought, it should be a civil action under the

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*Office of General Counsel, Department of the Navy. Email: K_yasaitis@hotmail.com
Convention on Cultural Property Implementation Act (CPIA). The court found that the Egyptian Law constituted a valid decree of national ownership, and, thus, the state owned the property Schultz purchased and sold. Declared stolen, the property fell within the reach of the NSPA and the United States government criminally charged Schultz.

How best to protect cultural property remains a matter of debate. Yet, with the use of the NSPA, a new tool has emerged. This case note will focus on the court’s reasoning in United States v. Schultz, and how the court’s decision in Schultz may impact future cultural property cases. Part I will outline the background of the case: the development and purpose of the NSPA, the McClain doctrine, the aftermath of McClain, including the 1970 UNESCO Convention and the implementation of the CPIA, and, finally, the court’s decision in United States v. An Antique Platter of Gold, the case leading up to Schultz. Part II will discuss Schultz’s activities and the court’s discussion of Schultz’s arguments within the context of United States policy. Part III will analyze international efforts to protect cultural property, and this note will conclude that Schultz’s conviction reveals a new precedent in national courts, and perhaps, the development of a new international norm.

BACKGROUND

The National Stolen Property Act

Enacted in 1934, the NSPA is a federal criminal statute whose original purpose was to help state governments recover stolen motor vehicles. Congress wanted to aid states in prosecuting criminals who attempted to escape punishment by using the channels of interstate commerce to secret their stolen goods or counterfeiting tools outside a state’s jurisdiction. Section 2314 of the NSPA seeks to prevent the interstate transport of such goods by prosecuting, “[w]hoever 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.” If convicted, a defendant may be both fined and imprisoned. Section 2315 intends to discourage the initial theft by punishing the receipt of such goods. This provision holds that,

[w]hoever receives, possesses, conceals, stores, barters, sells or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities of the value of $5,000 or more, which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken

may be both fined and imprisoned. Taken together, both provisions focus on tangible, movable property where the possessor is aware of its illicit status. Thus, the
NSPA includes a mens rea requirement, whereby the defendant must realize the illegality of his actions in reference to the property at issue.

At the time of the law’s creation, cultural property theft was not a significant concern. It was not until decades later that national legislation and international conventions began dealing with the destruction and illegal trade in cultural objects. As the NSPA stands today, there is still no express reference to the protection of cultural property. Yet, American courts have been using the NSPA to prosecute dealers of stolen cultural property. In this way, the courts are treating stolen antiquities as they would treat any other stolen object, including instances when that antiquity is declared stolen by virtue of a foreign country’s national ownership law.

Under the NSPA, the United States government, in effect, prosecutes the offender on behalf of the foreign government, applying that foreign country’s national ownership law as the basis for finding the object stolen. This raises the question of whether something should be considered stolen in a United States criminal proceeding when the object was unknown to its true owner prior to its theft. Among other things, the application of the NSPA to such situations asks if previously unknown objects can be “stolen” rather than only illegally exported. Thus, the courts in McClain and Schultz address whether an object stolen pursuant to a national ownership law is “stolen” within the meaning of the NSPA. It is the resolution of this question that led to the controversy surrounding the NSPA’s use in cultural property cases.

The McClain Doctrine

Once a court determines that the national ownership law creates a valid property interest in the state, it may then apply the NSPA to prosecute dealers of “stolen” items. The first prosecution cases upholding national ownership laws under the NSPA, Hollinshead and McClain, “shook the American art world” as contrary to the notions of private international law. In United States v. Hollinshead, Clive Hollinshead offered for sale a pre-Columbian stele to the Brooklyn Museum, who in turn sought the opinion of the one individual in the world who had personally studied the object and who could identify it specifically as being stolen. As a result, Hollinshead was convicted under the NSPA for dealing, and for conspiring to deal, in stolen goods. Affirmed on appeal, the Ninth Circuit Court of Appeals found that the Guatemalan national ownership law created a valid state property interest in the pre-Columbian stele. Relying on expert testimony and substantive evidence, the court also found that the defendants knew their removal of the stele from Guatemala violated the ownership law. Since the defendants knowingly participated in the illicit deal, the United States could criminally prosecute them under the NSPA.

The court’s decision in Hollinshead was not nearly as controversial as the court’s decision in McClain for various reasons, primarily that the cultural object in Hollinshead was a documented and published object, known to both the Guatemalan government and outside experts. Thus, because the stele’s ownership and origin
could be traced without question, it was undisputedly the property of the foreign
country and Hollinshead consciously dealt with it as a stolen object.

Three years after Hollinshead, the Fifth Circuit Court of Appeals, in McClain, found a violation of the NSPA for conspiring to transfer and possess objects stolen under a Mexican national ownership law on facts much more problematic than those in Hollinshead. The defendants in McClain admitted that they illegally exported the objects from the country; yet, they maintained that the objects were not owned by the State and could not be “stolen” within the meaning of the NSPA. Specifically, in McClain I, the defendants argued that the Mexican national ownership laws came about in halting stages, and while the first was enacted in 1897, neither it, nor its predecessors unequivocally transferred ownership of all cultural objects to the State. Additionally, the defendants argued that because the objects at issue could not be traced to a specific place or time of origin, it could not be conclusively determined that any of the national ownership laws would apply, even if uniformly applied.

The Court of Appeals in McClain I found that the District Court’s instruction to the jury, relating that the Mexican government had in fact owned the objects by virtue of its national ownership laws, to be incorrect and prejudicial. The court, however, disagreed with the defendants’ argument that the NSPA was not meant to cover such property declared “stolen” by national ownership laws where the objects had never been possessed or so designated by the State. The court determined that the real question to be answered was “whether this country’s own statute, the NSPA, covers property of a very special kind—purportedly government owned, yet potentially capable of being privately possessed when acquired by purchase or discovery.” The court concluded that it did, and that Congress enacted stolen property statutes to “discourage both the receiving of stolen goods and the initial taking”; thus, the case was reversed and remanded for reconsideration of the validity of Mexico’s property interest in the cultural objects.

On their second appeal, in McClain II, the defendants reiterated many of their arguments in McClain I. They again argued that the Mexican national ownership laws did not transfer a valid property interest to the State and the NSPA was not meant to apply to property declared stolen by virtue of a national ownership law. Additionally, they asserted that the Mexican laws were too vague and inconsistent to give the defendants proper notice of the status of the objects. The court reversed the defendants’ substantive convictions under the NSPA on the grounds that while the 1972 Federal Law on Archaeological, Artistic and Historic Monuments and Zones conclusively transferred ownership of the antiquities to the state, the earlier jury’s instructions claiming that Mexico owned the objects since 1897 had allowed the defendants to be convicted “pursuant to laws that were too vague to be a predicate for criminal liability under our jurisprudential standards.” However, the court found that the conspiracy conviction should not be overturned. The evidence showed the defendants “knew and deliberately ignored Mexico’s post-1972 ownership claims”; therefore, they fulfilled the intent requirement necessary to conspire to violate the NSPA. The McClain court found that in “[d]eferring to this
legitimate act of another sovereign . . . it is proper to punish through the National Stolen Property Act encroachments upon legitimate and clear Mexican ownership, even though the goods may never have been physically possessed by agents of that nation.  

Several scholars immediately criticized the McClain decision. Paul M. Bator, for instance, argued that the court’s application of the NSPA to property that had never been known or possessed by the State blurred the lines between export control and ownership. In the court’s view, the exportation of the objects “constitute[d] a sufficient act of conversion to be deemed a theft,” yet, Bator viewed the support of national ownership laws as support of disguised export regulations. Terming national ownership laws, “blanket ‘ownership’ statutes,” Bator argued against the broad application of McClain to future cultural property cases as he feared the liability protections for innocent dealers, collectors, and museums would deteriorate. Despite his argument, however, American courts began to apply the McClain doctrine to prosecute the illicit transgression of cultural property across national boundaries.

The Aftermath of McClain: 1970 UNESCO Convention and the Cultural Property Implementation Act

International conventions, created both before and after McClain, deal expressly with the continuing rise in thefts of cultural property; however, most international efforts to stop the illicit trade in art and antiquities have met with little success. Prior to McClain, the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1970 (hereinafter referred to as the UNESCO Convention) drafted a treaty that allowed source nations, believing their cultural property to be threatened by looting or pillage, to request assistance in the form of immediate import restrictions from market nations. UNESCO also created the World Heritage Committee, an intergovernmental group designed to keep inventories of all cultural and natural heritage items and receive requests for international assistance. The main purpose of the draft UNESCO Convention was to halt the illicit trade in art and artifacts through a prohibition on the importation of cultural property that was either illegally exported or stolen. Many market nations, foremost the United States, objected to prohibiting all trade as illicit because of the domestic laws of source nations and, as a result, significantly amended this provision to fit within their individual jurisprudence before ratification. The UNESCO Convention thus maintains the procedure of allowing nations to enforce cultural property protection according to their national, rather than proscribed international, laws.

The United States signed the UNESCO Convention before McClain was decided, but it was not until 1983 that the CPIA was enacted to implement the Convention. The United States subscribes generally to the basic rule that a foreign country’s law, declaring export to be illegal, does not make import into the United States illegal without United States’ law declaring the same. The CPIA, however, is
a customs law that makes the import of specified cultural property illegal.\textsuperscript{23} The Senate report supporting the implementation of the 1970 UNESCO Convention stated that Congress needed to adopt the CPIA because the increase in looting and destruction of antiquities was depriving nations of their cultural patrimony and the world of knowledge of its past. Perhaps, somewhat more practically, it was also straining the United States’ relationship with other nations, as the United States remained a principal market for stolen cultural goods.\textsuperscript{24} At the time of its creation, the Department of State stated that, “[t]he [CPIA] legislation is important to our foreign relations, including our international cultural relations. . . . the United States considers that on grounds of principle, good foreign relations, and concern for the preservation of the cultural heritage of mankind, it should render assistance in these situations.”\textsuperscript{25}

Recognizing that the purpose of the UNESCO Convention is to stop the illicit trade in art, any of the signatories may submit a request to the United States for an import control on certain categories of archaeological or ethnographic material. The CPIA authorizes the President to create bilateral or multilateral agreements with source nations to uphold such import controls on any antiquities that are illegally exported. The President, however, must determine that the controls “would be of substantial benefit in deterring the situation of pillage.”\textsuperscript{26} If an imported item violates the CPIA, it can be seized, forfeited, and civil remedies may apply. Additionally, if an item is seized, it shall first be offered for return to the State Party, or will be returned to the claimant who forfeited the material if that claimant can show valid title to the material or that he was the bona fide purchaser for the value of the material. If the claimant establishes valid title “as against the institution from which the article was stolen,” the item may still be forfeit if the State Party pays just compensation in return for the item.\textsuperscript{27}

Since the implementation of the 1970 UNESCO Convention, many have asserted that the CPIA should be the sole source of cultural property protection in the United States. Scholars have argued that since the CPIA was specifically designed to deal with cultural property issues, whereas the NSPA was not, Congressional intent was that the CPIA, and not the NSPA, should apply in cultural property cases. Additionally, they feared that the use of the NSPA would take significant power away from the Executive’s duty to consider the broader interests at stake in regulating and responding to specific problems.\textsuperscript{28} As quoted by the Brief of Amici Curiae in Support of the Appeal of Defendant-Appellant Frederick Schultz, Senator Daniel Patrick Moynihan argued in 1985 to amend the NSPA and expressly limit its reach in situations where the CPIA should apply:

should we not protect our citizens from criminal prosecution based on broad declarations of foreign ownership—often unavailable in English translation? Is it right . . . to permit American institutions and citizens to be subject to criminal prosecution by allowing declarations of foreign governments to replace the time-tested requirements that an owner have a real possessory interest in an object before it can be considered stolen?
The U.S. Federal law should embrace American—not foreign—legal principles. Proponents of this argument find the CPIA’s procedural requirements supply more adequate protection for innocent buyers of antiquities while still addressing the situations of pillage and theft.

However, despite the implementation of the CPIA, courts applied the reasoning in McClain to find national ownership laws as grounds for declaring cultural property “stolen.” For example, in Government of Peru v. Johnson, the court looked to Peru’s national ownership law to determine if it was sufficiently clear and whether the State had a real property interest in the objects. Although this was a civil and not a criminal case, the court applied McClain’s standards in analyzing the law. Finding no concrete evidence to show the objects actually originated in Peru, and that they had been exported after 1985, the effective date of the only national ownership law concerning pre-Columbian artifacts, the court found that Peru had not sustained its burden of proving ownership. The court further found that Peru only applied its ownership law to items leaving the country; since the claim of national ownership appeared otherwise ignored, the law was not applied as vesting a property interest so much as it was export sought for regulation.

In The Republic of Turkey v. OKS Partners, a Massachusetts district court stated that the United States will uphold an unequivocal law declaring national ownership of all antiquities. Whether the cultural objects, in this case, Greek and Lycian coins, had been taken at a time when the law was in effect became the issue at trial. The court found that since 1906, the Turkish national ownership law had been clearly and consistently applied, thus, the defendants had notice of the law and of the status of the coins. In United States v. Pre-Columbian Artifacts, an Illinois district court held that the violation of a Guatemalan export law meant that the objects could be classified as “stolen.” It saw the law as unequivocally transferring ownership of the items in question to the State, regardless of the State’s lack of possession. Therefore, similar to the reasoning in McClain, while the objects were not taken from any individual, they were “stolen” from the Guatemalan government. The court summarized its reasoning by broadly stating, “[f]or the property to be stolen, it must belong to someone else.” In the court’s view, that someone else may be a foreign government who has no prior knowledge of the specific objects as long as the law is clear and unambiguous.

Steinhardt and the Gold Phiale

In United States v. An Antique Platter of Gold, the McClain doctrine was brought into question. The trial court in An Antique Platter of Gold ordered the forfeiture of an Italian gold phiale to the United States government because of the misrepresentations made by an American art dealer on his customs form. Customs Directive No. 5230-15, on which the court relied, requires customs officials to look into the place of origin of an object and whether that place has a national ownership law which
could potentially support a claim for ownership. Specifically, the Directive purports that the “leading case construing the National Stolen Property Act as it relates to claims of ownership of cultural property by foreign countries is United States v. McClain.”\(^3\) The court found that since Italy has a national patrimony law, Robert Haber’s listing of Switzerland, rather than Italy, as the place of origin could affect the object’s treatment in customs. As a result, Haber’s misrepresentations were material.

Alternatively, the trial court found that there was probable cause the phiale had been exported in violation of Italy’s national patrimony law, thus rendering it stolen. The court looked to both Haber’s invocation of the Fifth Amendment and his inclusion in the sales contract of a provision stating, “if the object is confiscated or impounded by customs agents or a claim is made by any country or governmental agency whatsoever, full compensation will be made immediately to the purchaser,” to see a likelihood of prior knowledge of the phiale’s status.\(^3\) The court therefore found the forfeiture to be further justified by the NSPA.

On appeal, the court affirmed the government’s motion for summary judgment and forfeiture of the phiale due to the false statements on the customs forms. It stated that because of the independent nature of the two bases for forfeiture, the court did not need to “address whether the NSPA incorporates concepts of property such as those contained in the Italian patrimony laws.”\(^3\) However, the court again relied on the Customs Directive to dismiss Steinhardt’s argument that the misstatements were not material because they did not create a legal basis for the seizure of the phiale. The court emphasized the fact that customs officials could scrutinize an object from Italy, unlike one from Switzerland, for a possible violation of the NSPA. The court expressly relied on the Directive’s incorporation of the NSPA through McClain by stating,

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\text{[r]egardless of whether McClain’s reasoning is ultimately followed as a proper interpretation of the NSPA, a reasonable customs official would certainly consider the fact that McClain supports a colorable claim to seize the Phiale as having possibly been exported in violation of Italian patrimony laws. Indeed, the Directive explicitly references the McClain decision and informs officials that if they are unsure of the status of a nation’s patrimony laws, they should notify the Office of Enforcement.}\]

Through this reasoning, the court saw a legal basis for the forfeiture of the phiale.

While not addressing the NSPA directly, the appellate court upheld the district court’s finding under 18 U.S.C. § 545 that the Government had shown probable cause that the phiale was subject to forfeiture and that Steinhardt did not meet his burden of proving, by a preponderance of the evidence, that the phiale was not stolen. An Antique Platter of Gold did not answer the question whether Italy’s patrimony law constituted valid ownership of the antiquity, however, or resolve the outstanding issue about the relationship between the NSPA and CPIA, and which one should apply in cultural property cases. In effect, Steinhardt sent a mixed message: on the one hand, the potential violation of the NSPA was grounds for forfeiture, but, on the other hand, the court was unwilling to apply outright Italy’s national patri-
mony law as the basis for ownership. Thus, the Schultz case took on greater impor-
tance as the next case that might be able to offer clarification on this issue.

ANALYSIS OF SCHULTZ

Schultz’s Dealings

The facts in Schultz are striking. Beginning in the early 1990s, Schultz funneled money
to a renowned art thief and smuggler, Jonathan Tokeley-Parry. Tokeley-Parry pur-
chased various looted antiquities with the help of an Egyptian couple, Ali and Tou-
tori Farag, dipped the artifacts in clear plastic, and painted them to represent cheap
souvenirs to smuggle them out of Egypt. In addition to funding his work, Schultz
worked with Tokeley-Parry to bypass the 1983 Egyptian ownership law. They copied
19th century pharmaceutical labels onto paper that had been baked and tea stained,
claiming the artifacts belonged to the “Thomas Alcock Collection;” thereby, they
turned newly stolen antiquities into “legitimately owned” English pieces. If the objects
had been privately owned before the turn of the twentieth century, it would be much
harder to prove the object as stolen pursuant to a foreign public law. Prior to the
creation of national ownership legislation, most source nations relied on export
controls to stop the trade in looted artifacts. When British authorities investigated
Tokeley-Parry’s illegal trade, they discovered Schultz’s illicit activities, as Tokeley-
Parry implicated Schultz both in his personal documents and in his trial testimony.
and the United States Federal Bureau of Investigation, as well as Tokeley-Parry him-
self, testified regarding Schultz’s involvement in the smuggling and sale of numerous
stolen antiquities. Schultz was found guilty of conspiring to receive stolen goods in
violation of the NSPA and was sentenced on June 11, 2002.

Schultz Argued that Egyptian Law 117 is about Licensing and
Export Regulation, not State Ownership

Schultz argued that Egyptian Law 117 is about licensing and export regulation, and
thus, no true ownership rights vested because of the law. Because Egypt never actu-
ally possessed the objects in question, the State’s ownership was triggered only by
their export. Thus, Schultz claimed Law 117 is primarily concerned with preventing
exportation, and United States’ policy does not generally recognize the public laws
of a foreign nation. However, witnesses for the United States testified that the Egyp-
tian government and its Antiquities Police are more concerned with cases that involve
unlawful possession of antiquities than smuggling. Relying on this assertion and
analyzing the plain language of Egyptian Law 117, the court concluded that as of
1983, Egyptian Law 117 clearly gives the State title over, possession of, and the right
to transfer all movable and nonmovable antiquities.
Egyptian Law 117, implemented through Egypt’s Supreme Council of Antiquities, is arguably one of the world’s clearest ownership laws, stating all antiquities are the property of the government.43 Both Egyptian witnesses for the United States “confirmed the purpose of Law 117 [as] ... to bring all newly discovered antiquities within the direct possession and control of the Egyptian government in order to ensure that they are properly preserved and documented.”44 While critics claimed that the law was obscure and generally not enforced at the time of Schultz’s illegal trade, the court disagreed. The court found that the law was both clear and uniformly applied at the time the objects left the country; therefore, Schultz had proper notice of its existence. Dr. Gaballa Ali Gaballa, the Secretary General of the Egyptian Antiquities Council, stated that, “[t]his is the first time that a foreign law has been recognized in America, and now we can file suits against international thieves and smugglers who have become wealthy at our expense; we can ensure that our treasures are returned to their homeland.”45

**Schultz Argued that the United States should not recognize the “Special” Property created by “Patrimony” Laws like Egyptian Law 117**

Schultz’s argument concerned the policy of the American judiciary: that national ownership laws do not create interests that the United States should legally protect. Because he viewed the law as an export or licensing scheme, Schultz asserted that the United States does not uphold the export restrictions of foreign countries. This argument reasoned that a national ownership law, claiming ownership of objects not yet discovered, documented, or possessed, is in actuality, an export restriction to prevent antiquities from leaving the State. Although true, to an extent, the court pointed out that Egyptian Law 117 is not about export restrictions, but rather, constitutes a valid ownership law. In addition, the court noted that other United States’ courts had previously prosecuted foreign thefts through the NSPA to deter United States citizens specifically from dealing with internationally stolen goods.46 While the trial court emphasized the significant property interest a State has in protecting its symbolic heritage, seemingly whether or not that heritage is in its actual possession, the appellate court stated that, “the fact that the rightful owner of the stolen property is foreign has no impact on a prosecution under the NSPA.”47

The reasoning of the Schultz court mirrored the analysis used in previous cultural property cases. As was seen in The Republic of Turkey v. OKS Partners and United States v. Pre-Columbian Artifacts, ownership laws present a way for source nations to have their cultural property regulations upheld by foreign courts, especially those in market nations.48 Such laws also support the archaeological interest in the investigating of antiquities in situ, that is, within their original context and not yet excavated. Yet, the application of the NSPA requires a national ownership
law be unambiguous and its ownership be evident in order to comply with the United States’ Constitutional due process requirements. The object in question must also be taken from the country after the enactment of an effective national ownership law to satisfy the evidentiary showing United States’ courts require. Many argue that upholding national ownership claims allows a “blank check” for foreign nations to stop the export of their cultural property, as was seen in Bator’s argument concerning _McClain_. But, according to the court in _Schultz_, national ownership laws can also represent “legitimate declarations of ownership.”

**Schultz Argued that If There Is a Foreign Interest Entitled to Protection in a United States Court, the Case Should Fall Under the CPIA, and Not the NSPA**

The basis of Schultz’s argument was that the CPIA supercedes the NSPA in this case. He claimed the creation of the CPIA “confirms that Congress never intended [the] NSPA to reach ownership claims based upon national vesting laws when the property has not been reduced to the possession of the foreign state.” Schultz argued that the CPIA is the only law intended to apply to antiquities and cultural property imported into the United States. Additionally, he avowed that the NSPA did not apply because the status of _McClain_ had been shaken by the court’s decision in _An Antique Platter of Gold_. The court in _Schultz_, however, disagreed and found that its earlier decision not to address Italy’s patrimony law had no effect on their analysis of Egypt’s patrimony law, nor on the validity of the _McClain_ doctrine. Neither did the trial or appellate court find any language or legislative intent directing the CPIA as the sole law to deal with imported cultural property. Rather, the court looked to the underlying policy concerns of both the CPIA and the NSPA, and found the NSPA’s purpose of deterring theft to be more fitting in this case.

The CPIA specifically restricts the importation of certain, identified objects into the United States when there exists an agreement between the United States and a foreign country. These restrictions may be applied in two instances: (1) where the object has been stolen from a museum, religious or secular institution, or public monument; or (2) where there is a demonstrated need by the foreign country for import controls due to excessive looting or theft.

Schultz argued that since the CPIA specifically prohibits the import of objects stolen from museums or other such institutions, objects taken in violation of foreign patrimony laws were not included in the CPIA’s restrictions. The court dismissed this argument as “unpersuasive,” and ruled that “[t]he CPIA does not state that importing objects stolen from somewhere other than a museum is legal. If, for instance, an artifact covered by the CPIA were stolen from a private home in a signatory nation and imported into the United States, the CPIA would not be violated, but surely the thief could be prosecuted for transporting stolen goods in violation of the NSPA.”
The NSPA punishes those who knowingly deal in goods that are “stolen, converted or taken by fraud” from any source. The NSPA is not intended to be used as an import restriction, and the court in Schultz made a point of reaffirming the distinction between “mere unlawful export and actual theft.” By requiring the national ownership law to comport with rigorous standards of clarity, uniformity, and consistency, as well as demanding an analysis of when and from where the objects were taken, the courts distinguish valid State property interests from export restrictions. In addition, and through the plain language of the CPIA’s legislative history, the CPIA was intended to exist concurrently with other criminal laws. Although the CPIA and the NSPA may overlap in certain areas, it was expressly stated in the CPIA’s accompanying Senate report that “the implementation of Article 7(b) of the [Cultural Property Implementation] Convention affects neither existing remedies available in State or Federal courts, nor laws prohibiting the theft and the knowing receipt and transportation of stolen property in interstate and foreign commerce.”

The NSPA does require a high evidentiary burden of proof, because as a criminal statute, the elements of the crime must be proven beyond a reasonable doubt and there is an intent requirement that the prosecution must prove on the part of the defendant. Some say this is why convictions under the NSPA are rare. For instance, because stolen antiquities often pass through many or various possessors, tracing the theft of an item to a particular time and place is very difficult. Despite this, “the NSPA remains one of the most effective means of recovering stolen cultural objects in the United States.”

The Aftermath of Schultz

Reactions varied to the Schultz decision. Some hailed it as finally affirming the need to combat the looting of antiquities. Others criticized it, believing the recognition of national ownership laws will only serve to stop the worldwide circulation of art, historical, and archaeological material that is of benefit to “humankind”; and that the United States government is only pursuing this course of action because it is “in the business of keeping other countries happy.” Specifically, many antique dealers and art collectors argue against the ruling in Schultz because they believe that the enforcement of national ownership laws is only a nod to national patrimonial politics and actually prevents those who can best preserve and protect cultural property from doing so.

Many find the trade in cultural property to be a very beneficial exchange. In addition, they argue that to uphold foreign national ownership laws is essentially to uphold the foreign export laws of a nation, in that included within a national ownership law is a prohibition against the exportation of cultural objects. After the McClain decision, for instance, Bator argued that the application of the NSPA to objects declared stolen by virtue of a national ownership law is a “blanket legislative declaration of state ownership … [that] without more, is an abstraction … [thus] illegal export, after the adoption of the declaration, suddenly becomes ‘theft.’”
The *Schultz* decision reaffirmed this abstraction in the minds of many scholars. Despite these concerns, however, there is an unmistakable trend in United States cases whereby foreign cultural property ownership laws can be the basis for the prosecution of violators under the NSPA.

**THE EMERGING TREND**

Most market nations, including the United States, believe in “cultural internationalism,” whereby cultural property is viewed as subject to the common interest of mankind and that efforts should focus on the free flow of information and protection by those with the best resources to do so. In “cultural nationalism,” an approach common to source nations, the relationship between an artifact and its country of origin is most significant and the retention of national heritage is thought to supercede worldwide heritage.61 Spanning the two approaches, a prevalent theme in international law is the idea that, “the cultural property of a country of origin must be protected, the criminal taking of cultural property from its country of origin is prohibited, and States must co-operate in good faith to resolve questions of ownership of such property after a taking has occurred.”62 Thus, many argue that there is a new customary international norm requiring nations to return stolen objects, and nations comply with this norm out of a sense of legal obligation and an interest in public policy. Some proponents of international protection argue for further international intervention in cases where the source nation cannot adequately protect its own cultural property. Many believe that preventing international intervention only cuts off antiquities from those who could help preserve them, and that either to reconcile foreign exploitation and military invasions, or simply to aid poorer nations, international law should allow long-arm jurisdiction arguments to justify intervention.63

Some individuals advocate for more internationally focused arbitration when nations conflict over the proper protective strategies. For instance, determining the “identity of the rightful owner, the culture which the object represents, and the significance of the object to that culture,” as well as whether the object should be returned at all, are often issues that cause serious litigation, and most national courts are biased towards one party or another. Scholars point to the benefits of international arbitration: the forum will be more neutral, arbitrators with expertise could be appointed, uniform rules and regulations could lower the costs and the obstacles to resolving an international cultural property conflict, and finally, parties would receive a better assurance of having the decision enforced on an international plane.64

While leaning towards a nationalistic view, the reliance on national ownership laws as creating valid property interests is becoming more widespread by source and market countries alike. The NSPA applies national property principles and federal criminal sanctions while only relying on foreign national ownership laws to determine the status of the object. It would appear, from *McClain* and its progeny, *Schultz*, that...
regardless of whether the State has possession, or even knowledge, of the object prior to its theft, a valid property interest is created by the national ownership law that satisfies the NSPA’s definition of “stolen” and fulfills its purpose of preventing the cross-jurisdictional transportation of stolen goods. A newspaper commentator, writing before Schultz’s conviction, remarked that “the Schultz trial will quite likely define how far the American judiciary is willing to let the U.S. government go in regulating the antiquities trade—and what legal weapons federal prosecutors can use.”65 Such a move in the United States, although still receiving criticism, is reflective of the growing international pressure to increase the protection of cultural property.66

Other market nations, in addition to the United States, are developing criminal laws to combat thefts of cultural property. The United Kingdom, for instance, recently enacted the *Dealing in Cultural Objects (Offences) Act 2003*. This criminal statute deals specifically with the “acquiring, disposing of, importing or exporting tainted cultural objects.”67 Defining an object as “tainted” if it is unlawfully excavated, the *Dealing in Cultural Objects (Offences) Act* is similar to the NSPA in that it criminalizes all dealings in stolen objects, regardless of where the object acquired its “stolen status.” Thus, while the NSPA does not expressly protect cultural property, both it and the *Dealing in Cultural Objects (Offences) Act* function to prosecute individuals dealing in goods that are stolen by virtue of the individual’s violation of a foreign national ownership law.

**CONCLUSION**

Cultural property is very significant to the people for whom it is part of their cultural heritage. However, cultural property is undoubtedly most significant when it can be placed in a chronological sequence and historical framework, thereby illuminating a group’s cultural identity. The “uncontrolled movement of antiquities results in irreparable damage,” not only to the objects themselves, but “in [the] incalculable losses to important segments of history.”68 The application of the NSPA, a statute originally meant to handle stolen motor vehicles, to international thefts of cultural property provides a new tool in the fight for cultural property protection. For instance, just recently in the context of the recent Iraqi conflict, the United States Secretary of State, Colin Powell, publicly sanctioned the use of the NSPA for prosecuting illicit dealings in cultural property.69 The appellate court in *Schultz* concluded its discussion of the NSPA by stating,

[w]e believe that, when necessary, our courts are capable of evaluating foreign patrimony laws to determine whether their language and enforcement indicate that they are intended to assert true ownership of certain property, or merely to restrict the export of that property . . . [t]he mens rea requirement of the NSPA will protect innocent art dealers who unwittingly receive stolen goods, while our appropriately broad reading of the NSPA will protect the property of sovereign nations.70
Thus, in United States case law and public policy, the NSPA is fast on its way to becoming “established” as a cultural property protection tool.71 Because the United States is not the only country championing the use of criminal prosecutions in cultural property cases, the harsher punishments and recognition of the valid property interests created by national ownership laws foreshadow a greater use by source nations of state involvement to protect sensitive antiquities and cultural items from illegal excavation and exportation. The use of the NSPA will also help create stronger deterrents to discourage would-be thieves of cultural property. While the final impact of the NSPA on the black market of cultural property remains unsure, it is clear that in the United States and perhaps throughout the world, the decision in Schultz reveals an emerging trend that is here to stay and forever shape the future of cultural property protection.

ENDNOTES

2. Wilkie, “From the President.”
8. See Convention for the Protection of Cultural Property in the Event of Armed Conflict, preamble (representing one of the earliest major international efforts to protect cultural property).
11. 495 F.2d 1154.
12. United States v. Hollinshead, 495 F.2d 1154, 1155-56 (9th Cir. 1974).
13. United States v. McClain, 545 F. 2d 988, 992 (5th Cir. 1977), rehearing denied, 551 F. 2d 52 (5th Cir. 1977) [hereinafter McClain I]; United States v. McClain, 593 F. 2d 658 (5th Cir. 1979), cert. denied, 444 U.S. 918 (1979) [hereinafter McClain II].
14. See McClain I, 545 F.2d 988, 996 (stating that it was Congress’s intent to provide property owners in foreign nations protection for their property beyond export laws).
15. See McClain I, 545 F.2d 988, 993 (stating that Congress’s purpose in creating such statutes as the NSPA was to help source nations that previously could not protect their cultural property once it had left the country).
17. McClain II, 593 F. 2d 658, 671.


22. S. Rep. No. 97-564, Title II.


25. S. Rep. No. 97-564, Title II.


34. 991 F. Supp. 222, aff’d, 184 F. 3d 131; Schultz, 333 F. 3d 393, 406-07.


37. An Antique Platter of Gold, 184 F. 3d 131, 134.

38. An Antique Platter of Gold, 184 F. 3d 131, 137.

39. See Merryman, “Symposium III,” 57–59 (quoting the Cairo newspaper Al-Ahram’s list of Tokeley-Parry’s and Schultz’s antiquities smuggled out of and then later returned to Egypt, including: twenty-seven papyrus texts in Demotic script dating from 300 B.C., twelve Coptic textiles, a sixth-dynasty limestone relief of a seated woman named Se-Chess-Hat, a terracotta statue of an unknown person, Greco-Roman mummy masks, a “magnificent” bronze statue of the god Horus, an unidentifiable royal head in granite, colored reliefs from ancient Egyptian tombs, thirty-five items from the tomb of Hetep-Ka at Saqqara); “Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century: Panel Discussion,” 314.


41. Rose, “Antiquities Dealer Sentenced.”

42. See “List of Cultural Property Agreements and Federal Register Notices” (revised July 30, 2002). http://exchanges.state.gov/culprop/list.html (accessed 27 Feb. 2003) showing that Egypt does not have an import restriction agreement with the United States so there would be no statutory precedent for upholding an Egyptian importing or licensing regulation); see also Schultz, 178 F. Supp.2d 445, 447-8 (stating that Egyptian Law 117 “unequivocally asserts state ownership of all antiquities [Art. 6], requires their recording by the state [Art. 26], prohibits [with certain practical exceptions] private ownership, possession, or disposal of such antiquities [Arts. 6-8], and requires anyone finding or discovering a new antiquity to promptly notify the Antiquities Authority [Art. 23-24]”). The court considers the practical components of Law 117 to further prove its purpose as a transfer of ownership.

43. See “UNIMED-AUDIT, The Cultural Heritage Legislation in Egypt”, 2002, at http://www.sca.gov.eg/activity/body.html (accessed 27 Feb. 2003), stating that Law 117 defines “antiquities” as “any building or movable object resulting from the different civilizations that span the totality of the Egyptian History, reflecting human, artistic, technical, military, religious aspects and of more than one hundred years old.”
44. Schultz, 333 F. 3d 393, 405.
45. See Vincent, “Schultz Convicted” (claiming that the American justice system is seeking ways to please allies and strengthen international relationships as the real reason why the court upheld the Egyptian law); “Egyptian antiquities law enforced by American courts”; Al-Alref and Jobbins, “The Night of Counting the Years.”
46. Schultz, 333 F. 3d 393, 448.
47. Schultz, 333 F. 3d 393, 402; Schultz, 178 F. Supp.2d 445, 446 n.5.
49. Luñkin, “New York court rules Egyptian law can be basis of prosecution of dealer”; see also Moore, “Enforcing Foreign Ownership Claims in the Antiquities Market,” 466, 473, 474 (noting that when a state declares itself owner of all antiquities within its borders, it usually refers to antiquities both discovered and undiscovered, therefore, in many cases the state will not have any prior knowledge or documentation of the cultural object). In most other property claims in United States courts, the court demands proper documentation and proof of ownership; with national ownership claims, the court relies on the language and application of the law to determine if the item was actually owned by the state; McAlee, “The McClain Case, Customs, and Congress,” 180.
50. Schultz, 333 F. 3d 393, 403; Schultz, 178 F. Supp.2d 445, 449.
51. Schultz, 178 F. Supp.2d 445, 449; see also United States v. Stephenson, 895 F.2d 867, 873 (2nd Cir. 1990) (noting the distinctions made in statutory language and when two statutes use similar terms of art, looking to the legislative intent to decide which of the two to apply).
52. 19 U.S.C. §2607-08.
53. Schultz, 333 F. 3d 393, 408-09.
55. Schultz, 333 F. 3d 393, 403.
56. S. Rep. No. 97-564, Title II.
65. Vincent, “Commentary.”
67. See Dealing in Cultural Objects (Offences) Act 2003 (noting that this act does not apply to Scotland).
69. Macari, “Last Shot for Schultz?”
70. Schultz, 333 F. 3d 393, 410.
71. Eck and Gerstenblith, “Cultural Property.”

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