Department of Justice

STATEMENT

OF

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BEFORE

THE

SUBCOMMITTEE ON CRIMINAL LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

ARCHEOLOGICAL THEFT

ON

MAY 22, 1985

Mr. Chairman; members of the Subcommittee.

I appreciate the opportunity to appear before this Committee to testify in opposition to S. 605, a bill to amend sections 2314 and 2315 of title 18, United States Code, relating to stolen archeological material.

In order to protect their national heritage, a number of nations have enacted legislation which provides that archeological material of civilizations which once existed within their territorial boundaries belongs to the nation even if such property has not yet been discovered or recovered. The courts of the United States have generally recognized the sovereign right of a country to declare itself the owner of such property. In addition to a declaration of ownership, our courts have required that the foreign country establish sufficient controls over the property to reflect its ownership interests.

Sections 2314 and 2315 of title 18, United States Code, compose the National Stolen Property Act (NSPA). Section 2314 prohibits the transportation in interstate or foreign commerce of goods, wares, merchandise, money, or securities of a value of $5,000 or more knowing the same to be stolen, converted, or taken by fraud. Section 2315, the fencing provision, prohibits the receipt, concealment, storing, bartering, selling or disposing of such property which is moving as, is a part of, or constitutes interstate or foreign commerce knowing the same to have been stolen, unlawfully converted, or taken by fraud. Under S. 605 sections 2314 and 2315 of title 18, United States Code, would be amended to add at the end of each section the following:

> This section shall not apply to any goods, wares, or merchandise which consists of archeological or ethnological materials taken from a foreign country where —
>
> (1) the claim of ownership is based only upon —
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> (A) a declaration by the foreign country of national ownership of the material; or
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> (B) other acts by the foreign country which are intended to establish ownership of the material and which amount only to a functional equivalent of a declaration of national ownership;
>
> (2) the alleged act of stealing, converting, or taking is based only upon an illegal export of the material from the foreign country; and
>
> (3) the defendant's knowledge that the material was allegedly stolen, converted, or taken is based only upon the defendant's knowledge of the illegal export and the defendant's knowledge of the claim of ownership described in clauses (1)(A)and (B).

S. 605 effectively precludes the assertion of ownership interests of foreign governments in those archeological and ethnological materials from their past that have not yet been reduced to possession by those foreign governments. S. 605 is an attempt to limit the scope of the National Stolen Property Act as interpreted by the United States Court of Appeals for the Fifth Circuit in United States v. McClain, 545 F.2d 988 (1977), rehearing at 551 F.2d 52 (1977), retrial at 593 F.2d 658 (1979). The Department of Justice believes that the McClain

decision reflects the proper interpretation of the NSPA. 1/ Under McClain, if a foreign country declares itself the owner of certain property within its territory which has not been reduced to actual possession and imposes controls over such property to enforce its ownership, its property rights are protected by the NSPA.

S. 605 does not directly attack the right of the foreign government to declare ownership of this type of property. Instead it denies the protection of the NSPA to property which had not been reduced to possession by the foreign government even when the defendant was aware of the foreign government's legal claim and the fact that the material had been illegally smuggled out of that country. The additional burdens placed on the prosecutor to prove the elements of the offense will, as a practical matter, effectively remove the deterrent aspects of the NSPA as to archeological or ethnological property which has not been reduced by the government to possession, since it would be nearly impossible for the prosecution to prove the circumstances of the original "taking" of the material. And even in those cases where the object has been reduced to possession, it may

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1/ Moreover, it is unclear to the Department of Justice exactly which countries are targeted by S. 605. For example, it is our judgment that S. 605 as drafted would not apply to Mexico because that country has established a whole panoply of legal requirements pertaining to such property (e.g., registration, identification procedures, export controls and a national declaration of ownership).

make proof of theft more difficult since the defendant will likely claim that he/she discovered it, a claim which if believed would remove his/her conduct from the scope of the NSPA.

In our judgment, the deterrent effect of McClain is consistent with the United States' policy of protecting the archeological and ethnological property of foreign nations, as evidenced by Congress' recent enactment of the Convention on Cultural Property Implementation Act, P.L. 97-446 (title III), January 19, 1983, 96 Stat. 2350, 19 U.S.C. 2601-2613, and by this nation's laws on its own archeological resources (Archeological Resources Protection Act of 1979, P.L. 96-95, Oct. 31, 1979, 93 Stat. 721, 16 U.S.C. 470 aa-11). The former legislation, and the the Convention it implements, is intended to supplement existing laws relating to cultural property and not supplant them. In enacting the Cultural Property Implementation Act, there is no credible evidence to indicate any intent by the Congress to overrule McClain.

The Department of Justice was involved in the long and arduous legislative process that produced the Convention on Cultural Property Implementation Act and we have opposed previous proposals to overrule the McClain decision. We have consistently noted the significant prosecutive burdens which must be overcome in a successful prosecution under 18 U.S.C. 2314 and/or 2315. (For the benefit of the Subcommittee, I have enclosed with my statement a memorandum discussing the elements of a prosecution under the National Stolen Property Act.) We have also recognized

the lack of any indication of prosecutorial abuse of these statutes in their application to archeological material.

We would, however, renew an offer, first made almost a decade ago, to meet with representatives of legitimate owners of archeological material, such as dealers, private collectors and museums, to discuss the adoption of internal Department of Justice procedures which could include preindictment review of proposed prosecutions involving archeological or ethnological material to prevent inappropriate prosecutions.

In sum, however, from a law enforcement perspective, enactment of S. 605 is not desirable. S. 605 would impair our ability to prosecute the trafficker in stolen archeological and ethnological materials who flouts the laws of foreign nations concerning such property. Though not so intended by its proponents, its enactment could effectively create a legal marketplace within the United States for the fruits of foreign grave robbery — a situation we cannot countenance.

I thank you for providing us the opportunity to testify on S. 605. I will be glad to answer any questions the Subcommittee may have.

Applicability of National Stolen Property Act (NSPA) to Certain Forms of Stolen Archaeological and Ethnological Material

For the benefit of the Subcommittee, as well as those persons who have expressed concern over the possibility that the decisions in United States v. McClain, 545 F.2d 988, (5th Cir. 1977), rehearing at 551 F.2d 52 (1977), retrial at 593 F.2d 658 (1979), would create an enhanced risk of prosecution under the National Stolen Property Act (NSPA), the following is provided to illustrate the heavy burden of proof which must be met in order to conduct a successful prosecution under 18 U.S.C. § 2314 and § 2315. Each of the various elements listed below must be proven beyond a reasonable doubt.

18 U.S.C. § 2314

Section 2314 of Title 18, United States Code, provides, in part:

> Whoever transports 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 . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Under 18 U.S.C. § 2314 the government would be required to prove:

1. unlawful transportation which requires transportation with a criminal intent or criminal purpose;

2. that the material was transported in interstate or foreign commerce;

3. that the material was "goods, wares, or merchandise";

4. that the material had a value of $5,000 or more;

5. that the material was "stolen, unlawfully converted, or taken by fraud." This means the Government must be able to prove that the foreign country is in fact the true owner. Except for Mexico, most foreign nations, according to our understanding, have not passed appropriate statutes which are sufficiently enforced to give rise to such proof; and

6. the defendant knew the material was "stolen, unlawfully converted, or taken by fraud." In terms of the "thefts" years ago, the normal inference of possession of recently stolen property to show guilty knowledge would not be available. The Government would have to show actual knowledge. The uncertainty of foreign laws and honest claims of innocent purchaser for value without guilty knowledge would be extremely hard to overcome.

18 U.S.C. § 2315

Section 2315 of Title 18, United States Code, provides, in part:

> Whoever receives, 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 $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

In regard to 18 U.S.C. § 2315, besides the similar elements and intent of 18 U.S.C. § 2314, the Government would also have to show the material "is moving as, or which is a part of, or which constitute interstate or foreign commerce" at the time of the operative act (i.e. receive, conceal, store, barter, sell, dispose, pledge, or accept as collateral). Interstate and foreign commerce eventually come to an end. For "thefts" decades ago and for museums who have held such material for years it will be highly unlikely that the Government could prove the material was still in the "movement" condition required by the statute. (Note: The value of the property for the operative acts of pledging or accepting as collateral would only have to be $500 instead of $5,000.)

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