

RECORD NO. 11-2012

In the
United States Court of Appeals
for the Fourth Circuit

ANCIENT COIN COLLECTORS GUILD,

Plaintiff–Appellant,

v.

**U.S. CUSTOMS AND BORDER PROTECTION,
DEPARTMENT OF HOMELAND SECURITY;
COMMISSIONER, U.S. CUSTOMS AND BORDER
PROTECTION; UNITED STATES DEPARTMENT OF
STATE; ASSISTANT SECRETARY OF STATE,
Educational and Cultural Affairs,**

Defendants–Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT BALTIMORE**

—————
REPLY BRIEF OF APPELLANT
—————

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SUMMARY OF ARGUMENT

In its opening brief, the Ancient Coin Collectors Guild (“the Guild”), a non-profit advocacy group for collectors and the small businesses of the numismatic trade, established that the District Court was obliged to review the Government’s efforts to suppress the long-standing trade in common collectors’ coins. In so doing, the Guild demonstrated that import restrictions must only be imposed in compliance with the significant procedural and substantive constraints on executive authority found in the Convention on Cultural Property Implementation Act (“CPIA”), 19 U.S.C. §§ 2601 *et seq.*

In response, the Government has retreated back to the extreme positions it espoused below. First, although the District Court concluded that the Government’s delays in filing a forfeiture action cut towards the finding of a constitutional violation, the Government nonetheless alleges that the Guild “circumvented” the law in filing this action. (Government Brief at 28-30.) The Government then insists that its efforts to suppress the long-standing trade in common collectors’ coins is either a foreign policy matter or one fully committed to agency discretion, leaving the Guild and the small businesses and collectors it represents without recourse. (*Id.* at 30-40.) Next, the Government claims that it is empowered to seize any undocumented coin that “likely” was found in either Cyprus or China, notwithstanding explicit statutory language to the contrary. (*Id.* at

40-46.) Finally, the Government asserts that China asked for import restrictions on coins, but cites no record evidence to support that position. (*Id.* at 46-50.)

As the Guild confirms in this reply, the District Court had the duty to conduct a judicial review of the Government's decisions to impose import restrictions on collectors' coins. Despite the Government's efforts to cast this dispute as one about diplomatic relations, the Guild only seeks judicial review of import restrictions on ancient coins. It strains credulity to imagine how any judicial decision either to strike down such import restrictions or to limit their scope will have any foreign policy repercussions whatsoever, particularly when those restrictions discriminate only against American coin collectors and small businesses. There is also no reason to consider import restrictions on coins to be "committed firmly to agency discretion." If laymen on the Cultural Property Advisory Committee ("CPAC") can apply the criteria of the CPIA to their own recommendations, certainly a court can do so as well. For the reasons the Guild establishes here, and in its opening brief, the decision below should be reversed. This case should go forward on the merits.

ARGUMENT

The District Court Possessed Ample Authority to Review the Government's Decision to Impose Import Restrictions on Collectors' Coins.

A. Serious Substantive and Procedural Irregularities Marred the Government's Decision-making.

1. The Guild's Allegations Control.

The Government asserts that the U.S. Department of State (“State”) and U.S. Customs and Border Protection (“CBP”) complied with the CPIA’s procedures, but the Guild has alleged that serious substantive and procedural irregularities actually marred their decision-making. Because this appeal arises from a motion to dismiss, the allegations in the Amended Complaint are deemed true. *See Robinson v. Am. Honda Motor Corp.*, 551 F.3d 218, 222 (4th Cir. 2009). To the extent the Government suggests otherwise in its papers, the Guild’s allegations must control this Appellate Court’s assessment of whether the court below dismissed its claims without allowing the development of a factual record.

Substantively, the Guild alleges that the Government: (1) confused “cultural significance” with “archaeological significance” when it comes to objects that exist in multiples, like coins; (2) ignored evidence that Cypriot and Chinese coins circulated widely beyond their place of manufacture such that the “first discovery requirement” could not be met; (3) ignored or misapplied the CPIA’s requirements

that less drastic measures like treasure trove laws or regulation of metal detectors¹ be instituted before imposing restrictions; (4) ignored or misapplied the CPIA’s “concerted international response requirement”; and (5) wrongfully imposed import restrictions on coins without regard to their find spots. (*See Amended Complaint* ¶¶ 29, 35-36, 44, 45, 62, 120-45, 170-77, JA 144-45, 147, 151, 163-70.)

Moreover, the Guild also alleges: (1) State Cultural Heritage Center staff worked behind-the-scenes with members of the archaeological lobby to orchestrate a change in existing precedent exempting coins from import restrictions; (2) State Cultural Heritage Center staff added coins to the Chinese import restrictions without a formal request from Chinese officials to do so; (3) after CPAC rebuffed a last-minute effort to add import restrictions on Cypriot coins, then State Undersecretary Nicholas Burns ordered such import restrictions anyway as a “thank you” to Greek and Cypriot-American advocacy groups which had given him an award; (4) Assistant Secretary of State, Bureau of Educational and Cultural

¹ The Government claims that the advent of the metal detector undercuts State Deputy Legal Adviser Feldman’s representations to Congress that “it would be hard to imagine” import restrictions on coins. (Government Brief at 45 n.18.) However, such devices have been available since the 1970s in Europe, and they were certainly in wide use by 2007, when CPAC again recommended against import restrictions on coins. *See Raimund Karl, On the Highway to Hell: Thoughts on the Unintended Consequences for Portable Antiquities of § 11(1) Austrian Denkmalschutzgesetz*, *The Historic Environment* 111, 120 (Oct. 2011). Consequently, the Government’s “metal detector defense” is little more than a “red herring.”

Affairs (“Assistant Secretary, ECA”) Dina Powell did not recuse herself from approving the 2007 extension of the Memorandum of Understanding (“MOU”) with Cyprus after she had accepted a new position with an international financial institution that likely has business interests with Cyprus; (5) when she made this decision, State employees provided Powell with a false choice of either renewing the current MOU and adding new restrictions on coins or ending all restrictions; and (6) State then misled Congress and the public about CPAC’s true recommendations against import restrictions on coins. (*See Amended Complaint* ¶¶ 37-90, 120-37, JA 146-58, 163-68.)²

² In addition, former CPAC members have expressed other serious concerns about how State administers the CPIA. These include: (1) conducting CPAC votes using shortened versions of required findings (Transcript of Seminar, *The Cultural Property Act: Is It Working?* (Mar. 21, 2011) (hereinafter “CPRI Seminar”) at 30:8-17; 51:4-52:8, JA 362, 383-84); (2) refusing to allow CPAC members to review their own CPAC reports such that they cannot even verify if their recommendations were accurately reported to the decision-maker (*id.* at 49:1-14, JA 381); (3) relying upon evidence of historic looting rather than evidence of present-day looting to conclude that a source country’s cultural patrimony was in jeopardy (*id.* at 30:19-21, JA 362); (4) requiring only minimal self-help efforts and evidence of cultural exchange to justify ever broader restrictions (*id.* at 30:21-31:10; 58:5-18, JA 362-63, 390); (5) unilaterally changing restrictions from “emergency” to “regular” ones without making the required findings or seeking CPAC’s recommendations even though different standards apply (*id.* at 32:3-33:1, JA 364-65); (6) ignoring CPAC’s recommendations with regard to coins (*id.* at 45:17-46:15, JA 377-78); and (7) packing CPAC slots meant for representatives of other stakeholders with representatives of the archaeological community (*id.* at 46:12-15; 50:4-20; 83:4-84:7, JA 378, 382, 415-16). These revelations also belie any argument that State and CBP scrupulously follow the law.

The Guild is mindful that these are serious allegations, but as such, they deserve full and open consideration below.

2. The Government's New "Evidence" Raises New Questions That Were Not Raised Below.

For the first time on appeal, the Government offers new "evidence" that was not part of the record below: (1) an "Action Memo" approving the 2007 extension of the MOU with Cyprus (*see* Government Brief, Addendum 1); and (2) the representation that State employees had preliminary responsibility for preparing the designated lists that imposed import restrictions on particular types of Cypriot and Chinese coins. (Government Brief at 30-31.)

The Government's unexplained insertion of this new material into the record on appeal prejudices the Guild and demonstrates the same indifference to the rules as evidenced in the Government's misapplication of the CPIA. *See Ostergren v. Cuccinelli*, 615 F.3d 263, 266 n.1 (4th Cir. 2010) ("From a procedural standpoint, courts hearing a case on appeal are limited to reviewing the record that has been developed below."). Indeed, the importance of this material to the Government's case only argues for a remand to allow for the full development of a factual record below.

a. The “Action Memo” Adds Little in Its Redacted State.

Even assuming *arguendo* that the Court considers the “Action Memo,” the heavy redactions therein limit its value.³ First, one cannot discern whether the decision-maker was informed about CPAC’s recommendations against import restrictions on coins. Second, the “Action Memo” merely reveals a false choice: either renew the Cypriot MOU with new restrictions on coins or disapprove it in its entirety. (See Amended Complaint ¶¶ 72-73, 135(k), 170-77, JA 153-54, 167, 174-76.) Finally, the document confirms that the decision-maker *only* decided to impose import restrictions on coins as a general matter; there is *no suggestion* that Powell also determined the particular coins that should be subject to restriction or the basis for any such determination.

b. Preparation of the Designated List.

The Government has also alleged for the first time on appeal that State employees had preliminary responsibility for preparing the designated lists that imposed import restrictions on specific types of Cypriot and Chinese coins. (Government Brief at 30-31.) The Government then conflates their work

³ Despite the Government’s use of the heavily redacted “Action Memo” here, its past refusals to provide documentation about its decision-making to the general public under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, cannot thwart any future discovery below under the Federal Rules of Civil Procedure. See *Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 252 n.14 (D.C. Cir. 1977).

specifying types of coins for restriction with the Assistant Secretary, ECA's, initial general decision to impose import restrictions on coins. (*Id.* at 39-41.) By confusing the issue, the Government seeks to make both decisions immune from judicial review. (*Id.*)

Though shrouded in secrecy until now, this work of low-level State employees has far more practical significance to the Guild and the collectors and small businesses it represents than the preliminary decision of the Assistant Secretary, ECA, to impose import restrictions on coins. First, as a legal matter, only the designated list represents the "final agency action" triggering APA review. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (noting that for an action to be final for purposes of the APA, it must be an event by which rights and obligations are determined or from which legal consequences flow). Second, the longer the designated list of restricted coin types, the greater the problem the small businesses of the numismatic trade and collectors face in continuing their business and hobby, which are heavily dependent on the ability to import historical coins from collectors and dealers abroad.⁴

⁴ As a practical matter, the documentary evidence required to comply with import restrictions is difficult to procure, particularly for items of modest value like coins, which are typically traded both here and abroad without the necessary documentary information. (*Compare* Government Brief at 13 *with* Amended Complaint ¶¶ 32-33, JA 145.) Moreover, actual experience suggests that CBP often requires additional documentation well beyond that required under the CPIA, on pain of one's coins being subject to seizure and forfeiture. (*See* CPRI Seminar at

The Guild has always acknowledged that the Assistant Secretary, ECA, made the preliminary decision to impose import restrictions on coins. (*See id.* ¶¶ 72-73, JA 153-54.) *On the other hand*, until this new revelation, how certain coin types became restricted remained a mystery. (*See* Transcript of Motions Hearing (Feb. 14, 2011) (hereinafter “Transcript”) at 26:1-5, JA 276 (“[I]t’s unclear to us because the record has not been developed exactly what is the interplay between Customs and State. I mean State presumably makes some general recommendations as to coins, but that’s not in the record here.”).)

If anything, both the CPIA and the public information that was available suggested that others were primarily responsible for creation of the designated list. The CPIA itself places primary responsibility for creating the designated list squarely with CBP (formerly Treasury). 19 U.S.C. § 2604. Moreover, the Senate Report suggests that CPAC, not State employees, “will contribute heavily to the composition of the list.” *See* Senate Report 97-564 (1982) (hereinafter “S. Rep.”) at 8, JA 129. The regulations at issue and State’s own pre-litigation press releases also paint CBP as the responsible agency for deciding which particular coins are subject to potential detention and seizure. *See* 72 Fed. Reg. 38470-74 (July 13,

69:16-70:20, JA 401-02.) Even worse, import restrictions have served as a convenient predicate to justify last-minute demands for proof that cultural goods to be auctioned in the United States were imported legally sometime in the past. (*Id.* at 72:17 to 74:9, JA 404-06.) These concerns demonstrate that import restrictions have a *real impact on real small businesses and collectors*.

2007), JA 105-13 (identifying CBP as lead agency). (*See also* Amended Complaint ¶¶ 79, 81-82, JA 155-56.) As discussed *infra*, the Government's newly-minted claim that State, rather than CBP employees, prepared a preliminary designated list has some significance for the reviewability of this matter.

B. The Guild Is Entitled to *Ultra Vires* Review of the Assistant Secretary, ECA's, Decisions and APA Review for Other Decisions Related to Import Restrictions on Coins.

In its opening brief, the Guild established that *ultra vires* review of the decisions of the Assistant Secretary, ECA, was warranted because the CPIA places discernible limits on her discretion. (Guild Brief at 14-16.) The Guild also demonstrated that APA-style review was mandated for State and CBP decision-making other than that of the Assistant Secretary, ECA. (*Id.* at 16-20.) For purposes of this case, this translates to *ultra vires* review of the decision of the Assistant Secretary, ECA, to impose import restrictions on coins generally and an APA-style review of other State and CBP actions, most notably the decision to place particular coin types on the designated list without any reference to their find spots. (*See generally id.* at 14-27.) As set forth *infra*, none of the Government's arguments for avoiding such judicial review have merit.

1. The Court Should Determine Whether the Assistant Secretary, ECA, Failed to Comply with the Significant Procedural and Substantive Constraints of the CPIA.

Below, the District Court agreed with the Guild that the actions of the Assistant Secretary, ECA, were subject to *ultra vires* review. (Memorandum Opinion (“Op.”) at 31, JA 457.) The District Court then failed, however, to undertake such a review, except as to “the first discovery requirement” and whether China actually requested import restrictions on coins.⁵ (*Id.* at 31-38, JA 457-64.) In so doing, the District Court asserted that the Guild’s remaining cognizable claims were solely based upon “bias and/or prejudgment and/or *ex parte* contact” that were beyond the scope of *ultra vires* review. (*Id.* at 38-39, JA 464-65.) Adopting that same tack, the Government also claims that *ultra vires* review is inapplicable. According to the Government, “[p]laintiff does not allege—as it cannot—that the Assistant Secretary failed to adhere to the decisionmaking process set out by the CPIA.” (Government Brief at 32.) In so doing, however, the Government confuses lip service to procedural forms with adherence to the substantive requirements of governing law.

⁵ The District Court presumably focused on these two particular issues to the exclusion of others because they attracted academic comment. (*See Op.* at 33, JA 459; Guild Brief at 7 n.2 (citing Stephen K. Urice & Andrew Adler, *Resolving the Disjunction Between Cultural Property Policy and the Law: A Call for Reform*, 32-35 (Miami L. Res., Paper Series, Draft Mar. 17, 2011), available at <http://ssrn.com/abstract=1792588>) (last visited Feb. 3, 2012) (hereinafter “Urice and Adler.”).)

Simply, *ultra vires* review is not as limited as the Government maintains. “The basic premise behind non-statutory review is that, even after passage of the APA, some residuum of power remained with the District Court to review agency action that is *ultra vires*.” *R.I. Dep’t of Env. Mgmt. v. United States*, 304 F.3d 31, 41 (1st Cir. 2002). In conducting *ultra vires* review, “[c]ourts can defer to the exercise of discretion, but they cannot abdicate their responsibility to insure compliance with congressional directives setting the limits on that discretion.” *Aid Ass’n for Lutherans v. USPS*, 321 F.3d 1166, 1173 (D.C. Cir. 1995) (citations omitted).

As the case upon which the Government primarily relies further explains,

It is ... well established that “there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.”

...

[T]he “*ultra vires* standard” requires the reviewing court to ascertain the scope of the acting officials’ statutory authority and determine whether the officials’ action conformed with that authority. Such authority may be broad or narrow depending on the language employed in the empowering legislation. Similar to the role the courts play in interpreting contracts, the courts’ role in applying the “*ultra vires*” standard is limited to examining the four corners of the statute that gives the officials the power to act and determining whether the officials have complied with the statute’s language....

....

Even after the court concludes the Secretary conformed to his legislative grant of authority, the court may still consider the manner in which he exercised that authority. Such a consideration requires the reviewing court to determine whether the Secretary acted arbitrarily, capriciously, or in bad faith. The purpose of such an inquiry, however, is not to determine whether the Secretary conformed to his statutory authority, but rather whether he *abused* his authority.

United States v. 16.03 Acres of Land, 26 F.3d 349, 354-55 (2d Cir. 1994), *cert. denied sub nom. Nelson v. Dep't of Interior*, 513 U.S. 1110 (1995); *accord Aid Ass'n for Lutherans*, 321 F.3d at 1174 (“An agency construction cannot survive judicial review if a contested regulation reflects an action that exceeds the agency’s authority. It does not matter whether the unlawful action arises because the disputed regulation defies the plain language of the statute or because the agency’s construction is utterly unreasonable and hence impermissible.”).

Even judged under the Government’s limited notion of *ultra vires* review, a “sign-off” on a pre-packaged “Action Memo” that provides the decision-maker with the “false choice” does not in itself satisfy the requirements of the CPIA. (*See* Government Brief, Addendum 1.) More fundamentally, *16.03 Acres of Land* establishes that the CPIA’s provisions must be analogized to those of a contract, and that there must be some further inquiry into whether the Assistant Secretary, ECA, breached her obligations under that law. 26 F.3d at 357-58. Here, of course, the Guild alleges that the Assistant Secretary, ECA, violated her statutory authority and that serious abuses of the Government’s authority help explain these

violations. (See Amended Complaint ¶¶ 29, 44, 62, 75, 120-31, 135(a), (f-m), (p), 138-45, 170-77, JA 144, 147, 151, 154, 163-65, 166-70, 174-76.) The Guild, has, therefore, stated a claim that should go forward on the merits. *Cf. Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002) (no claim where President has wide discretion to declare historic landmarks), *cert. denied*, 540 U.S. 813 (2003).

2. No “Higher Purpose” Excuses the Government’s Lapses.

A consistent theme running through the Government’s papers is that the “higher purpose” of cultural property protection and any benefits it may provide to our foreign relations⁶ excuses the Government from strict adherence to the law.

Nevertheless, “[i]t is emphatically the province and duty of the judicial department to say what the law is....” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Moreover, “one of the Judiciary’s characteristic roles is to interpret statutes, and [it] cannot shirk this responsibility merely because of the interplay between the statute and the conduct of the Nation’s foreign relations.” *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010), *cert.*

⁶ In passing, the Government states that import restrictions are “not subject to the APA’s notice and comment rulemaking requirements because it involves a ‘foreign affairs function’ of the United States.” (Government Brief at 31.) However, APA Section 553(a) applies *only* to the procedural requirements of notice and comment rulemaking and *does not* relate to the degree of judicial review. Wright & Miller, 32 Fed. Prac. & Proc. Judicial Rev. § 8158 (online edition current through 2009 update).

denied, 131 S. Ct. 997 (2011) (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986)) (internal quotation marks omitted).

Courts typically analyze such issues as a “political question” under the formula enunciated in *Baker v. Carr*, 369 U.S. 186, 217 (1962). See *Hopson v. Kreps*, 622 F.2d 1375 (9th Cir. 1980). That formulation calls for “a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in a specific case, and the possible consequences of judicial action.” *Id.* at 1378 (quoting *Baker*, 369 U.S. at 211-12). In *Hopson*, the Ninth Circuit concluded that despite such foreign policy overtones, it was empowered to construe the applicable law. *Id.* at 1379-80. A similar result was obtained in *Sneaker Circus Inc. v. Carter*, 566 F.2d 396 (2d Cir. 1977). There, the Court also applied the *Baker* “political question” analysis in concluding that a federal court was empowered to determine if trade agreements had been negotiated in compliance with the Trade Act. *Id.* at 402.

Here, all the *Baker* factors support judicial review of this matter. The “particular question” raised in the Amended Complaint is quite narrow. It *is not* whether State is empowered to enter into MOUs with other countries. It *is* whether the Government has promulgated and has applied import restrictions on ancient coins in compliance with governing law. Until the controversial decisions to

impose import restrictions on ancient Cypriot and Chinese coins, the Government exempted such cultural goods from restriction. (*See* Amended Complaint ¶¶ 37-40, 52, JA 146, 149; Chart, JA 245-46.) Courts are well-suited to determine whether the CPIA was followed in changing this precedent. Finally, it is hard to imagine how a court decision to strike down or to limit import restrictions on coins widely collected in both Cyprus and China will have *any* negative consequences on our foreign relations. To the contrary, such a decision could very well provide a much-needed example to cultural bureaucracies both here and abroad of the meaning of the “rule of law.” This matter is thus well within the competence of a court to handle.

In any event, Congress, exercising its exclusive power to regulate foreign commerce under U.S. Const. art. I, § 8, has already considered any foreign policy repercussions during the decade-long legislative process that ultimately led to the passage of the CPIA. (*See* CPRI Seminar at 15:4 to 18:20, JA 347-50); *accord* Urice and Adler, *supra* note 5, at 18-19.

While the initial House bill took a similar approach to “cultural property protection” as espoused by the Government here, the Senate version that ultimately became the CPIA contained significant limitations on the Executive’s ability to act. As Mark Feldman, State’s former Deputy Legal Advisor, has recently stated,

There is not space here to detail the negotiations that ultimately lead [sic] to the CCPIA. In brief, antiquity dealers and their supporters, including Senator

Daniel Moynihan, had serious objections to the implementing legislation submitted to Congress by the State Department, and numerous changes had to be made to meet their concerns....

....

Ultimately a grand bargain was achieved in Congress that imposed significant procedural and substantive constraints on Executive authority to enter bilateral agreements....

The main safeguards established by Congress to protect the public interest from excessive interference with the movement of cultural property were (1) the formation of a formal Cultural Property Advisory Committee (“CPAC”) expected to represent the conflicting interests of the American stakeholders directly affected, and (2) statutory prohibition of import controls, other than emergency controls, unless “applied in concert” with those nations individually having a significant import trade in the material concerned.⁷

Mark B. Feldman, *The UNESCO Convention on Cultural Property: A Drafter’s*

Perspective, Art & Cultural Heritage Law Newsletter 1, 5-6 (Summer 2010),

available at <http://apps.americanbar.org/dch/committee.cfm?com=IC936000> (last

visited Feb. 3, 2012).⁸ Under the circumstances, the Government’s suggestion that

⁷ Below, the Guild specifically alleged that no other country places import restrictions on ancient coins like those now imposed on American collectors and the small businesses of the numismatic trade. (Amended Complaint ¶¶ 44, 62, 135 (j), JA 147, 151, 167; Transcript at 28:6-11, JA 278 (“If you allow this matter to go forward, Your Honor, we will be able to put on evidence that no other country has similar restrictions as the United States has put on Cypriot coins, none, zero. Therefore, the concerted international response cannot be met.”).).

⁸ The Government’s claims that the Assistant Secretary, ECA’s, statutory authority is “within the discretion of the President” is based on a selective reading of the legislative history concerning *one* of the findings the President must make under the CPIA. (Government Brief at 34.) As the legislative history also observes, “Nevertheless the committee believes the standards set forth in this section,

the CPIA should be construed so as to effectuate the goal of protecting foreign cultural property should not trump either the plain meaning of the CPIA and its significant limitations on Executive authority or the other interests at stake, particularly those of the small businesses of the numismatic trade and collectors.

3. The Court Has an Obligation to Ascertain Whether Coins Were Properly Designated for Restriction.

The Government next asserts that the decision to impose import restrictions on common collectors' coins is "committed to agency discretion," and hence is outside the scope of judicial review. In particular, despite asserting elsewhere for the first time on appeal that State employees were responsible for a preliminary compilation of the designated list, the Government nonetheless also alleges that the CPIA's limitation of State's authority to a "consulting" role effectively means that the Court can have no say in the matter. (*Compare* Government Brief at 40 and 12.)

together with active contributions by the Advisory Committee to the Administration's decision-making process, will ensure that the President will enter into agreements only in accord with the purposes and standards of the bill." S. Rep. at 7, JA 128.

The Government also claims that its decisions were subject to "political review" because the CPIA requires State and CPAC to submit separate reports to Congress. (Government Brief at 35.) Of course, because the Government never produced the CPAC reports below, there is no way for the Court to assess whether they were in fact shared with Congress. Moreover, despite this claim, the Government has in fact *refused* to share CPAC reports with a member of Congress who specifically requested them. *See* Urice and Adler, *supra* note 5, at 26.

Notwithstanding the Government's discordant views, there is a presumption in favor of judicial review under the APA that normally can only be overcome by "clear and convincing evidence" to the contrary. *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967). Here, there is no reason to conclude that the "final agency action" to impose import restrictions on coins is soundly "committed to agency discretion." In particular, this is not a situation where "there is no law to apply." *See Heckler v. Chaney*, 470 U.S. 821, 826 (1985). Indeed, the CPIA itself provides all the "meaningful standards" the Court needs to determine whether State and CBP properly listed coins for restriction. This is particularly true of the compilation of the designated list.⁹

First, CBP acted in an arbitrary, capricious, or illegal manner under the APA when it allowed State to assume authority over the preparation of the designated list. It now appears that CBP's sole role was to "publish" the list. (*See* Government Brief at 12 (noting that CBP "publishes" the list); *see also* JA 237-43 (Federal

⁹ Below, the Guild avoided proposing any particular level of deference that this decision-making should be afforded. However, the Government now concedes that the actions of low-level State employees to prepare a preliminary designated list were not subject to notice and comment rulemaking. (*See* Government Brief at 30-31). Accordingly, their decision-making should not be afforded any heightened deference whatsoever. *See* William N. Eskridge, Jr., & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 Geo. L.J. 1083, 1196 (Apr. 2008) ("To be Chevron-eligible, a boon even if of indeterminate importance, the agency usually has to make law through notice-and-comment rulemaking and therefore provide evidence supporting the rule and respond to alternatives.").

Register notice provided to Congress references State origin at bottom).) On the other hand, the CPIA mandates that CBP act as a check on State's actions when the list is "promulgated." According to the CPIA, CBP must ensure that any "import restrictions" are "applied only to the archaeological and ethnological material covered by the agreement...." 19 U.S.C. § 2604. Based upon the new evidence now advanced in the Government's brief, however, CBP apparently abdicated its statutory role when it allowed State to assume its responsibilities.

Second, the CPIA's own provisions belie any claim that that the Court is incapable of making the determination of whether the designated list comports with the "first discovery requirement." If CPAC (which includes representatives of the public) is expected to "contribute heavily" to whether and what coins appear on the designated list, certainly the Court can undertake a more limited APA-style review to determine if the Government acted properly in imposing import restrictions on coins. *See* 19 U.S.C. § 2605(f)(4) (giving CPAC responsibility to recommend what cultural goods may be subject to restriction) and S. Rep. at 8, JA 129 (noting that CPAC is to contribute heavily to the composition of the designated list). Under the circumstances, the decision to impose import restrictions on common collectors' coins cannot be "committed to agency discretion."

C. The Guild Brought This Action After the Government Failed to File a Forfeiture Action.

The Government's claim that a forfeiture action provided an adequate remedy for the Guild borders on the Kafkaesque. (*See* Government Brief at 28-30.) The APA, 5 U.S.C. § 704, provides for judicial review of a final agency action where there is no other adequate remedy in court. However, the Supreme Court has cautioned that "a restrictive interpretation of § 704 would unquestionably, in the words of Justice Black, 'run counter to § 10 and § 12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes....'" *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988) (citation omitted). Moreover, "[a]n alternate remedy will not be adequate under § 704 if the remedy offers only 'doubtful and limited relief.'" *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 130 S. Ct. 1138 (2009) (quoting *Bowen*, 487 U.S. at 901). Such is the case here.

First, the Guild patiently waited for some ten (10) months after the Government detained the Guild's coins before filing suit. (Amended Complaint ¶¶ 95-101, JA 159-60.) In so doing, the Guild was following the course the U.S. Supreme Court prescribed, i.e., filing an equitable action seeking an order compelling the filing of a forfeiture action or a return of the coins. *See United States v. \$8,850*, 461 U.S. 555 (1983). Yet no such action was ever filed, leading the District Court to conclude that "[t]he length of the delay and ACCG's assertion

of its right thus cut towards finding that the delay is unconstitutional.” (Op. at 47, JA 473.) Second, even assuming *arguendo* that the Government would have filed a forfeiture action, the Government takes the position (wrongly in the Guild’s view) that no defense is available other than presentation of documentary evidence that the coins were properly imported.¹⁰ (See Government Brief at 28-30.) Under the circumstances, the Court should conclude that it is entirely proper that this action go forward because any prospective forfeiture action did not provide the Guild with an adequate remedy.

D. The Court’s Specific Rulings Violate the CPIA’s Plain Meaning or Require Additional Discovery.

In its brief, the Government disputes that (1) the CPIA limits the Government to only restricting artifacts if the foreign government asks for such restrictions and (2) that the CPIA requires the Government to tie any restrictions on coins to the specific country where they are found. (Government Brief at 40-50.) As the Guild explains below, neither of these contentions possess merit.

1. The Guild Stated a Claim Regarding the Chinese Request.

The Government plays coy about the Chinese request. First, it claims that the Guild’s allegation that State Cultural Heritage Center employees added coins to

¹⁰ Below, the Guild argued that the Government would need to establish every element of the CPIA, including the “first discovery requirement.” (Transcript at 21:5-22:15, JA 271-72.)

the Chinese request cannot be correct because the Government's *own summary* of the Chinese request (which was never placed in the record below) mentions "coins." (*Id.* at 47.) Then, the Government hints that to the extent China requested import restrictions at all, that request may have been made at some unspecified later date. (*Id.* at 49.)

All this means, however, is that this issue can only be decided after some well-targeted discovery. At present, the Government has left this Court in the dark, as it did the District Court below. As Urice and Adler explain, the CPIA requires the foreign requester to provide some detail about its own request, a requirement that would become a mere formality if the Executive could simply enlarge the categories of restricted items *sua sponte*. Urice and Adler, *supra* note 5, at 34-35. The Guild has made a good-faith allegation, which deserves to be fully aired in court, that low-level State employees added coins to the Chinese request for import restrictions on their own authority. *See id.* at 34 n.237 (explaining that the Guild's allegations were based on FOIA disclosures and information sourced to the Chinese Embassy). That is all that is required to survive a motion to dismiss. It would be anomalous to dismiss that claim based on an argument in the Government's brief rather than on real evidence.

2. The Government's New "Likelihood Standard" Does Not Comport with the CPIA's Requirements.

The Government relies on either a mischaracterization of the Guild's position or a new standard to attempt to explain away the plain meaning of the CPIA's "first discovery requirement." Again, all this suggests is that the issues deserve to be fully considered on a well-developed record below. In any event, there is no reason to suppose the CPIA's drafters—who were obviously concerned with constraining both the Executive and the nationalist aspirations of foreign requesters—would countenance any such effort to broaden the reach of restrictions to everything and anything that "likely" could be found in any one of many countries. (*See* Amended Complaint ¶¶ 21-29, JA 142-44.)

First, at page 41 of its brief, the Government continues to allege that the Guild contests the Government's ability to list coins by type; however, this has never been its position. The Guild has always recognized and respected the Government's authority to list coins by type *if there is also undisputed scholarly support for the assumption that such coins can only be found in either Cyprus or China, which is necessary to satisfy the "first discovery requirement."* (Amended Complaint ¶¶ 138-45, JA 168-70; Guild Brief at 26.)

As the Guild establishes in its opening brief, Congress may have allowed CBP to list restricted material by type rather than by individual object, but that does not excuse the Government from complying with the plain meaning of other

related statutory requirements. Indeed, even if listed by type: (1) the archaeological materials must be “first discovered within, and ... subject to export control by, the State Party;” and (2) “each listing ... shall be sufficiently specific and precise to insure that ... import restrictions ... are applied only to the archaeological material covered by the agreement....” (Guild Brief at 21-27 (citing 19 U.S.C. §§ 2601(2), 2604.)

Second, at pages 42-43 of its brief, the Government also ignores the fact that, while the coins that were seized have a “country of origin” or manufacture of Cyprus and China, the seller was also careful to state on the invoice, for each coin, “[n]o recorded provenance” and “[f]ind spot unknown.” (JA 14.) This establishes that, whatever their “country of origin” may be under Customs rules, the Guild never “admitted” that its coins were properly subject to detention and seizure.

Third, the Government is apparently conflicted about the use of “scholarly evidence.” Although the Government complains that the Guild and the amici see a need for such evidence, the Government itself also acknowledges that State employees relied on the same sort of evidence when they purportedly created a designated list “based on all available evidence as to the likelihood of first discovery in a given State.” (*Compare* Government Brief at 43-44 (claiming that the Guild’s and amici’s recourse to scholarly evidence “essentially restates the

plaintiff's view that imports restrictions cannot apply by category") *with* Government Brief at 30-31 (citing recourse to "scholarly research").

Fourth, the Government's newly-minted "likelihood standard" is, as a practical matter, no different than one based on "country of origin" or place of manufacture. Indeed, *all* the coins on the Cypriot and Chinese designated lists were also thought to be produced in those countries. (JA 87, 111.) If anything, this suggests that this new standard may be little more than a *post hoc* rationalization created to explain away the apparent confusion between the Government's regulations based upon "country of origin" i.e., manufacture, and the CPIA's "first discovery requirement." (See Guild Brief at 21-27.) See also *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (court may not accept such a *post hoc* rationalization on appeal).

Fifth, a "likelihood standard" comports no better with the CPIA's provisions than the one based on a coin's place of production that was the District Court's focus below. (See Op. at 31-36, JA 457-62.) Certainly, a historical coin may "likely" be found where it was produced, but the Guild has also alleged that such coins may "likely" also be found elsewhere. (See Amended Complaint ¶¶ 14-16; JA 140-41.) Accordingly, the "first discovery requirement" must contemplate far more certainty than a mere "likelihood." Otherwise, the CPIA's additional provision that any archaeological material "first discovered within" a specific State

Party also “be subject to export control” by that same specific State Party would have no meaning. (*See* Brief of Amicus PNG at 6 (citing CPIA, 19 U.S.C. § 2601(2).) Moreover the CPIA’s further requirement in 19 U.S.C. § 2604 that restrictions “appl[y] *only to* the archaeological material covered by the agreement” also presupposes a far more stringent standard than one based on “likelihood.” (*See* Brief of Amici IAPN, ANA, and ACE at 7.) In short, if Congress wanted to authorize the Government to detain and seize historical coins from American collectors and the small businesses based on a “likelihood standard,” Congress would have inserted such a standard into the CPIA.

Finally, any construction of the CPIA’s “first discovery requirement” based on a “likelihood standard” must fail as unworkable. (*See* Guild Brief at 26.) Although the Government alleges that its incentives to act with care “abound,” Amici ACCP and IADAA suggest that adherence to anything but a strict “first discovery requirement” will result in overlapping restrictions.¹¹ (*Compare* Government Brief at 44 n.17 *with* Brief of Amici ACCP and IADAA at 19-21.)

Indeed, taken to its logical conclusion, accepting the District Court’s analysis or a “likelihood standard” means that import restrictions on Roman

¹¹ Notably, Amici ACCP and IADAA accurately predicted that Italian import restrictions would overlap with Greek ones, which have since been announced. *Compare* 76 Fed. Reg. 3013, 3014 (Jan. 19, 2011) (Italian import restrictions on Attic and Corinthian ware produced in Greece) *with* 76 Fed. Reg. 74691, 74694 (Dec. 1, 2011) (Greek import restrictions on the same types of Greek pottery).

artifacts granted to *one* country, Italy, could lead to the detention, seizure, and repatriation to that *one* country, Italy, of any Roman artifacts also “likely” found in any of the other modern countries that exist today within the Roman Empire’s old boundaries. (See Brief of Amici ACCP and IADAA. at 21.) There is simply no reason to suppose the CPIA’s drafters would countenance broadening the reach of import restrictions so far. In contrast, restrictions on specific types of artifacts squarely linked to find spots in specific countries are more narrowly tailored to not only the plain meaning of the CPIA, but its goal of deterring pillage of archaeological sites within a given country. See S. Rep. at 2-3, JA 123-24 (CPIA places import controls on archaeological materials “*specifically identified* as comprising part of a state’s cultural patrimony that is in danger of being pillaged”) (emphasis added).

CONCLUSION

For the foregoing reasons, the decision of the District Court should be reversed and this matter remanded for further proceedings.

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Respectfully submitted,

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Dated: February 13, 2012

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