

# GLOBAL ART AND HERITAGE LAW SERIES

## UNITED STATES



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COMMITTEE FOR  
CULTURAL POLICY

Prepared by

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In Collaboration with



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CCP supports public appreciation for the art of ancient and indigenous cultures. It provides resources to educational institutions, press and policy-makers. It encourages policies that preserve artifacts and archaeological sites, adequate funding for site protection, safe harbor in international museums for at-risk objects, uncensored academic research, and the development of regulatory structures that foster the lawful collection, exhibition, and global circulation of artworks.

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TRUSTLAW REPORT USA<sup>1</sup>**I. INTRODUCTION**

This report provides a summary of U.S. laws on cultural property, its ownership, transfer, import, export, and preservation. It covers U.S. domestic laws and policy on Native American and Native Hawaiian artifacts, archaeological sites, and their cultural landscapes. It has been illegal to dig or to remove objects from archaeological sites or graves on federal and Indian lands since 1906, and passage of the 1979 Archaeological Resources Protection Act clarified the restrictions and penalties applying to trade in objects taken without authorization from these lands.<sup>2</sup> The report describes how, since passage of the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990, Native Americans and Hawaiians may claim superior title to human remains and to archaeological and ethnological materials classified as sacred or as cultural patrimony in the collections of public museums and institutions receiving federal support.<sup>3</sup>

The report then examines the development of policies on international cultural property after Congress' enactment of the 1983 Cultural Property Implementation Act (CPIA)<sup>4</sup>, the U.S. implementing legislation for the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.<sup>5</sup> The CPIA balanced U.S. interests in free trade and access to art, with source country claims to heritage and the need to protect archaeological sites from looting. In the CPIA, Congress reserved judgment on the scope of import restrictions to the U.S.<sup>6</sup> Instead, the CPIA allowed targeted export restrictions on specific materials from threatened sites and required important market nations to act together to implement similar restrictions.

The report describes the current operation of the CPIA, which has resulted in agreements restricting imports into the U.S. of virtually all cultural property from seventeen nations,<sup>7</sup> as well as similar legislative barriers applying to Iraq and Syria.

It further describes how a federal theft law of general applicability, the 1934 National Stolen Property Act<sup>8</sup> (NSPA), which makes it a crime to trade in stolen property, conflicts with and undermines key provisions of the CPIA. The NSPA has come to dominate cultural property law and policy in the U.S. after a line of criminal cases found that if a foreign country has enacted a valid law nationalizing ownership of cultural property, its removal constitutes theft and it becomes 'stolen' under U.S. law.<sup>9</sup>

In the U.S., "cultural property" is generally understood as objects of artistic, archaeological, ethnological or historical interest belonging to any human civilization or period. The very broad classifications of objects termed cultural property in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention) are used in the primary U.S. legislation, the CPIA.

But the U.S. itself has no "national cultural property." The law rarely restricts private transfers of objects that other

<sup>1</sup> Author Kate Fitz Gibbon. Special thanks are due to Katherine Brennan, who made many thoughtful suggestions, created charts and graphics, and reviewed and corrected the text. Submitted on behalf of the Committee for Cultural Policy, POB 4881, Santa Fe, NM 87502. [www.committeeforculturalpolicy.org](http://www.committeeforculturalpolicy.org).

<sup>2</sup> Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-mm (1979).

<sup>3</sup> Native American Graves Protection and Repatriation Act (NAGPRA), Pub. L. No. 101-601, § 104 Stat. 3048, (1990), codified as 25 U.S.C. § 3001 et seq. (1990).

<sup>4</sup> Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, tit. III, 96 Stat. 2350 (1983) (codified at 19 U.S.C. §§ 2601-2613).

<sup>5</sup> UNESCO, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, No. 11806, 823 U.N.T.S. 231 (Nov. 14, 1970) <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/text-of-the-convention>. The Convention entered into force on 24 April 1972. It was accepted by the United States on February 9, 1983. *State Parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. Paris, 14 November 1970, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E>.

<sup>6</sup> The indiscriminate use of national patrimony statutes by art source nations to restrict export of all cultural property was discussed by Professor Paul Bator in, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275 (1982), in his Congressional testimony on the CPIA, and by Senators Moynihan and Dole in their subsequent proposed legislation to amend the National Stolen Property Act. Bator argued that the National Stolen Property Act should be limited to cases of real theft. *Relating to stolen archeological property: Hearing before the Subcommittee on Criminal Law of the Committee on the Judiciary on S. 605*, 99th Cong. 1 (1985) (Testimony of Paul Bator at 19, 20). See also A bill to amend sections 2314 and 2315 of title 18, United States Code, relating to stolen archaeological material, S. 1559, 98th Cong. (1983).

<sup>7</sup> As of March 2019, there are import restrictions under the CPIA on cultural property from 17 countries.

<sup>8</sup> National Stolen Property Act, 18 U.S.C. §§ 2311-2318 (2006).

<sup>9</sup> See *United States v. McClain*, 545 F.2d 988, 1000-01 (5th Cir. 1977), *reh'g denied*, 551 F.2d 52 (5th Cir. 1977); *aff'd in part, rev'd in part*, 593 F.2d 658 (5th Cir. 1979); *cert. denied*, 444 U.S. 918 (1979) and *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), *aff'g* 178 F. Supp. 2d 445 (S.D.N.Y. 2002).

nations consider cultural property.<sup>10</sup> While there are many artworks owned by federal, state and local government institutions, they are not in any sense inalienable. Lands and historic monuments may be acquired by federal or state governments and preserved for public use and benefit, but no movable objects have the legal character of “national heritage” as it is understood in some other parts of the world. In the U.S., cultural property is simply a form of property, governed by much the same laws that regulate ownership of other types of property.

With the exception of Native American human remains, and certain objects from Indian and federal lands that are held to belong to indigenous communities and not to the U.S. government, virtually all artworks and artifacts may be privately owned and publicly traded. There are no other restrictions on the export or trade of American art and artifacts except when they contain materials subject to U.S. environmental laws or international agreements such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>11</sup>

There is also no U.S. legal concept of a protected “intangible cultural heritage.” Under U.S. law, rights to creation in literature, visual art, music and dance are protected under copyright; beyond the duration of copyright, the global intangible heritage is preserved by the efforts of hundreds of thousands of amateur enthusiasts, students, professional performers, folklorists, storytellers, researchers and dedicated cultural preservationists across the U.S. Protection of intangible cultural heritage comes from research, documentation, promotion, enhancement, transmission to others, and revitalization, not from statute.<sup>12</sup> Given the U.S. population’s diversity, global heritage *is* American heritage.

Historically, U.S. policies emphasized the free trade of cultural property for the public good. The U.S. has longstanding import policies encouraging the importation of modern and antique artworks, manuscripts, books, scientific, and other cultural objects by making such imports free of duty. The Educational, Scientific, and Cultural Materials Importation Act of 1966, Section 1(b) provides that “The purpose of this Act is to enable the United States to give effect to the Agreement on the Importation of Educational, Scientific and Cultural Materials... with a view to contributing to the cause of peace through the freer exchange of ideas and knowledge across national boundaries.”<sup>13</sup> This Act made importation of “antiques made prior to 100 years before their date of entry” duty free,<sup>14</sup> and enabled duty free importation of “[e]thnographic objects made in traditional aboriginal styles and made at least 50 years prior to the date of entry.”

Even earlier, in 1930, Congress had exempted antiquities and art objects made before 1830 from duty in order to encourage the free flow of artistic and cultural materials into the U.S.<sup>15</sup> Thus, the U.S. exempted antiques from duty as a matter of public policy before the UNESCO Florence Agreement of 1952, which also was intended to “facilitate the free flow of educational, scientific and cultural materials by the removal of barriers that impede the international movement of such materials.”<sup>16</sup> The free trade policies of the past are still reflected in customs duties allowing free entry of art, antiques, books and manuscripts into the U.S.

In the 21<sup>st</sup> century, the pendulum of U.S. cultural property policy has swung away from the goals of free trade and public access to art toward a broad enforcement of foreign national patrimony laws (even those which would not meet Constitutional standards if enacted in the U.S.) and a reconsideration of historical policies allowing free export of privately owned U.S. art and cultural heritage around the world.

If American cultural property law and practice is neither consistent nor coherent today, there is even greater uncertainty about the future. A number of laws have been introduced but not passed by the U.S. Congress in recent years that

<sup>10</sup> For example, an important symbol of American independence, the Liberty Bell, is not owned by the federal government but by the City of Philadelphia, which loaned it to the National Park Service after World War II. Although the federal government owns numerous artworks, it acquired them through bequests, gifts from the public, or purchases. U.S. law does not provide for federal or state preemptions of artworks or other cultural property, for mandatory registration, or for involuntary takings of lawfully owned artworks from private owners.

<sup>11</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 3 Mar. 1973, 27 U.S.T. 1087; 993 U.N.T.S. 243.

<sup>12</sup> UNESCO’s USA Intangible Cultural Heritage webpage lists four accredited NGOs. *Accredited NGOs located in this country*, UNESCO INTANGIBLE CULTURAL HERITAGE, <https://ich.unesco.org/en-state/united-states-of-america-US?info=accredited-ngos>. However, every American city has dozens if not hundreds of organizations or informal groups of adults or children who participate in traditional crafts, storytelling, music, singing, or dance from a variety of cultural traditions.

<sup>13</sup> The Educational, Scientific, and Cultural Materials Importation Act of 1966, Pub. L. No. 89-651, 80 Stat. 897 (1966).

<sup>14</sup> *Id.* at §4(b) (Works of Art, Antiques). Section 1(a) of Pub. L. 89-651, Oct. 14, 1966, 80 Stat. 897.

<sup>15</sup> The Harmonized Tariff Schedule for the U.S. Tariff Act of 1930 established the concept of an “antique” as a handcrafted object 100 years old or older. 19 U.S.C. ch. 4 (1930). The exemption from duty on antiques and archaeological materials is under the Harmonized Tariff Schedule of the United States Revision 7, ch. 97, § XXI (2019), (Works of Art, Collectors’ Pieces and Antiques, Subheading 9705.00.00 to 9706.00.00).

<sup>16</sup> UNESCO Agreement on the Importation of Educational, Scientific and Cultural Materials, adopted by the General Conference at its fifth session, Florence, 17 June 1950, entered into force 1952 (“Florence Agreement”), 131 U.N.T.S. 25 (1950). The U.S. signed June 24, 1959 and ratified November 2, 1966. Declarations & Reservations: Protocol to the Agreement on the Importation of Educational, Scientific or Cultural Materials, with Annexes A to H 1976, UNESCO, adopted by the General Conference at its fifth Session, Florence, 17 June 1950, entered into force 1952 (“Florence Agreement”).

would have made not only foreign patrimony laws but also foreign export laws enforceable in the U.S.<sup>17</sup> Legislation in the drafting stage in 2019 could further challenge longstanding principles of private ownership of American cultural property and give additional weight to foreign source country legislation prohibiting export of cultural property.<sup>18</sup>

## PART II. U.S. STAKEHOLDERS AND INFLUENCERS

A short list of the stakeholders who are directly impacted by and influence U.S. cultural policy includes:

- Federal and State Governments
- Native American and Native Hawaiian tribes, numbering 573 federally recognized tribes<sup>19</sup>
- NGOs and affiliates of international cultural organizations
- Archaeologists
- Academics and academic institutions
- Museums and museum organizations, trustees, donors, financial supporters, members.
- Artists and Artist Activists
- Collectors
- Art Dealers, trade organizations, auction houses, internet markets
- Political advocacy groups and think tanks
- Journalists/media bringing art and culture news to the public.

The most important stakeholder in international and domestic cultural property issues is the U.S. public. The public depends upon museums and other cultural institutions to provide access to art and information about art and art history. There are 850 million museum visits made by the public each year,<sup>20</sup> and ordinary citizens donate one million hours of service each week as museum volunteers.<sup>21</sup> Thirty-seven percent of U.S. museums have free entry, and 55 million children visit in school groups each year.<sup>22</sup> Museums provide Americans of all backgrounds with cultural and educational benefits, a better understanding of individual and community heritage, and greater global awareness. U.S. museums' education departments now regularly supplement and are sometimes the only source for fine art and cultural education activities for U.S. public schools.<sup>23</sup> A groundbreaking museum survey showed that students who attended a field trip to an art museum experienced an increase in critical thinking skills, historical empathy and tolerance, and for students from rural or high-poverty regions, the increase was even more significant."<sup>24</sup>

850 Million  
Visits to U.S. museums each year.

55 Million  
Children who visit museums in  
school groups each year.

37%  
Percentage of U.S. museums  
with free entry.

Museum Facts & Data, AMERICAN ALLIANCE OF MUSEUMS, [https://www.aam-us.org/programs/about-museums/museum-facts-data/#\\_ednref7](https://www.aam-us.org/programs/about-museums/museum-facts-data/#_ednref7), citing National Study on the Use of Libraries, Museums, and the Internet, IMLS (2008), [https://www.aam-us.org/programs/about-museums/museum-facts-data/#\\_ednref1](https://www.aam-us.org/programs/about-museums/museum-facts-data/#_ednref1).

<sup>17</sup> For example, the 2016 Terrorism Art and Antiquity Revenue Protection Act (TAAR Act), S. 3349, 114th Cong. (2016), would have amended the NSPA to treat any item removed in violation of any foreign law as stolen, eliminating the distinction between foreign ownership laws and export laws, and reducing the jurisdictional threshold under the NSPA from \$5,000 to \$50 for cultural property.

<sup>18</sup> For example, in the domestic sphere, legislation such as the Safeguard Tribal Objects of Patrimony Acts of 2016, 2017, and similar 2019 initiatives. The Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791(1994) established three ways for acquiring federal recognition; by Act of Congress, by administrative procedures under 25 C.F.R. Part 83, or through the decision of a U.S. court.

<sup>19</sup> The Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791(1994) established three ways for acquiring federal recognition; by Act of Congress, by administrative procedures under 25 C.F.R. Part 83, or through the decision of a U.S. court.

<sup>20</sup> *Museum Facts & Data*, AMERICAN ALLIANCE OF MUSEUMS, [https://www.aam-us.org/programs/about-museums/museum-facts-data/#\\_ednref7](https://www.aam-us.org/programs/about-museums/museum-facts-data/#_ednref7), citing *National Study on the Use of Libraries, Museums, and the Internet*, IMLS (2008), [https://www.aam-us.org/programs/about-museums/museum-facts-data/#\\_ednref1](https://www.aam-us.org/programs/about-museums/museum-facts-data/#_ednref1)

<sup>21</sup> *Id.* (citing MUSEUM FINANCIAL INFORMATION SURVEY (American Association of Museums, 2009)).

<sup>22</sup> *Id.*

<sup>23</sup> CENTER FOR THE FUTURE OF MUSEUMS, BUILDING THE FUTURE OF EDUCATION: MUSEUMS AND THE LEARNING ECOSYSTEM 9 (2013) <https://www.aam-us.org/wp-content/uploads/2017/12/Building-the-Future-of-Education.pdf>.

<sup>24</sup> Jay P. Greene, et al., *The Educational Value of Field Trips*, 14 EDUCATION NEXT (2014) <https://www.educationnext.org/the-educational-value-of-field-trips/>.

Ceiling in the Collector's Office of the Alexander Hamilton U.S. Custom House in New York City, built in 1902–1907. The ceiling and wall panels were designed by Tiffany Studios. Photo by Rhododendrites, 14 October 2017. Creative Commons Attribution-Share Alike 4.0 International license.



With the exception of Native Americans and Native Hawaiians, who are about one percent of the U.S. population, most Americans are relatively recent immigrants who came or were brought to the U.S. no more than two centuries before. U.S. museum collections reflect this diversity of race, religion and roots. For most American citizens, museums are the permanent, public places where the threads of our cultural lives intersect, reinforcing concepts of American multiculturalism and displaying human creativity as a collective accomplishment.

### **The National Endowment for the Arts and State and Local Government Cultural Funding**

The National Endowment for the Arts (NEA) is an independent federal agency. Its mission is to “fund, promote, and strengthen cultural capacity” and it is the chief federal grantmaking program for cultural activities in the U.S.<sup>25</sup> The NEA makes several thousand grants of base funding for cultural organizations each year that impact 16,000 American communities through outreach and touring.

The NEA receives total federal funding of only \$155 million annually, about 47 cents per capita in the U.S., compared to state government contributions to arts funding of \$360 million and local government funding of \$860 million.<sup>26</sup> The remaining funding for U.S. museums comes from individual and corporate contributions – from the public.

NEA funding drives additional donations by encouraging private philanthropy. While the percentage contribution of the NEA to total U.S. arts funding is very small, it has a powerful validating and stabilizing effect. Each \$1 of an NEA grant leverages approximately \$9 from other state, local, and private sources.<sup>27</sup>

Although obtaining NEA funding from some administrations has been challenging, Congress has maintained the NEA’s funding levels over time (although they do not keep pace with inflation). Consistent data shows that the arts contribute significantly to the U.S. economy and civic well-being. Both for profit and nonprofit cultural production contributed \$764 billion to the U.S. economy in 2015, 4.2% of the U.S. Gross Domestic Product.<sup>28</sup> U.S. state and local governments also recognize that art and cultural activities have a high social impact, improving children’s education, sparking business and social innovation, and improving healthcare.<sup>29</sup>

### **American Indian Tribes and Native Hawaiian organizations**

In January 2019, there were 573 federally recognized American Indian Tribes. Federal recognition is granted through a statutory process.<sup>30</sup> Federal recognition grants tribes “the authority to establish a land-base over which to exercise jurisdiction, provide government services to tribal citizens, and sovereign immunity from lawsuits and taxation from other governments.”<sup>31</sup> Not all American Indian tribal groups meet the federal criteria for recognition, which require having a lengthy existence as an autonomous community, having some governmental functions over its membership, and being distinct from existing tribal groups.<sup>32</sup> In cultural property matters, federal recognition enables tribes to make claims under the Native American Graves Protection and Repatriation Act (NAGPRA) for return of human remains and certain cultural objects.

Native Hawaiians are not organized under “tribal” categories and do not receive federal benefits specifically designated for “tribes.” Native Hawaiian organizations listed under the National NAGPRA program range from Chamber of Commerce-like groups working to enhance economic opportunities for Hawaiian people, to school programs supporting traditional culture, and environmental groups. Native Hawaiian organizations must reapply after five years or they are unlisted. A federal registration process identifies Native Hawaiian organizations that should be notified or consulted with when required under laws such as the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and NAGPRA. A list of current Hawaiian entities is maintained at the Office of Hawaiian Relations (OHR) within the Office of the Secretary, U.S. Department of the Interior (DOI).<sup>33</sup>

25 NATIONAL ENDOWMENT FOR THE ARTS, <https://www.arts.gov/>.

26 AMERICANS FOR THE ARTS, [www.americansforthearts.org](http://www.americansforthearts.org).

27 NATIONAL ENDOWMENT FOR THE ARTS, NATIONAL ENDOWMENT FOR THE ARTS (NEA) PROMOTING CREATIVITY AND ACCESS TO THE ARTS (2014), [http://www.tcg.org/pdfs/advocacy/NEA\\_2014.pdf](http://www.tcg.org/pdfs/advocacy/NEA_2014.pdf).

28 These numbers are heavily weighted by for profit activities such as movies and television, but the nonprofit arts industry generates \$166.3 billion annually, supporting 4.6 million jobs, and vastly expanding cultural tourism.

29 AMERICANS FOR THE ARTS, 2019 FACTS AND FIGURES 4 (2019), <https://www.americansforthearts.org/sites/default/files/2019%20Facts%26Figures%20%28ALL%29.pdf>

30 Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. § 83 (2012).

31 *Oversight Hearing on Federal Acknowledgment: Political and Legislative Relationship between Governments*, S. Hrg. 112-684 (2012) (Testimony of Bryan Newland, Senior Policy Advisor Office of the Assistant Secretary for Indian Affairs, United States Senate), [https://www.doi.gov/ocl/hearings/112/FederalTribalRecognition\\_071212](https://www.doi.gov/ocl/hearings/112/FederalTribalRecognition_071212).

32 *Id.* In the period from the 1950s to the 1960s, it was U.S. federal policy to terminate recognition of tribes and force their assimilation into the legal jurisdiction of the states where Indian reservations were located. Tribes whose federal recognition was terminated by Congress must seek reinstatement through Congress. For more on the Termination Period, see *Indian Termination Policy*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Indian\\_termination\\_policy](https://en.wikipedia.org/wiki/Indian_termination_policy).

33 Native Hawaiian Organization Notification List. Fed. Reg. 186 (Sept, 26, 2007).



*Kamehameha Schools Marching Band, 100th King Kamehameha Parade 2016, Photo by Daniel Ramirez from Honolulu, USA, 11 June 2016, Creative Commons Attribution 2.0 Generic license.*

The legal status of Native Alaskan peoples under NAGPRA has been unclear for many years. Under federal law, Alaskan Natives belong to the twelve for-profit regional corporations and 227 “Alaska Native Villages” corporations set up under the Alaska Native Claims Settlement Act (ANCSA) of 1971.<sup>34</sup> ANCSA settled outstanding claims by Native Alaskans to Alaskan lands and resources, and at the same time established clear title to the lands traversed by the trans-Alaska oil pipeline. The regional corporations hold title to regional lands, including the subsurface mineral rights within each region; a portion of the surface lands was allotted to each village corporation based upon population.<sup>35</sup> In 2011, the Department of the Interior informed the National NAGPRA Program that Alaska regional and village corporations were not Indian tribes for NAGPRA purposes.<sup>36</sup> However, the State of Alaska’s position is that there are 229 Alaska Native tribes, federally recognized since 1994, and that all three branches of the U.S. government have affirmed Alaska Natives’ tribal sovereignty.<sup>37</sup>

Native American tribes, Hawaiian organizations and Native Alaskan corporations have campaigned hard for recognition of Native rights to human remains collected ostensibly for scientific purposes, and to objects of historic and spiritual significance to their communities. The American Indian Civil Rights Movement of the 1960s brought together Indian communities from around the country to fight for the right to teach children in Native languages, to preserve subsistence hunting and fishing in Alaska and the Northwest Coast, to practice Native American religions and perform sacred rites,<sup>38</sup> to control mineral and other resources on Indian lands, and to obtain federal protection from destructive development in the vast cultural landscape of America’s Southwest. These ongoing struggles have also brought tribes, Alaskan villages and Hawaiian organizations together to advocate on issues of cultural heritage,

<sup>34</sup> Alaska Native Claims Settlement Act (ANCSA), 43 USC §§ 1601–1624, Pub. L. No. § 92-203 (1971)

<sup>35</sup> Pursuant to ANCSA, a thirteenth regional corporation was established for Alaskan Natives living outside the state. Historically, Alaskan Native peoples were not forced into reservations, although an assimilation policy was attempted in the 1930s. In the 1960s various Native groups including the Alaska Federation of Natives made claims to the entire state of Alaska. The discovery of plentiful oil reserves on Alaska’s North Slope pushed the federal government to settle and the Alaska Native Claims Settlement Act (ANCSA) of 1971 was the result. Earlier allocations of Alaskan land and resources were defined under the Homestead Act of 1862, the Organic Act of May 17, 1884, and the Native Allotment Act of 1906. See Fae L. Korsmo, *The Alaska Natives*, in POLAR PEOPLES: SELF-DETERMINATION AND DEVELOPMENT, 81–104 (Minority Rights Group, ed., 1994), excerpted at [http://www.alaskool.org/projects/native\\_gov/articles/korsmo/polarppls.htm](http://www.alaskool.org/projects/native_gov/articles/korsmo/polarppls.htm).

<sup>36</sup> See March 18, 2011 Letter from Edith Blackwell, Dep’t of the Interior Assoc. Solicitor, to Sherry Hutt, National NAGPRA Program Manager (Mar. 8, 2011), [https://www.nps.gov/nagpra/DOCUMENTS/Solicitors\\_Memo\\_ANCSA\\_03182011.pdf](https://www.nps.gov/nagpra/DOCUMENTS/Solicitors_Memo_ANCSA_03182011.pdf)

<sup>37</sup> Letter from Jahna Lindemuth, Att’y Gen. of the State of Alaska, delivering Legal opinion to the Hon. Bill Walker, Governor of the State of Alaska, re: legal status of tribal governments in Alaska (Oct. 19, 2017), [http://www.law.state.ak.us/pdf/opinions/opinions\\_2017/17-004\\_JU20172010.pdf](http://www.law.state.ak.us/pdf/opinions/opinions_2017/17-004_JU20172010.pdf).

<sup>38</sup> The American Indian Religious Freedom Act of 1978, Pub.L. No. 95-341, 92 Stat. § 469, codified as 42 U.S.C. § 1996 (1978), recognized Native American religions and protected traditional religious practices.

both supporting and challenging federal programs such as National NAGPRA.

The National NAGPRA Program is administered by the National Parks Service, a bureau of the Department of the Interior. National NAGPRA works with federal agencies, American Indian tribes, Alaska Native corporations and tribes, Native Hawaiian organizations, and U.S. institutions holding Native American artifacts to comply with the Native American Graves Protection and Repatriation Act. National NAGPRA reviews compliance and makes regulatory recommendations for NAGPRA. It publishes Federal Register notices of inventories, repatriation and disposal of human remains, sacred objects, unassociated funerary objects, and objects of cultural patrimony. National NAGPRA maintains online databases with the content of these notices and summaries of inventory information submitted by museums and Federal agencies. It provides training to Indian tribes and Hawaiian organizations on working with NAGPRA and to institutions that hold Native artifacts and remains. It also administers grants to support Indian tribes and Hawaiian organizations to assist them in fulfilling NAGPRA requirements.<sup>39</sup> Repatriation by the Smithsonian Institution is governed by another statute, the National Museum of the American Indian Act of 1989.<sup>40</sup>

The independent Indian organization the Association on American Indian Affairs (AAIA)<sup>41</sup> was formed in 1920 to “change the destructive path of federal policy from assimilation, termination and allotment, to sovereignty, self-determination and self-sufficiency.” While recognized by tribes as an important voice in Indian affairs, the AAIA does not directly represent them. Since 2015, the organization has given increasing attention to repatriation issues, holding annual conferences focused on “seeking the return of ancestors, cultural, and sacred items to their homelands.”<sup>42</sup>

### Museums

U.S. museums and academic institutions have vast holdings of art from around the globe, spanning prehistoric to contemporary works, but they are far more than warehouses for art. Responsibilities come with the privilege of art ownership. The U.S. has led the way in sponsoring travelling exhibitions, conservation projects and art historical and archaeological enterprises on every continent.<sup>43</sup> U.S. museum policies are most often founded upon a cosmopolitan argument that cultural heritage belongs to all mankind.<sup>44</sup> This “universalist” argument contrasts with many foreign governments’ views, particularly in the developing world,<sup>45</sup> where cultural property is viewed as an exclusive national economic and social resource, a viewpoint shared by many academics in art source countries as well.<sup>46</sup>

U.S. museums operate independently, as a general rule, but museum organizations have set forth operational and ethical guidelines that place them at the heart of U.S. cultural policy development.

### Association of Art Museum Directors

The Association of Art Museum Directors (AAMD) represents a small but highly influential subset of directors of fine art museums in the U.S., Canada, and Mexico. As the directors of collecting museums, the 220 AAMD members have proportionately greater interest in international and domestic cultural property issues than other museum groups. Well before cultural property issues were considered pertinent to collecting institutions, the AAMD’s publications and policies related to the special needs and concerns of global museums.<sup>47</sup>

The AAMD’s most recently issued *Guidelines on the Acquisition of Archaeological Material and Ancient Art* (revised 2013)<sup>48</sup> state:

<sup>39</sup> See *What We Do*, NATIONAL NAGPRA PROGRAM, <https://www.nps.gov/orgs/1335/whatwedo.htm>; *National NAGPRA Online Databases*, NATIONAL NAGPRA PROGRAM, <https://www.nps.gov/nagpra/onlinepdb/index.htm>; Notices, NATIONAL NAGPRA PROGRAM, <https://www.nps.gov/nagpra/NOTICES/INDEX.HTM>.

<sup>40</sup> National Museum of the American Indian Act (NMAI) Pub. L. No. 101-185, (1989); National Museum of the American Indian Act Amendments of 1996, Pub. L. No. 104-278 (1996).

<sup>41</sup> ASSOCIATION ON AMERICAN INDIAN AFFAIRS (AAIA), <https://www.indian-affairs.org/>.

<sup>42</sup> Press Release, Association On American Indian Affairs Announces Indigenous International Repatriation Conference, (Sept. 25, 2018), [https://www.indian-affairs.org/uploads/8/7/3/8/87380358/iirc\\_2017\\_press\\_release.pdf](https://www.indian-affairs.org/uploads/8/7/3/8/87380358/iirc_2017_press_release.pdf).

<sup>43</sup> Major U.S. donors to international projects include the Paul Mellon Foundation, the J. Paul Getty Trust, and the World Monuments Fund (with majority supported by U.S.-based donors). There are many hundreds of smaller heritage-based organizations. The Department of State’s Ambassadors Fund for Cultural Preservation also makes significant annual donations to projects around the world. See U.S. Ambassadors Fund for Cultural Preservation 2018, Bureau of Educational and Cultural Affairs (2018), [https://eca.state.gov/files/bureau/afcp\\_2018\\_awards\\_list.pdf](https://eca.state.gov/files/bureau/afcp_2018_awards_list.pdf).

<sup>44</sup> See, JAMES CUNO, *WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE* (2008).

<sup>45</sup> See, Kwame Anthony Appiah in *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (ISSUES OF OUR TIME) 111–13, 124–28 (2006).

<sup>46</sup> KWAME OPOKU, *DECLARATION ON THE IMPORTANCE AND VALUE OF UNIVERSAL MUSEUMS: SINGULAR FAILURE OF AN ARROGANT IMPERIALIST PROJECT* (2013), [http://www.africavenir.org/fileadmin/downloads/Opoku\\_UniversalMuseum.pdf](http://www.africavenir.org/fileadmin/downloads/Opoku_UniversalMuseum.pdf).

<sup>47</sup> See, for example, the 2001 publication, Association of Art Museum Directors, *Art Museums and the International Exchange Of Cultural Artifacts*, (Oct. 2001), <https://aamd.org/sites/default/files/document/Cultural%20Property%2010.01.pdf>.

<sup>48</sup> See, for example, the 2001 publication, Association of Art Museum Directors, *Art Museums and the International Exchange Of Cultural Artifacts*, (Oct. 2001), <https://aamd.org/sites/default/files/document/Cultural%20Property%2010.01.pdf>.

*Wind Point Lighthouse, Wind Point, Wisconsin. Constructed in 1880. © Jeremy Atherton, 2007, 4 November 2007, Creative Commons Attribution-Share Alike 3.0 Unported license.*



AAMD believes that the artistic achievements of all civilizations should be represented in art museums, which, uniquely, offer the public the opportunity to encounter works of art directly, in the context of their own and other cultures, and where these works may educate, inspire and be enjoyed by all. The interests of the public are served by art museums around the world working to preserve, study and interpret our shared cultural heritage.<sup>49</sup>

AAMD guidelines and protocols for acquisition, documentation, and management of culturally sensitive works and controversial categories of art have been adopted far beyond its membership. In particular, the AAMD's so-called "1970 Rule" for acquisition of international cultural property has been adopted by other American museums.<sup>50</sup> A fully foreseeable consequence of this well-intentioned policy has been the creation of "an estimated million or more

<sup>49</sup> *Meeting of the Cultural Property Advisory Committee to Review the Request of the Government of the Hellenic Republic to the United States of America for Imposing Import Restrictions Under the Cultural Property Implementation Act*, Oct. 13, 2010, (Statement of the Association of Art Museum Directors Presented by Larry Feinberg, Director Santa Barbara Museum of Art) <https://www.aamd.org/sites/default/files/key-issue/testimony%20LFeinberg.pdf>.

<sup>50</sup> AAMD: REPORT OF THE AAMD TASK FORCE ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIALS AND ANCIENT ART (June 10, 2004), <https://aamd.org/sites/default/files/document/June%2010%20Final%20Task%20Force%20Report.pdf>; NEW REPORT ON ACQUISITION OF ARCHAEOLOGICAL MATERIALS AND ANCIENT ART ISSUED BY ASSOCIATION OF ART MUSEUM DIRECTORS (June 4, 2008), <https://aamd.org/sites/default/files/document/2008ReportAndRelease.pdf>; INTRODUCTION TO THE REVISIONS TO THE 2008 GUIDELINES ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIAL AND ANCIENT ART (Jan. 29, 2013) <https://aamd.org/sites/default/files/document/AAMD%20Guidelines%202013.pdf>.

‘orphaned’ objects held by U.S. collectors or museums”<sup>51</sup> that cannot be gifted, sold, or sometimes even loaned for exhibitions, as well as widespread public confusion about what makes an artwork legal or illegal to trade, since the 1970 date has no legal relevance whatsoever. (See below, Part XXIII. Non-Government Solutions to Cultural Property Issues: U.S. Museums, Acquisition Policies and the “1970 Rule.”)

AAMD policies have been very influential in encouraging institutional transparency about collections; American museums now open their records to the public and larger museums now provide provenance and ownership history in publicly accessible databases.<sup>52</sup> The AAMD has also issued guidelines for establishing museum policies on deaccessioning artworks,<sup>53</sup> on how to include private collectors in exhibitions without conflict of interest,<sup>54</sup> and on dealing with artworks that may have been wrongfully taken from Jewish owners during the Holocaust.<sup>55</sup> The AAMD has also issued guidance on treatment and presentation of culturally sensitive materials of indigenous peoples.<sup>56</sup>

Over the last decade, the AAMD has advocated strongly for more direct support and coordination between source country and U.S. museums. The AAMD has also recognized that chronic looting in source countries can be mitigated by rewarding local residents for protecting art and cultural heritage. Once a reliable supporter of import restrictions under the Cultural Property Implementation Act, the AAMD has recently provided detailed testimony before the Cultural Property Advisory Committee (CPAC) in opposition to several source country requests, cautioning CPAC against overbroad import restrictions in Designated Lists<sup>57</sup> and noting the failure of requests to meet the statutory requirements under the Act.<sup>58</sup> The AAMD has also proposed consideration of a legal systems of cultural property exchange that would be source-country government regulated, taxed, and the proceeds used to build museums, fund scientific exploration of archeological sites and provide related employment to local communities.

### American Alliance of Museums

The American Alliance of Museums (AAM) is the largest museum organization in the U.S., offering accreditation, professional education and training, and extensive guidance on ethical standards, financial management, museum operation and administration, collections management and conservation, institutional planning, disaster preparedness, and many other institutional needs. The organization’s members include fine arts museums, history museums, children’s museums, tribal museums, historic homes and sites, natural history, science and anthropological museums, botanical gardens, zoos, and aquariums.

Diversity in organization and independence of action brings tremendous vitality to the U.S. museum enterprise, but it also means that U.S. museums do not speak with one voice. Relatively few museums collect objects seen as cultural property of other nations or indigenous peoples, and therefore are not called upon to develop accession policies or ethical standards in controversial areas. Museums are staid institutions and unlikely to take controversial stands. This perspective encourages a focus within this large museum umbrella organization on subjects on which there is national and international institutional agreement, such as museum operation and financing, best practices on object conservation, standards for documentation, accession, and deaccession.

Like the AAMD, the AAM lobbies Congress and government agencies to promote and protect museum interests. Together with other cultural partners, it sponsors Museum Advocacy Day in Washington, DC, bringing hundreds of museum advocates to meet with elected officials and urge support for museums across the country.

51 William G. Pearlstein, *White Paper: A Proposal to Reform U.S. Law and Policy Relating to the International Exchange of Cultural Property*, 32 *CARDOZO ARTS & ENTMT’L J.* 569, 570 (2014).

52 *The Association Of Art Museum Directors Releases New Guidelines On Loans Of Antiquities And Ancient Art: Enhanced Transparency and Due Diligence in Loans Process Furthers Art Museums’ Public Mission*, AAMD (Feb. 27, 2006), [https://aamd.org/sites/default/files/document/AAMD%20Guidelines%20for%20Incoming%20Loans\\_FINAL.pdf](https://aamd.org/sites/default/files/document/AAMD%20Guidelines%20for%20Incoming%20Loans_FINAL.pdf).

53 *Art Museums and the Practice Of Deaccessioning*, AAMD, <https://aamd.org/sites/default/files/document/PositionPaperDeaccessioning%2011.07.pdf>.

54 *Art Museums, Private Collectors, and the Public Benefit*, AAMD (Jan, 2007), <https://aamd.org/sites/default/files/document/PrivateCollectors3.pdf>.

55 *Art Museums and the Identification and Restitution of Works Stolen by the Nazis*, AAMD (May 2007), [https://aamd.org/sites/default/files/document/Nazi-looted%20art\\_clean\\_06\\_2007.pdf](https://aamd.org/sites/default/files/document/Nazi-looted%20art_clean_06_2007.pdf).

56 *Association of Art Museum Directors Releases Report on the Stewardship And Acquisition of Sacred Objects*, AAMD (Aug. 9, 2006), <https://aamd.org/sites/default/files/document/Sacred%20Objects%20Guideline%202008.06.pdf>.

57 *Meeting of the Cultural Property Advisory Committee* (July 19, 2017) (Statement of the Association of Art Museum Directors Concerning the Request from the Government of Libya to the Government of the United States of America under Article 9 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property), <https://culturalpropertynews.org/wp-content/uploads/2018/03/Statement-of-the-AAMD-Concerning-the-Request-by-Libya.pdf>.

58 See, for example, *Meeting of the Cultural Property Advisory Committee* (July 31, 2018) (Statement of the Association of Art Museum Directors concerning the Request by the Government of the People’s Democratic Republic of Algeria to the Government of the United States of America for the Imposition of Import Restrictions to Protect its Cultural Patrimony under Article 9 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property), July 31, 2018, <https://aamd.org/sites/default/files/key-issue/AAMD%20Statement%20%20Algeria%202018.pdf>.

The AAM's Advocacy Brief on the Native American Graves Protection and Repatriation ACT (NAGPRA)<sup>59</sup> urges Congress to ensure that NAGPRA's administration and interpretation is consistent with the original intent of Congress. The brief expresses concern over Congress' failure to provide adequate grant funding to tribes and museums to support NAGPRA implementation; the amount granted is a small fraction of what is needed, creating a major financial burden on museums. It strongly objects to the 2010 promulgation of a Final Rule for Disposition of Culturally Unidentifiable Human Remains that mandated transfer of human remains without evidence of a shared group relationship and disposition of culturally unidentifiable associated funerary objects, which could subject museums to future legal claims and liabilities.

### Donors and Museum Trustees

According to the Institute of Museum and Library Services (IMLS), there were 35,144 active museums in the U.S. in 2014.<sup>60</sup> American museums are supported primarily by the public, although they receive significant assistance grants and subventions from the cities or states where they are located. Private sector giving to the arts, culture, and humanities by individuals, foundations and corporations was \$19.51 billion in 2017.<sup>61</sup> The reliance on non-government support is one of the unique characteristics of the U.S. museum system. Even the U.S. national museum complex in Washington, DC, the Smithsonian Institution, receives only 70% of its funding from federal government appropriations.<sup>62</sup> Economic data shows that this public support is amply repaid in both educational and civic value received. Museums are economic engines and play an important role in the economic development of the cities where they are located.<sup>63</sup>

For the most part, U.S. museums are public charities overseen by boards of trustees and managed by professional staff. Trustees are often expected to make generous gifts to the institutions they serve, to build endowments, fund acquisitions, provide seed money for construction and expansion projects, and to donate significant art collections. In return, trustees often gain social prestige, but more importantly, they have the opportunity to shape the institutions where they serve and enhance the cultural environment in cities where they live. As fiduciaries, they have duties to the museum that require responsible planning for the institution and diligent care of its assets and collections. Although most administrative activities are performed by directors and professional staff, museum trusteeship entails continuing education in museum management, financial development, and ensuring the continuity of their institutions. The most prominent organization for trustees in the U.S. is the Museum Trustee Association, whose primary task is to teach good governance and build skills and capacity among trustees.<sup>64</sup>

Corporate donors sometimes use museum sponsorships as positive public relations steps to advertise themselves as good corporate citizens – countering, for example, negative reputations as toxic polluters. Recently, prominent U.S. donors' families have been criticized for how their money was made, and artists and activists have joined in demonstrations in major museums to protest funding by corporations and donors with “dirty hands.”<sup>65</sup> Individual trustees have come under fire for being slumlords and exploiters.

Museums have also been criticized for perpetuating gender discrimination and reinforcing colonialist perspectives

# 35,144 U.S. Museums

According to the Institute of Museum and Library Services (IMLS), there were 35,144 active museums in the U.S. in 2014.

Press Release, Institute of Museum and Library Services, Government Doubles Official Estimate: There Are 35,000 Active Museums in the U.S. (May 19, 2014), <https://www.imls.gov/news-events/news-releases/government-doubles-official-estimate-there-are-35000-active-museums-us>.

# \$19.51 billion

Private sector giving to the arts, culture, and humanities by individuals, foundations and corporations was \$19.51 billion in 2017.

AMERICANS FOR THE ARTS, 2019 FACTS AND FIGURES, 9 (2019) <https://www.americansforthearts.org/sites/default/files/2019%20Facts%26Figures%20%28ALL%29.pdf>.

<sup>59</sup> *Advocacy Brief on the Native American Graves Protection and Repatriation ACT (NAGPRA)*, AMERICAN ALLIANCE OF MUSEUMS (2017), <https://www.aam-us.org/wp-content/uploads/2017/12/brief-nagpra.pdf>.

<sup>60</sup> Press Release, Institute of Museum and Library Services, *Government Doubles Official Estimate: There Are 35,000 Active Museums in the U.S.* (May 19, 2014), <https://www.imls.gov/news-events/news-releases/government-doubles-official-estimate-there-are-35000-active-museums-us>. See also *Museum Data Files*, INSTITUTE OF MUSEUM AND LIBRARY SERVICES, [www.imls.gov/museum\\_universe](http://www.imls.gov/museum_universe).

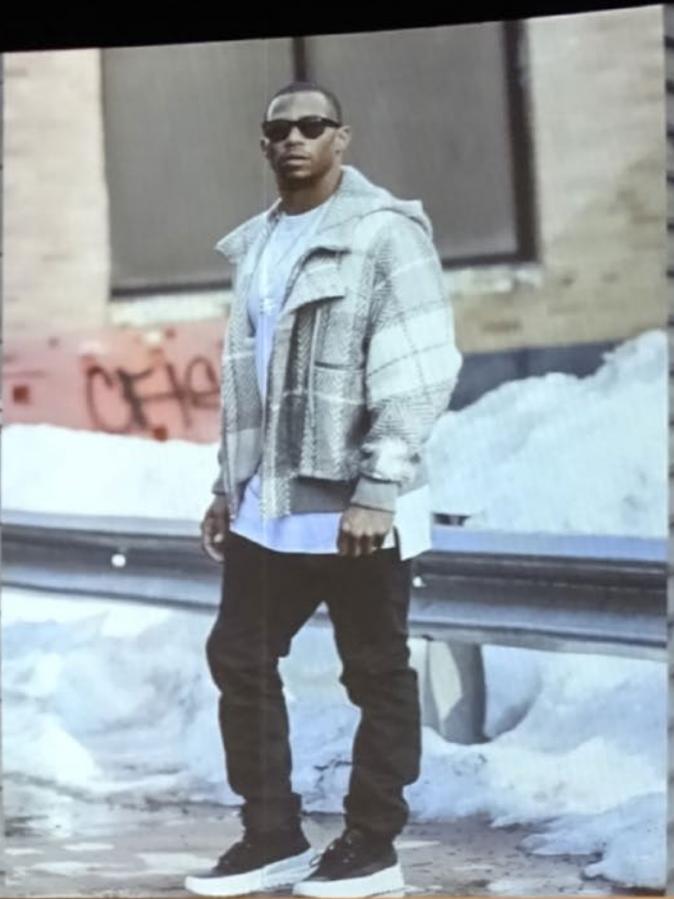
<sup>61</sup> AMERICANS FOR THE ARTS, 2019 FACTS AND FIGURES, 9 (2019) <https://www.americansforthearts.org/sites/default/files/2019%20Facts%26Figures%20%28ALL%29.pdf>.

<sup>62</sup> The Smithsonian Institution received over \$193 million in support from individuals, corporations, and foundations in fiscal year 2017. SMITHSONIAN, 2017 ANNUAL REPORT 69. <https://www.si.edu/sites/default/files/about/smithsonianannualreport2017.pdf>

<sup>63</sup> Museums contribute \$50 billion per year to the U.S. economy and support more than 726,000 American jobs. *Museums as Economic Engines*, OXFORD ECONOMICS 5 (2017), <https://www.aam-us.org/wp-content/uploads/2018/04/American-Alliance-of-Museums-web.pdf>.

<sup>64</sup> MUSEUM TRUSTEE ASSOCIATION, <https://www.museumtrustee.org/>.

<sup>65</sup> Alex Marshall, *Museums Cut Ties With Sacklers as Outrage Over Opioid Crisis Grows*, N.Y. TIMES, Mar. 25, 2019, <https://www.nytimes.com/2019/03/25/arts/design/sackler-museums-donations-oxycontin.html>.



NOBODY CAN GIVE YOU FREE  
NOBODY CAN GIVE YOU EQU  
OR JUSTICE OR ANYTHIN  
IF YOU'RE A MAN, YOU TAK

MALCOLM X

**GOING GLOBAL**  
AFRICAN AMERICAN STUDENTS

**ARTICULATING  
EQUALITY  
THE GREAT  
DEBATERS**

The art of debate requires a mastery of English, sharp thinking, organization, and courage. In 1890 students of small historically black Wiley College in Marshall, Texas, competed against a university of Michigan law students in the nation's first interracial collegiate debate. These Southern University's debate team, Sigma Xi Alpha, has been winning competitors since its founding in 1946.

**PREACHING TRADITIONS**

Whether Pentecostal, African Methodist Episcopal, or Seventh-Day Adventist, it's the preacher and the sermon that bring faith, hope, and the promise of a better life to the congregation.

Preachers engage congregations to defend a common message that reaches everyone. Black congregations have an emotional and interactive relationship with preachers that often takes the form of call and response.

African American preachers also work to improve the community and serve as civic and political leaders.

**MINISTER  
REV. HOWARD THURMAN**

Rev. Howard Thurman (1899-1954), known as the "preacher's preacher" and the teacher's teacher," wrote more than 40 books, founded the Church for the Fellowship of All Peoples, and served as a university dean. Thurman was Martin Luther King Jr.'s spiritual father-in-law. Deeply affected by Gandhi's philosophy, he later converted and signed leaders Martin Luther King Jr. and James Farmer Jr. Thurman's work and the Church of the Fellowship of All Peoples is a founding force for the modern Civil Rights Movement.

**TRAVELING PREACHER  
MRS. JARENA LEE**

In 1865, Jarena Lee (1775-1842) became the first woman authorized to preach under Richard Allen, founder of the African Methodist Episcopal Church. Her congregations and ministerial assignments for ability, she said, "I had no other ground, because the Spirit that led me to the pulpit, led me to the street for her sake. It is not a white Savior, instead of half-breed!" A traveling preacher throughout the Northeast, Lee ministered enslaved and free blacks and white to numerous churches through the Word of God.

**REVEREND  
G. E. PATTERSON**

Preaching, singing, politics, innovation, and social reform. Reverend G. E. Patterson's epitaph reads: "He was a Congregationalist by his day, a Presbyterian by his calling, a Baptist by his faith, a Methodist by his spirit, a Christian by his heart, a man of God by his life." A traveling preacher throughout the Northeast, Lee ministered enslaved and free blacks and white to numerous churches through the Word of God.

Exhibit at National Museum of African American History and Culture, Washington, DC Photo by Adam Jones from Kelowna, BC, Canada, 3 May 2019, Creative Commons Attribution-Share Alike 2.0 Generic license.

through the messaging in exhibitions or simply through museums' possession of objects taken from poorer nations.<sup>66</sup> Most museums acknowledge these issues and many are attempting to make these legitimate concerns a part of the museum narrative and visitor experience.<sup>67</sup>

### Private Collectors

Two additional groups sustain the unique U.S. museum network. The first is made up of private collectors, who donate the majority of artworks in U.S. museums, and the second is composed of art dealers, who supply objects for museums and private collections.<sup>68</sup> Private collectors have played a pivotal role in promoting great collections of antiquities, coins, ethnographic art, and other types of objects that fit UNESCO description of "cultural property." (Private collectors are equally important in promoting modern works, and bringing museum attention to categories of art outside of the mainstream.) The diversity of artistic interests among private collectors is a chief reason for the vitality of U.S. museums and for the extraordinary scope and depth of art historical and cultural studies in the U.S.<sup>69</sup> U.S. tax laws encourage donations of art by private collectors, both during life and at death.<sup>70</sup> For most donors, tax benefits are less important than the desire to ensure a permanent home for the works, to benefit the public and create a lasting legacy.

Along with museums and private collectors, the other necessary element to complete the symbiotic relationship that makes the American art system unique, is the art market. This includes both art dealers, who cultivate and educate collector-clients, bring art to market and promote it, and auction houses, which are an increasingly important international marketplace for collectors and art dealers, and a public venue for the sale of estates on death.<sup>71</sup>

### Art Markets

The U.S. retains its position as the largest art market in the world, with 44% of market share by value in 2018. The UK and China (a newcomer without a legal art market just two decades ago) vie for second place and stand at 21% and 19% respectively.<sup>72</sup> The vast majority of art sales by value take place in major auction houses and a few hundred major galleries worldwide. In 2016, there were some 5,000 art and antiques dealers in the U.S. This number appears fairly static, with a slight overall decline over time.<sup>73</sup> Antiques, antiquities and ethnographic art galleries generally operate at a far smaller scale than contemporary art galleries, except for a few at the top end of the market.<sup>74</sup>

Because the ancient and ethnographic art market is international in nature, both domestic and international trade organizations have been active in setting new standards for the trade: documenting ownership histories, and meeting due diligence

44%

The U.S.'s market share of the global art market in 2018, making it the largest art market in world.

\$11.6 billion

Total Revenue of art market sales in the U.S. in 2019.

\$51.56 million

Total proceeds for antiquities sold at auction in the United States in 2016.

0.43%

Percentage of Mediterranean and Asian classical antiquities sold in the U.S. compared to overall sales.

MCANDREW ET AL, ART BASEL AND UBS, THE ART MARKET 2019 at 16.  
DR. RACHEL A. J. POWNALL, TEFAF ART MARKET REPORT 2017 78, 141 (The European Fine Art Foundation, 2017), <http://1uyxqn3lzdsa2ytyzj1asxmmmpt.wpengine.netdna-cdn.com/wp-content/uploads/2017/03/TEFAF-Art-Market-Report-20173.pdf>

66 See, for example, DECOLONIZE THIS PLACE, <http://www.decolonizethisplace.org/> (last visited May 5, 2019). For European examples of protests, see Mariam Hale, *Visual Politics, Protests, and the Art Museum*, CULTURAL PROPERTY NEWS, Mar. 30, 2018, <https://culturalpropertynews.org/visual-politics-protests-and-the-art-museum/>.

67 See, for example, Ana Fota, *What's Wrong with this Diorama?*, N.Y. Times, Mar. 20, 2019, <https://www.nytimes.com/2019/03/20/arts/design/natural-history-museum-diorama.html>.

68 The U.S. system remains unique. See, e.g., Geraldine Fabrikant, *European Museums Adapt to the American Way of Giving*, N.Y. TIMES, Mar. 17, 2016, <https://www.nytimes.com/2016/03/17/arts/design/european-museums-are-shifting-to-american-way-of-giving.html>.

69 John Henry Merryman, *Art Systems and Cultural Policy 14* (Stanford Pub. L. Working Paper No. 1489612, 2009), <https://ssrn.com/abstract=1489612> and <http://dx.doi.org/10.2139/ssrn.1489612>.

70 U.S. law allows donors to choose to direct a portion of tax payments to non-profit charitable organizations under Internal Revenue Code § 501(c)(3). See INTERNAL REVENUE SERVICE, PUBLICATION 526 CHARITABLE CONTRIBUTIONS (2019). Only U.S. charities qualify for income tax donations. A charitable estate tax donation (on death) may be made to a qualifying foreign charity.

71 John Henry Merryman, *Art Systems and Cultural Policy*, 15 ART ANTIQUITY & L. 99 (2010).

72 CLARE MCANDREW, ART BASEL AND UBS, THE ART MARKET 2019 16, 36 (2019) [https://d2u3kfw92fzu7.cloudfront.net/The\\_Art\\_Market\\_Report\\_2019.pdf](https://d2u3kfw92fzu7.cloudfront.net/The_Art_Market_Report_2019.pdf).

73 DR. RACHEL A. J. POWNALL, TEFAF ART MARKET REPORT 2017 171 (The European Fine Art Foundation, 2017), <http://1uyxqn3lzdsa2ytyzj1asxmmmpt.wpengine.netdna-cdn.com/wp-content/uploads/2017/03/TEFAF-Art-Market-Report-20173.pdf>.

74 Neither U.S. nor global sales breakdowns are available for antiquities, which are both the smallest and the most restricted market sector. Decorative art and antiques dealers take over a year on average to sell inventory; inventory is acquired primarily from existing inventories, not recent imports, e.g. private collections (24%), estates (6%), other dealers (27%), and auctions (36%)<sup>16, 36, 70, 72</sup>.

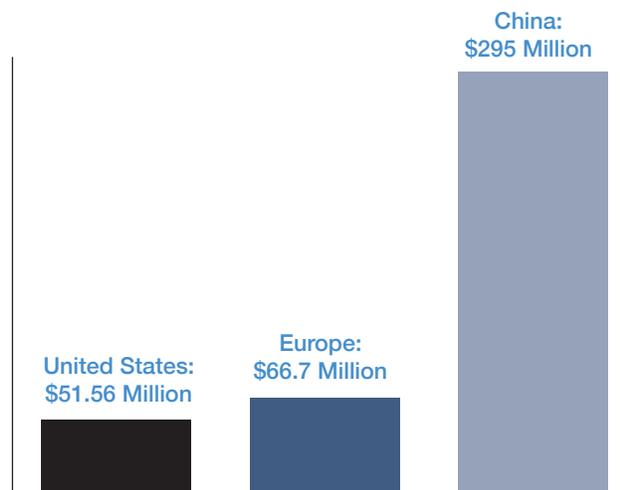


NY District Attorney Cyrus Vance with Ivory seized by Manhattan District Attorney's Office, New York State Department of Environmental Conservation, and the United States Fish and Wildlife Service, photo New York State Department of Environmental Conservation, July 12, 2012.

guidelines to avoid risks of money laundering.<sup>75</sup>

Art trade organizations support cultural policies enabling a recognized, licit market in antiquities and ethnographic art. Since the vast majority of goods in the antiquities trade have circulated for many decades, market representatives have repeatedly argued for digital systems that would document objects long in circulation and enable swift action to detect and halt the introduction of freshly looted antiquities. They argue that establishing permitting regimes in source countries, as originally proposed in the 1970 UNESCO Convention, and digital documentation of under-provenanced objects already in the market would allow a regulated trade in superfluous or duplicative materials. A number of art dealer organizations have taken self-regulatory steps to impose due diligence requirements for documentation on their members, to limit cash transactions and ensure that they are in compliance with banking regulations.<sup>76</sup> Some, like ATADA, have gone even further, limiting trade in legal, but sensitive Native American materials, and establishing a process for voluntary returns of sacred objects to tribes.<sup>77</sup>

With respect to proposed money-laundering laws and regulations for the art market, many market representatives argue there is no evidence of money laundering taking place in galleries or



### TEFAF: Antiquities Auction Sales in 2016

MCANDREW ET AL, ART BASEL AND UBS, THE ART MARKET 2019, at 16.

<sup>75</sup> The Responsible Art Market Initiative, or RAM was launched in February 2017. *Guidelines on combatting Money Laundering and Terrorist Financing, Responsible Art Market*, <http://responsibleartmarket.org/guidelines/guidelines-on-combatting-money-laundering-and-terrorist-financing/>.

<sup>76</sup> *Id.* See also the IADAA Code of Ethics and Practice, <https://iadaa.org/about-us/>.

<sup>77</sup> See, e.g., *ATADA Bylaws*, ATADA, <https://atada.org/bylaws-policies/> (amended May 20, 2017). See also *Voluntary Returns Program*, ATADA, <https://atada.org/voluntary-returns>.

auction houses, and that art dealers are unlikely to be used for large-scale illegitimate transactions in part because of the low volume and small size of antique art businesses.<sup>78</sup> Seventy-five percent of art and antiques businesses are small or solo retailers, without employees, although European businesses tend to be larger establishments than American ones.<sup>79</sup>

A key problem in the development of U.S. cultural policy with respect to the art market is a widespread misconception that the antiquities market is far larger than it actually is. When Asian antiquities are subtracted, the most widely accepted numbers for the volume and value of the entire international art market for Mediterranean antiquities, i.e. objects from the Classical world, including Italy, Spain, Greece, Turkey, the Middle East and North Africa, has been less than \$150 million per year in total sales for many years. This number appears relatively static in estimates by art professionals, dealers and auction houses. According to TEFAF, the percentage of Mediterranean antiquities in total sales has dropped significantly since 2014, in part in response to dealer and collector unwillingness to acquire objects that may have been looted during political upheavals in the Middle East.<sup>80</sup>

There are significant differences in the volume of total art sales reported by professional art market analysts. What remains consistent is that the share ascribed to antiquities is tiny compared to sales of other market categories of contemporary, modern, impressionist, and Old Master artworks. By far the greatest share of the antiquities market is in Chinese, Tibetan, and related Asian antiques, a segment that is dominated by an international Chinese clientele.<sup>81</sup> The TEFAF Art Market Report 2017 showed a \$51.56 million annual auction market in 2016 for all antiquities, including Chinese, in the U.S., compared to \$66.7 million in Europe and \$295 million in China.<sup>82</sup> Compared to the overall U.S. market of \$11.6 billion given by TEFAF, sales of Mediterranean and Asian classical antiquities of all kinds accounted for only 0.43% of the total U.S. annual art market.<sup>83</sup>

### Archaeologists

The largest archaeological organization in the U.S., the Archaeological Institute of America (AIA) opposes the sale of antiquities unless they can be documented as outside the countries of origin before 1970.<sup>84</sup> The AIA “speaks with a strong voice on behalf of the preservation of archaeological sites, monuments and artifacts and against looting of sites and the illicit trade in undocumented antiquities.”<sup>85</sup> It has consistently supported the imposition of import restrictions under the Cultural Property Implementation Act in testimony provided to CPAC and in its publications, which include the popular *Archaeology Magazine* and the professional *American Journal of Archaeology*.<sup>86</sup>

The AIA’s Code of Ethics addresses the trade in undocumented antiquities:

Members of the AIA should... [r]efuse to participate in the trade in undocumented antiquities and refrain from activities that give sanction, directly or indirectly, to that trade, and to the valuation of such artifacts through authentication, acquisition, publication, or exhibition. Undocumented antiquities are those that are not documented as belonging to a public or private collection before December 30, 1970...<sup>87</sup>

78 Letter from CINOA to the Hon. Jeb Hensarling, Chairman of the Fin. Services Comm., re: H.R. 5886 (May 2018), <https://culturalpropertynews.org/wp-content/uploads/2018/05/letter-from-CINOA.pdf>; see also Letter from Glob. Heritage All. to the Hon. Jeb Hensarling, Chairman of the Fin. Services Comm., (May 24, 2018), <http://global-heritage.org/sites/default/files/downloads/Global-Heritage-Alliance-Letter-House-Financial-Services-final-052418.pdf>.

79 POWNALL, *supra* n. 73 at 50.

80 The vast majority of the items sold each year have circulated for decades. Objects with “good” provenance going back 50 or more years are more saleable; often commanding a higher price than better quality antiquities with only a 10-25 year provenance. POWNALL, *supra* n. 73 at 50.

81 Committee for Cultural Policy & Global Heritage Alliance, *Meeting of the Cultural Property Advisory Committee, Testimony submitted to Cultural Property Advisory Committee, Bureau of Educational and Cultural Affairs, U.S. Department of State, on the Request for Renewal of the Memorandum of Understanding Between the United States of America and the Peoples Republic of China*, (Apr. 9, 2018), <https://culturalpropertynews.org/testimony-on-renewal-of-us-embargo-on-art-of-china-tibet/>.

82 POWNALL, *supra* n. 73 at 78, 141.

83 The Art Basel and UBS The Art Market report for 2018, reporting on 2017-year sales, describes the total U.S. art market as advancing 16% from 2016 to \$26.6 billion total. See McANDREW ET AL, *supra* n. 75, at 16. This report does not cover antiquities as a market sector, subsuming them within “decorative art and antiques.”

84 *AIA Fact Sheet*, ARCHAEOLOGICAL INSTITUTE OF AMERICA, <https://www.archaeological.org/sites/default/files/files/AIA%20Fact%20Sheet.pdf>.

85 *Id.*

86 See, for example, *AIA Members Speak in Favor of Continued Protection of Artifacts from Bolivia and Greece*, ARCHAEOLOGICAL INSTITUTE OF AMERICA, June 30, 2016, <https://www.archaeological.org/news/sitepreservationadvocacy/21682>.

87 *Code of Ethics*, ARCHAEOLOGICAL INSTITUTE OF AMERICA, Dec. 29, 1997, <https://www.archaeological.org/news/advocacy/130>.

This position results in the exclusion of undocumented antiquities from publications or announcements unless the presentation emphasizes the object's loss of archaeological context.<sup>88</sup> In 2004, the Executive Committee of the Governing Board of the Archaeological Institute of America affirmed that:

As a publication of the Archaeological Institute of America, the *American Journal of Archaeology* will not serve for the announcement or initial scholarly presentation of any object in a private or public collection acquired after December 30, 1973, unless its existence is documented before that date, or it was legally exported from the country of origin. An exception may be made if, in the view of the Editor, the aim of publication is to emphasize the loss of archaeological context.<sup>89</sup>

Although the AIA urged in 1973 that “consideration should be given to legitimate and honorable means for the acquisition of cultural property,” stating, “It is hoped that nations will release for acquisition, long term loan, or exchange, cultural property of significance for the advancement of knowledge and for the benefit of all peoples... in accordance with the provisions of the UNESCO Draft Convention,”<sup>90</sup> the AIA has not since advocated for a lawful, market-based system in the U.S. or elsewhere.

Currently, members of the AIA's Governing Board hold positions in anti-art trade advocacy groups,<sup>91</sup> and others have served lengthy terms on CPAC.<sup>92</sup> The AIA has encouraged very broad import restrictions and the repeated renewal of existing agreements with art source nations under the Cultural Property Implementation Act.<sup>93</sup>

#### **NGOs and affiliates of international cultural organizations**

Only a few of the many international heritage organization that have U.S. members and affiliates are listed below. These are some of the most active in the developing policy in the international cultural property field.

ICOM, the International Council of Museums,<sup>94</sup> an international NGO, is made up of museum professionals and experts from around the world, addressing issues from museums' roles in facilitating social and economic development to management and curatorial standards for museums. In the U.S. cultural property arena, however, ICOM is best known for its publication of cultural property “Red Lists”<sup>95</sup> for the use of national customs and law enforcement agencies worldwide. ICOM partners with and is funded by the U.S. State Department's Bureau of Educational and Cultural Affairs to produce these Red Lists, which are intended to depict objects of types typically illegally trafficked. Because of their stress on illegal trafficking, the ICOM Red Lists are most useful in bringing public and media attention to illegal trade.<sup>96</sup>

The International Council on Monuments and Sites (ICOMOS),<sup>97</sup> a professional preservation and conservation organization, has a U.S. affiliate organization, the U.S. National Committee of the International Council on Monuments and Sites (US/ICOMOS), one of 107 National Committees worldwide dedicated to the conservation of historic buildings, districts, and sites. ICOMOS US has about 700 U.S. institutional and individual members, including architects, historians, archaeologists, art historians, anthropologists, and engineers. In the U.S., ICOMOS typically

<sup>88</sup> *Annual Meeting: Ethical Standards Requirement*, ARCHAEOLOGICAL INSTITUTE OF AMERICA, <https://www.archaeological.org/about/ethicalstandards>.

<sup>89</sup> *Editorial Policy on the Publication of Recently Acquired Antiquities*, 109.2 AMERICAN JOURNAL OF ARCHAEOLOGY ONLINE, (2005). <https://www.ajaonline.org/editorial/97>.

<sup>90</sup> *Resolution on the Acquisition of Antiquities by Museums*, ARCHAEOLOGICAL INSTITUTE OF AMERICA, Dec. 19, 1973, <https://www.archaeological.org/news/advocacy/101>.

<sup>91</sup> For example, Deborah Lehr, founder and President of the Antiquities Coalition is an AIA General Trustee, see *Governance*, ARCHAEOLOGICAL INSTITUTE OF AMERICA, <https://www.archaeological.org/about/governance>.

<sup>92</sup> Nancy Wilkie, who has served on CPAC since 2003, was President of the AIA from 1998–2002. *AIA Tours: Lecturer/Host: Nancy Wilkie*, ARCHAEOLOGICAL INSTITUTE OF AMERICA, <https://www.archaeological.org/tours/leaders/nancywilkie>.

<sup>93</sup> See e.g., *Dispatches from the AIA- September /October 2011*, ARCHAEOLOGICAL INSTITUTE OF AMERICA, SEPT. 2, 2011, <https://www.archaeological.org/news/dispatches/6244>; *Protect Greek Archaeological Heritage: CPAC Meeting to Renew MoU with Greece*, ARCHAEOLOGICAL INSTITUTE OF AMERICA, Apr. 28, 2016, <https://www.archaeological.org/news/aianews/21544>.

<sup>94</sup> ICOM: INTERNATIONAL COUNCIL OF MUSEUMS, <https://icom.museum/en/>.

<sup>95</sup> *Red Lists*, ICOM, <https://icom.museum/en/activities/heritage-protection/red-lists/>.

<sup>96</sup> Red Lists at times have inherently political content, indirectly asserting rights of national ownership belonging to oppressed religious minorities, for example, the inclusion of Tibetan and Central Asian objects described as Qing and Tang dynasty in the China Red List, and Hebrew manuscripts and Torah finials in the Yemen Red List. *Id.*

<sup>97</sup> U.S. NATIONAL COMMITTEE OF THE INTERNATIONAL COUNCIL ON MONUMENTS AND SITES (US/ICOMOS), <https://www.usicomos.org/>.

works in partnerships between private (usually nonprofit) organizations and federal, state, and local governments. It also sponsors scientific research on preservation, scholarly symposia and conservation training.

The International Committee of the Blue Shield was founded in 1996 by ICA (International Council on Archives), ICOM (International Council of Museums), ICOMOS (International Council on Monuments and Sites), and IFLA (International Federation of Library Associations and Institutions). Its U.S. affiliate, the U.S. Committee of the Blue Shield (USCBS), describes its purpose as to “promote U.S. legal protections for and commitments to cultural property, consistent with the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its Protocols” and to “coordinate with the U.S. military, U.S. government, and cultural heritage organizations to protect cultural property worldwide during armed conflict.” USCBS produces public events in conjunction with the Lawyers’ Committee for Cultural Heritage Preservation (see below), with which it shares several directors. The UCSBS board has no representation of domestic or international trade or collecting organizations, or of collecting museums, but does include directors with strong conservation and heritage preservation backgrounds.

### Advocacy groups and think tanks

It is a unique characteristic of U.S. cultural policy that independent non-profit organizations, private museums, research organizations, and trade and collecting societies all play active roles in public policy development. Each of these stakeholders shares the goal of preserving cultural heritage but each has different perceptions of the importance of museums, the realities of the art market, and best legal path to follow in achieving this goal. Since about 2000, there has been even greater polarization between organizations advocating for an end of the antiquities and ethnographic art trade and what may be called “art market participants,” including collectors, art dealers, and collecting museums, although many museums find themselves in either camp, depending on the issue.

Some public advocates hold that archeological materials should not be commodified in any way, and that national governments are the only proper custodians of archaeological, ethnological, and other cultural materials. Legal scholar John Henry Merryman pointed out in 2004 in *A Licit International Trade In Cultural Objects*, that “...anti-market bias appears to have grown stronger. Its most recent, and most extreme, demonstration appears in the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. Article 2(7) of the convention states in its entirety: “Underwater cultural heritage shall not be commercially exploited.”<sup>98</sup> What was seen as “extreme” in 2004, however, pales in comparison to anti-market advocacy today.

When Merryman wrote *A Licit International Trade* in 2004, there were already a number of groups outside of the archaeological organizations that were actively engaged in public policy activities. Some anti-trade advocates categorize virtually all antiquities as ‘stolen’ according to source country nationalizing laws or blanket laws against export. While they only oppose ‘illicit’ trade, since many art source countries passed anti-export laws in the 19<sup>th</sup> or early 20<sup>th</sup> century, there are few ‘licit’ objects under these terms. Some organizations have targeted museums exhibiting global art and the art trade in the U.S. and U.K. The most active of these groups prior to the entry of the Antiquities Coalition in 2011 was SAFE,<sup>99</sup> (“Saving Antiquities for Everyone”). Among other activities, SAFE led regular “stolen art” tours of major museums, especially in New York.<sup>100</sup>

The Lawyers’ Committee for Cultural Heritage Preservation (LCCHP) describes itself as a “nonprofit, educational organization of lawyers, law students, and interested members of the public who have joined together to promote the preservation and protection of cultural heritage resources in the United States and internationally through education and advocacy, including through legal action as appropriate.” The LCCHP sponsors an annual symposium with speakers representing a range of perspectives on cultural heritage. LCCHP’s Statement of Principles states that it “believes it is appropriate for museums and other institutions to borrow, collect, conserve, preserve, study, publish, and display cultural objects, provided the provenance of those objects is documented and title has been lawfully acquired.”<sup>101</sup>

Far more extreme positions have been taken by the most recent advocacy organization to appear, the Antiquities Coalition, a well-funded U.S. charitable organization, which has quickly come to dominate the anti-trade,<sup>102</sup> pro-

98 John Henry Merryman, *A Licit International Trade In Cultural Objects*, in WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 271 (Kate Fitz Gibbon, ed., 2005).

99 SAFE: SAVING ANTIQUITIES FOR EVERYONE, <http://savingantiquities.org/>.

100 Similar tours continue. See e.g. Roger Atwood: “Stolen History,” SAFE, <http://savingantiquities.org/our-work/tours/roger-atwood/>.

101 The Board of the LCCHP is headed by prominent litigator Thomas R. Kline, and other distinguished attorneys. It also includes the executive director of the Antiquities Coalition, and other anti-art trade advocates.

102 See, for example, Lawrence Rothfield, *Policy Brief No. 2, How Can We Fund the Fight Against Looting and Trafficking? A “Pollution Tax” on the Antiquities Trade*, THE ANTIQUITIES COALITION (Dec. 2016) <https://theantiquitiescoalition.org/wp-content/uploads/2016/12/Policy-Brief-2-.pdf>. See also, *The Closing U.S. Borders to Illicit Antiquities*, ANTIQUITIES COALITION, <https://theantiquitiescoalition.org/developing-implementing-solutions/closing-u-s-borders-illicit-antiquities/>; and Letter to U.S. Treasury Secretary Jacob Lew from the Antiquities Coalition (Dec. 22, 2015) <https://theantiquitiescoalition.org/wp-content/uploads/2018/05/Lew-2015-12-22.pdf>.



*March to protest US immigration policies in St. Paul, Minnesota. Photo by Fibonacci Blue from Minnesota, USA, 20 January 2018, Creative Commons Attribution 2.0 Generic license.*

national-ownership side of the U.S. cultural property debate, and been a source for misleading data on illicit trafficking and the antiquities market.<sup>103</sup> The Antiquities Coalition is a vocal presence at international conferences on cultural heritage, meets regularly with both U.S. and foreign diplomats, and has an unpublished agreement described as a “public-private partnership”<sup>104</sup> with the government of Egypt, whose former government officials act as advisers.<sup>105</sup> It also funds the MANTIS<sup>106</sup> program at the University of Chicago.<sup>107</sup> Among its partners in various activities and enterprises have been the Middle East Institute, the Asia Society, American Schools of Oriental Research, ARCE (American Research Center in Egypt), and SAFE.<sup>108</sup>

The Antiquities Coalition partnered with the Asia Society and Middle East Institute in an April 2016 report, *#CultureUnderThreat: Recommendations for the U.S. Government*, which summarily declared a causal effect between the “multi-billion dollar demand for art and antiquities” and the looting and destruction of antiquities sites.<sup>109</sup> The *#CultureUnderThreat* report urges the State Department to proactively solicit bilateral agreements for import restrictions, asks Congress to prioritize funding to conduct criminal investigations of cultural property crimes with increased criminal penalties and lower financial thresholds, and recommends that the Internal Revenue Service require proof of due diligence and valid provenance for tax-deductible gifts of art to charities. The Task Force Report does not place responsibility for cultural heritage loss on source countries.<sup>110</sup>

<sup>103</sup> Katherine Brennan & Kate Fitz Gibbon, *Bearing False Witness: The Media, ISIS, and Antiquities*, CULTURAL PROPERTY NEWS, Dec. 1, 2017, <https://culturalpropertynews.org/bearing-false-witness-the-media-isis-and-antiquities/>.

<sup>104</sup> *Id.*

<sup>105</sup> The Antiquities Coalition’s Advisory Council is led by Honorary Chair Zahi Hawass, former Minister of Antiquities of the Arab Republic of Egypt and includes Ambassador Yasser Elnaggar, former Principal Deputy Minister of Planning, Monitoring and Administrative Reform, Arab Republic of Egypt, and former Deputy Chief of Mission for the Embassy of the Arab Republic of Egypt.

<sup>106</sup> The MANTIS Project describes itself as a “multi-disciplinary research team... working at the interface of economics and archaeology.” Past funding was provided by the Oriental Institute of the University of Chicago, the Antiquities Coalition, and the University of Chicago’s Department of Art History. <https://oi.uchicago.edu/research/projects/mantis>.

<sup>107</sup> *Modeling the Antiquities Trade in Iraq and Syria* (MANTIS), THE ORIENTAL INSTITUTE: UNIVERSITY OF CHICAGO, <https://oi.uchicago.edu/research/projects/mantis>.

<sup>108</sup> SAFE, *supra* n. 99.

<sup>109</sup> #CULTUREUNDERTHREAT: RECOMMENDATIONS FOR THE U.S. GOVERNMENT 6, Apr. 2016, <http://taskforce.theantiquitiescoalition.org/wp-content/uploads/2015/01/Task-Force-Report-April-2016-Complete-Report.pdf>. (citing Andrew Keller, *Documenting ISIL’s Antiquities Trafficking: The Looting and Destruction of Iraqi and Syrian Cultural Heritage: What We Know and What Can Be Done*, U.S. Dep’t of State, Sept. 29, 2015, <https://2009-2017.state.gov/e/eb/rls/rm/2015/247610.htm>).

<sup>110</sup> *Id.*, see also *Bad Policy: Antiquities Coalition Draft “#CultureUnderThreat” Task Force Report*, CULTURAL PROPERTY NEWS, Mar. 31, 2016, <https://culturalpropertynews.org/bad-policy-antiquities-coalition-draft-cultureunderthreat-task-force-report/>.



*The San Juan River cutting into the sandstone-pink landscape of southeastern Utah at Goosenecks State Park, surrounded by canyon walls more than 1,000 feet high. Photo by NASA Space Imaging, May 9, 2004.*

The Committee for Cultural Policy (CCP), which sponsored this TrustLaw report, is a research and educational think tank established in 2011 as a 501(c)(3) non-profit organization.<sup>111</sup> The Committee for Cultural Policy encourages development of a range of cultural policies that preserve artifacts and archaeological sites through a regulatory structure that fosters the lawful collection, exhibition, and global circulation of artworks, adequate funding for site protection and policies enabling safe harbor in international museums for at-risk objects from countries in crisis. In 2013, the CCP published a White Paper: *A Proposal to Reform U.S. Law and Policy Relating to the International Exchange of Cultural Property*, the first strategic review of policy from a museum and collector perspective, and produces symposia with a wide representation of perspectives and interest groups ranging from legal specialists to directors of major U.S. museums. Its board includes museum professionals, legal scholars, art historians, art dealers and collectors. CCP works together with legal and cultural heritage specialists worldwide to publish research on cultural policy. CCP publishes over 100 articles per year of news, analysis and research on the Cultural Property News online news website.<sup>112</sup>

Specialist groups representing collectors and art dealers are professionally focused, but also weigh in on cultural policy matters when their interests are touched. Coin collector and dealer organizations include the Ancient Coin Collectors Guild (ACCG), the American Numismatic Association (ANA), the Professional Numismatists Guild (PNG), and the International Association of Professional Numismatists (IAPN). There are large art market organizations such as International Federation of Dealer Associations, (CINOA),<sup>113</sup> which acts as an umbrella for 30 dealer organizations covering over 5,000 global dealers in all art and antiques. The internationally based IADAA<sup>114</sup> represents antique and antiquities dealers in Europe, Asia, and the United States. Other specialized organizations are nationally organized, such as the National Antique and Art Dealer Association of America, or the Art Dealers Association of America.

The most active U.S. dealer organization specializing in tribal and ethnographic art is ATADA, which also includes auction houses, art fairs, European-based specialist tribal art dealers and U.S. private museums.<sup>115</sup> In the ancient Americas field there is an umbrella organization for collectors and dealers, G.I.R.S.<sup>116</sup>, and over a hundred small avocational amateur archaeologist and collecting groups, usually focused on collecting points, arrowheads and other ancient objects from prehistoric America.

Independent cultural policy-focused organizations include Global Heritage Alliance (GHA), an organization advocating for the rights of private individuals, dealers, museums, and collectors in the government arena. Global Heritage Alliance provides legal and policy research on domestic, Native American, and international cultural heritage issues. It presents testimony before all three branches of the U.S. government—legislative executive, and judicial—including legal challenges to Department of State and U.S. Customs and Border Patrol overreach.<sup>117</sup> Global Heritage Alliance describes its aim as to “restore balance in US government policy in favor of fostering appreciation of ancient and indigenous cultures and the preservation of archaeological and ethnographic artifacts for the education and enjoyment of the American public.”<sup>118</sup>

Other active organizations in the cultural policy field include the Association of Dealers and Collectors of Ancient and Ethnographic Art (ADCAEA), which works to advance the responsible and legal trade in ancient art.<sup>119</sup> Another advocacy group, the American Council for the Preservation of Cultural Property<sup>120</sup> (ACPCP) was founded by retired U.S. Department of Homeland Security (DHS) agent James McAndrew, former head of the DHS International Art and Antiquity Theft Investigations Program. The ACPCP describes its role as representing all individuals who have a stake in the preservation of personal property rights as they relate to collecting ancient artwork. The ACPCP has been active in countering the inaccurate data on supposed links between terrorists and the antiquities trade in its advocacy work with government officials, based on its specialized experience in area of cultural property law enforcement.

111 The author of this report, Kate Fitz Gibbon, currently serves as executive director of the Committee for Cultural Policy, Inc. and as editor of Cultural Policy News.

112 CULTURAL PROPERTY NEWS, <https://culturalpropertynews.org/>.

113 CINOA, <https://www.cinoa.org/>.

114 INTERNATIONAL ASSOCIATION OF DEALERS IN ANCIENT ART, <https://iadaa.org/>.

115 ATADA, [ATADA.org](http://ATADA.org) (Authentic Tribal Art Dealers Association, formerly known as the Antique Tribal Art Dealers Association).

116 PREHISTORIC AMERICAN ONLINE: WEBSITE OF THE GENUINE INDIAN RELIC SOCIETY, INC., <https://prehistoricamerican.net/>

117 See, for example, Brief for the Association of Dealers & Collectors of Ancient & Ethnographic Art, et al., *Amici Curiae Supporting Appellants, United States of America v. 3 Knife Shaped Coins*, No. 17-1625 (4th Cir., filed July 12, 2017), <http://global-heritage.org/sites/default/files/downloads/Amicus-Brief-GHA-CCP-ADCAEA.pdf>.

118 *About Us*, GLOBAL HERITAGE ALLIANCE, <http://global-heritage.org/>.

119 ASSOCIATION OF DEALERS AND COLLECTORS OF ANCIENT AND ETHNOGRAPHIC ART, <https://adcaea.wildapricot.org/>.

120 THE AMERICAN COUNCIL FOR THE PRESERVATION OF CULTURAL PROPERTY, <https://www.acpcp.net/>.

Museum associates organizations such as the Museum Trustees Association,<sup>121</sup> the Textile Museum Associates,<sup>122</sup> and the California-based Ethnic Arts Council are just a few examples among hundreds of collecting/museum-support groups in the U.S. that advocate for support for museums, for professional governance, and for arts education in their artistic specialty.

Heritage and historical organizations of immigrant populations in the U.S. play important roles in preserving religious, historical and cultural community and traditions. Hundreds of organizations promote cultural heritage or do philanthropic work overseas. Many, including U.S.-based Armenian, Uyghur, and Tibetan organizations are particularly focused on cultural policy matters related to human rights violations and the deliberate destruction of minority cultural heritage by governments in countries of ancestral origin.<sup>123</sup>

Some organizations have only recently become involved in cultural policy issues. The inclusion of objects of Jewish heritage among restricted imports in CPIA-based Designated Lists for Iraq, Syria, Egypt and Libya—which could result in imported Jewish heritage being returned to Middle Eastern governments—caused outrage among American Jews of Middle Eastern and North African heritage whose communities were violently persecuted and forced to emigrate, abandoning their possessions.

In 2018, a State Department official told conference attendees that five more requests from Middle Eastern and North African nations for agreements under the CPIA were in the pipeline.<sup>124</sup> In 2018, a request from the Algeria People's Democratic Republic was heard by the Cultural Property Advisory Committee (CPAC), an advisory body under the aegis of the Department of State that makes recommendations on art source country requests pursuant to the CPIA. An MOU was signed with Algeria in August 2019.<sup>125</sup> By March 2019, a request for an MOU from Jordan had been heard by CPAC and in August 2019, the State Department announced a request from Morocco. The proliferation of requests from countries that are not currently known to suffer from significant looting or illegal trade raised concerns among the art community that the requests resulted from U.S. State Department policies aggressively seeking MOUs, rather than from threats to these countries' cultural heritage that would satisfy the Congressionally-mandated criteria under the CPIA. These MOUs could have the effect of closing the circulation of art to the U.S. from the Middle East and North Africa.

Although several large American Jewish organizations have also discussed the concern for the treatment and preservation of minority and minority-religious cultural heritage with State Department officials, the smaller non-profit organization, JIMENA, Jews Indigenous to the Middle East and North Africa,<sup>126</sup> has done much to educate and inform the public about the Iraqi Jewish Archives,<sup>127</sup> to voice opposition to agreements with Middle East and North African nations to State Department officials, and to give testimony at CPAC public hearings. In December 2018, eighteen Jewish organizations joined together with JIMENA to send a letter to U.S. Secretary of State Mike Pompeo to protest the inclusion of objects of Jewish, Christian, and other minority religious heritage in cultural property agreements with Middle Eastern and North African nations.<sup>128</sup>

121 MUSEUM TRUSTEE ASSOCIATION, <https://www.museumtrustee.org/>.

122 TEXTILE MUSEUM ASSOCIATES OF SOUTHERN CALIFORNIA, <http://www.tmasc.org/>.

123 See, for example, Djulfa.org, headed by political scientist and author Simon Maghakyan and *A Regime Conceals Its Erasure of Indigenous Armenian Culture*, HYPERALLERGIC (Feb. 18, 2019) <https://hyperallergic.com/482353/a-regime-conceals-its-erasure-of-indigenous-armenian-culture/>; UYGHUR HUMAN RIGHTS PROJECT, <https://uhrp.org/>; a list of Tibetan organization may be found at Andrea Miller, *How to Help Tibet*, LION'S ROAR (Mar. 10, 2017), <https://www.lionsroar.com/shambhala-sun-helping-tibet-an-online-resource-guide/>.

124 Joan A. Polaschik, Acting Principal Deputy Assistant Secretary of State for Near Eastern Affairs, at the Cultural Heritage Coordinating Committee's event, *A Discussion on Cultural Heritage Preservation and Foreign Policy*, October 24, 2018 at the Smithsonian Castle, Washington D.C. See also, <https://eca.state.gov/video/chcc-cultural-heritage-and-foreign-policy-panel-discussion>.

125 United States and Algeria Sign Cultural Property Agreement, U.S. Department of State, <https://www.state.gov/united-states-and-algeria-sign-cultural-property-agreement/>.

126 *About JIMENA*, JIMENA: JEWS INDIGENOUS TO THE MIDDLE EAST AND NORTH AFRICA, <http://jimenaexperience.org/iraq/about-jimena/>.

127 Iraqi Jewish Archive, WIKIPEDIA, [https://en.wikipedia.org/wiki/Iraqi\\_Jewish\\_Archive](https://en.wikipedia.org/wiki/Iraqi_Jewish_Archive) (last visited May 6, 2019). See also, Harold Rohde, *Outrage: U.S. Returning Artifacts Looted from Iraqi Jews to Iraq, Instead of Lawful Owners*, JIMENA (Aug. 26, 2013) <http://jimenaexperience.org/iraq/2013/08/26/outrage-u-s-returning-artifacts-looted-from-iraqi-jews-to-iraq-instead-of-lawful-owners/>.

128 *Letter to Secretary of State Mike Pompeo Regarding Cultural Property Agreements*, JIMENA blog, (Dec. 9, 2018), <http://www.jimena.org/letter-to-secretary-of-state-mike-pompeo-regarding-cultural-property-agreements/>.



*American Bald Eagle, taken in Kachemak Bay, Alaska. Photo by Andy Morffew from Itchen Abbas, Hampshire, UK. 15 March 2016, Creative Commons Attribution 2.0 Generic license.*

### PART III. FOUNDATIONS OF U.S. CULTURAL PROPERTY LAW AND POLICY

The U.S. has some of the most developed, fully enforced laws governing import and trade in international cultural property in the world. It has adopted laws and regulations intended to respect indigenous and religious rights to cultural heritage, to safeguard archaeological sites and cultural landscapes, and has institutionalized processes for returning stolen artifacts from other nations. At the same time, the U.S. has fewer restrictions on the private ownership and free circulation of art and artifacts than the vast majority of nations.

Within the realm of domestic cultural property, U.S. laws specifically regulate only transfers of cultural artifacts of Native American or Native Hawaiian origin. It does so to protect the interests of indigenous communities, not to grant government special rights to cultural property. These special protections acknowledge past abuses of Indian and Hawaiian peoples and the federal trust responsibility to tribes, which is the most important principle in federal Indian law.<sup>129</sup> The 573 federally recognized Native American tribes are self-governing Nations, many with unique laws and limited constitutional and legal authority over tribal members and lands held by treaty. As sovereign nations, tribes possess all powers of self-government except (1) those that Congress has expressly extinguished, (2) courts have determined are superseded by federal law, or (3) are inconsistent with U.S. national policies. Laws granting special rights to tribes over Indian cultural objects may be triggered if an object is over 100 years of age and removed from Indian or federally-owned land without a permit, or if it is held by an institution receiving federal funds and fits within a category of objects to which Native American or Native Hawaiian peoples have superior title.<sup>130</sup>

The U.S. Constitution establishes citizens' private property protection as a fundamental principle and protects private

<sup>129</sup> The U.S. government has a fiduciary responsibility to protect tribal treaty rights, Indian sovereignty, the lands set aside for Indian tribes, and the resources within those lands. The trust responsibility carries with it both legal duties and moral obligations, and "its conduct... should therefore be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

<sup>130</sup> See *Part V. US Laws on Domestic Cultural Property: The Antiquities Act, ARPA and NAGPRA*, *infra*.

ownership from government appropriation. No U.S. principle of law grants the state exclusive title to cultural property or the right to nationalize ownership of individual objects. Nor has the U.S. ever restricted the export of lawfully acquired artworks or artifacts of U.S. origin. Cultural property policies have developed around both the concepts of private ownership and the state's obligation to preserve and protect heritage for the public good.

In ancient times, the destruction of monuments and plunder of loot in battle was considered a legitimate part of making war.<sup>131</sup> The looting of what we call 'cultural property' today was not only the preferred form for taking concentrated wealth in battle; removing religious or dynastic objects was also a recognized means of weakening one's enemies. Although philosophical arguments over the propriety of such takings have been raised since Roman times, the practice was common not only in the ancient world, but was revived in the Renaissance and may have reached its height in the Napoleonic Wars of the beginning of the 19th century.<sup>132</sup> Such takings were not limited to the French, but the vast numbers of art treasures brought to France (many were later returned) attracted attention not only to the ethics of taking artistic treasure as loot, but also to its negative impact on the civilian populations of conquered regions.

One of the very first codifications of regulations on the taking of cultural property was in the Lieber Code,<sup>133</sup> promulgated by President Abraham Lincoln in 1863 at the height of the American Civil War. The Lieber Code allowed seizure of "all public movable property until further direction by its government" but not its destruction.<sup>134</sup> However, Sections 34-36 of the Lieber Code also provided that property belonging to churches, hospitals, schools, libraries, museums, and of a scientific character should not be considered public property, should be secured against injury, never wantonly destroyed, and its ultimate ownership should be settled as part of a peace treaty.<sup>135</sup>

The protection of libraries, monuments, and civilian institutions would become a key part of the discussions of ethical principles protecting noncombatants and nonmilitary targets in war. The Declaration of Brussels of 1874 and the influential 1880 manual, *The Laws of War on Land* prohibited seizure, destruction, or willful damage to religious and charitable institutions, works of art and science.<sup>136</sup>

The United States is a signatory to the 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague IV) that sets rules for noncombatants and the treatment of monuments.<sup>137</sup> The Roerich Pact, signed by the U.S. and 17 other nations in 1935, established the neutrality of monuments, museums, educational and cultural institutions in times of war.<sup>138</sup>

The terrible damage to museums, monuments, and religious and cultural establishments in World War II and the destruction and theft of artworks by the Nazis were key factors in the rapid development of institutions focused on preservation of cultural property; the United Nations Educational, Scientific and Cultural Organization (UNESCO) was first convened in 1945. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 gave strong expression to the interests of all peoples in a common heritage:

Damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.<sup>139</sup>

The 1954 Convention was signed by the U.S. but not ratified by Congress until 2009.

131 An Assyrian wall relief from the Central Palace in Nimrud, about 728 B.C.E. in the British Museum may be the most ancient record of these activities. *Wall Relief/Panel Museum Number 118931*, THE BRITISH MUSEUM, [http://www.britishmuseum.org/research/collection\\_online/collection\\_object\\_details.aspx?objectId=367010&partId=1](http://www.britishmuseum.org/research/collection_online/collection_object_details.aspx?objectId=367010&partId=1).

132 Dorothy Mackay Quynn, *Art Confiscation of the Napoleonic Wars*, 50 AM. HIST. REV. 437, 439 (1945).

133 The Lieber Code of April 24, 1863, also known as Instructions for the Government of Armies of the United States in the Field, General Order No. 100, was authored by the German-American legal scholar and political philosopher Franz Lieber. While a number of actions authorized by the Lieber Code would be held war crimes today, it required humane treatment of populations in occupied areas and forbade killing of prisoners of war except in extreme circumstances.

134 The Lieber Code at art. 31.

135 The Lieber Code at art. 34-36.

136 International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874; *The Laws of War on Land* (adopted by the Institute of International Law, Sept. 9, 1880).

137 Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 56, Oct. 18, 1907.

138 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935.

139 Preamble, 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954.



*Ceiling of the Cincinnati Union Terminal in Cincinnati, Ohio. Photo by Arun Sreeranganathan, 19 December 2015, Creative Commons Attribution-Share Alike 4.0 International license.*

The U.S. was an active participant in the crafting of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which was promulgated on November 17, 1970.<sup>140</sup> It was ratified in 1972 by the U.S. Senate with reservations<sup>141</sup> that were addressed in the drafting of the 1983 Convention on Cultural Property Implementation Act (CPIA). In doing so, the U.S. became one of the very few countries to enact domestic law in order to implement its international treaty obligations regarding other nations' cultural property. (The CPIA is discussed in detail below.)

Neither the United States nor other major art market nations<sup>142</sup> have signed the 1995 UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects.<sup>143</sup> The UNIDROIT Convention establishes conditions for restitution and return of stolen or illegally exported cultural objects between State Parties. It places the burden of proving good title on a current owner, whether the owner is an individual or institution. Claims of ownership by statute made by signatory nations or by members of a tribal or indigenous community for objects of traditional or ritual use by that community are deemed valid. The UNIDROIT Convention grants a very lengthy time period for claims, within 50-75 years of such a "theft" from state ownership.

The U.S. system contrasts with the majority of art source countries, which over the last 50 years have passed legislation forbidding export of virtually all domestic art.<sup>144</sup> Almost no art source countries have established permitting regimes enabling lawful permanent export. At the same time, many countries have failed to enforce their domestic laws forbidding export. Under these circumstances, if unlawful export is sufficient to make an object stolen, regardless of whether the laws were enforced under the principles of UNIDROIT, then an extraordinary number of objects presently in U.S. museums and private collections could be subject to UNIDROIT-based claims.

<sup>140</sup> 1970 UNESCO Convention, *supra* n. 5.

<sup>141</sup> *Id.* at Declarations and Reservations.

<sup>142</sup> Among market nations, only Switzerland and China have chosen to sign the 1995 UNIDROIT Convention.

<sup>143</sup> UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995.

<sup>144</sup> John Henry Merryman, *The Protection of Artistic National Patrimony Against Pillaging and Theft*, in *ART LAW DOMESTIC AND INTERNATIONAL* 236, 238 (L. DuBoff ed. 1975).

### Definitions of “Cultural Property”

As noted above, in the U.S., the term cultural property applies most often to objects originating outside its borders. U.S. law generally treats art and other cultural property no differently than other forms of property. Different terms are used in U.S. laws to refer to the types of regulated cultural property. These coexisting laws overlap—but do not explicitly cover the same objects.

Law	Term	How defined
<b>Antiquities Act of 1906</b>	“object of antiquity”	The earliest cultural property legislation, the Antiquities Act of 1906, used the term “object of antiquity” but did not define it, an omission that eventually led to the invalidation of the law as unconstitutionally vague in the 9 <sup>th</sup> Circuit case, <i>United States v. Diaz</i> . <sup>145</sup>
<b>Archeological Resources Protection Act (ARPA) (1979)</b>	“archaeological resource.”	(ARPA) covers “archaeological resources,” which need not ever have been buried but must be 100 years old. Under ARPA, virtually anything made by human hands is an “archaeological resource.” <sup>146</sup>
<b>Cultural Property Implementation Act (1983)</b>	“cultural property”	While cultural property <i>per se</i> has no special legal status in the U.S., the 1983 Cultural Property Implementation Act utilizes the definition incorporated under Article 1 of the 1970 UNESCO Convention but the CPIA limits both the range of property and the circumstances in which cultural property may be subject to U.S. import restrictions or seizure and return. <sup>147</sup> The 1970 UNESCO Convention defines cultural property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science,” and lists as examples, specimens of fauna, flora, minerals and anatomy, and paleontological remains, all property related to history and individuals of “national importance,” licit and illicit archaeological discoveries, elements of artistic or historical monuments, antiquities more than one hundred years old, inscriptions, coins and seals, ethnological objects, artistic works from paintings and drawings to prints and lithographs; rare manuscripts and old books and documents; postage and revenue stamps, archives, including sound, photographic and cinematographic archives, antique furniture and musical instruments.
<b>National Stolen Property Act (NSPA)</b>	“property”	The National Stolen Property Act (NSPA) covers all forms of tangible property, including cultural property, both foreign and domestic, as a form of “property” subject to its civil and criminal penalties. <sup>148</sup>

<sup>145</sup> *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974), rev’g 368 F. Supp. 856 (D. Ariz. 1973) (finding 16 U.S.C. § 432 unconstitutionally vague).

<sup>146</sup> 16 U.S.C. § 470bb(1) (1979).

<sup>147</sup> 19 U.S.C. §2601(5)–(6) (1983); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970.

<sup>148</sup> 18 U.S.C. §§ 2311, 2314–15 (1948).



*The Mount Rushmore Monument depicting Presidents George Washington, Thomas Jefferson, Theodore Roosevelt and Abraham Lincoln. Photo by Dean Franklin, 4 June 2003, Creative Commons Attribution 2.0 Generic license.*

## **PART IV. US LAWS ON NATIVE AMERICAN AND HAWAIIAN CULTURAL PROPERTY: THE ANTIQUITIES ACT, ARPA AND NAGPRA**

<b>1906</b>	<b>Antiquities Act</b>	Made it a crime to excavate, injure or destroy any site or appropriate any object of antiquity on lands owned or controlled by the government.
<b>1979</b>	<b>Archaeological Resources Protection Act (ARPA)</b>	Established federal ownership of “archeological resources” on federal or Indian land, made excavation illegal without a permit, and prohibited trafficking in interstate or foreign commerce of any archaeological resources taken or possessed in violation of any U.S. federal, state or local law.

1990

**Native American Graves Protection and Repatriation Act (NAGPRA)**

1. Provides for restitution of both newly discovered and institutionally held human remains and objects from any government-funded U.S. museums.
2. Requires museums to inventory all Native American objects and establishes processes for claims from tribes.
3. Prohibits trafficking in Native American human remains without the right of possession and in cultural items that were obtained in violation of NAGPRA.

The agencies with administrative responsibility for Native American and Native Hawaiian cultural property include the Department of Interior's Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), Bureau of Reclamation (BOR), U.S. Fish and Wildlife Service (FWS) and National Park Service; the Department of Agriculture's U.S. Forest Service; the U.S. Army Corps of Engineers (Corps); and the Tennessee Valley Authority (TVA). All administer important aspects of monument and environment protection. Many of these agencies' administrative responsibilities under NAGPRA or ARPA are identical, but their responsibilities are divided based upon the agency's jurisdiction over specific lands or government activities.

The unique status of Indian and Hawaiian objects under U.S. law, which can take precedence over traditionally strong private property rights, is grounded upon the 'federal trust responsibility' for America's indigenous peoples. This trust responsibility is founded upon treaties, statutes, executive orders, and negotiated and militarily imposed relationships with Indian tribes, so regulation is politically rather than racially based.<sup>149</sup> The trust responsibility is expressed in both legal duties and moral obligations to Indian tribes. Federally recognized Indian tribes are defined as 'domestic dependent nations.'<sup>150</sup> As independent nations, they have sovereign authority to govern themselves, although sovereignty has been limited by Congress and the courts. Tribal sovereignty does not extend beyond the boundaries of tribal lands. Even on tribal lands, tribal legal jurisdiction<sup>151</sup> is restricted to less severe crimes; federal authorities have jurisdiction over crimes listed under the Major Crimes Act.<sup>152</sup> Only federal and tribal laws apply to tribal members while on federal Indian reservations. Outside of federal reservations, Indian tribal members are subject to all federal, state, and local laws.

The primary laws that impact historic and prehistoric period Native American art today are federal laws: ARPA (the Archaeological Resources Protection Act of 1979), and NAGPRA (the Native American Graves Protection and Repatriation Act of 1990). ARPA prohibits excavation without a permit on federal and Indian lands and trafficking in archaeological resources that have been illegally removed. NAGPRA is focused on the repatriation of human remains and ritual objects to tribes from any museum, institution or State or local government agency that receives Federal funds. Other federal laws deal with the theft of objects from sites on government and Indian lands or apply to damaging ruins or graves, considered destruction of federal property.

**Antiquities Act of 1906 ("National Monuments Act")**

The Antiquities Act of 1906<sup>153</sup> gave the President of the United States the power to protect landmarks, sites of extraordinary scenic beauty, scientific or historic interest from development or economic exploitation by designating them as national monuments. In just the first few years of the Antiquities Act, from 1906 to 1909, U.S. President Theodore Roosevelt used his powers to designate nineteen National Monuments, including El Morro, the Petrified Forest, Chaco Canyon, Muir Woods, the Grand Canyon, and Pinnacles. Currently, there are 155 protected monuments that have been established under the Antiquities Act.<sup>154</sup> Two recent additions include the vast Bears Ears National Monument in Utah (originally established by President Barack Obama in 2016 at over 1.3 million acres, later reduced in size by President Trump) and the less than one acre-sized Birmingham Civil Rights National Monument in Alabama,

149 United States v. Antelope, 430 U.S. 641, 645 (1977). See also Morton v. Mancari, 417 U. S. 553, n.24 (1974).

150 The Federal Acknowledgment Process (FAP), regulations codified under 25 C.F.R. pt. 83, administer requests for federal recognition from Indian groups. The Federally Recognized Indian Tribe List Act of 1994, *supra* n. 19, established the ways in which a tribe can become federally recognized.

151 The scope of tribal jurisdiction is varied, depending on the tribe. It may be limited by statute (i) by whether the crime took place in Indian Country, 18 U.S.C. § 1151 (1948); (ii) by the type and severity of the crime, and (iii) by whether the perpetrator and victim are Native American or non-native. *General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL COURT CLEARINGHOUSE, <https://www.tribal-institute.org/lists/jurisdiction.htm>.

152 Major Crimes Act, 18 U.S.C. § 1153 (1948). The Major Crimes Act "grants jurisdiction to federal courts, exclusive of the states, over Indians who commit any of the listed offenses, regardless of whether the victim is an Indian or non-Indian." 679. The Major Crimes Act — 18 U.S.C. § 1153, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153>.

153 The Antiquities Act, 16 U.S.C. §§ 431-433.

154 *Antiquities Act 1906–2006: Maps, Facts, & Figures*, NAT'L PARK SERV., <https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm> (last visited May 6, 2019).



*The carved face of Crazy Horse seen through a life size statue at the Crazy Horse Memorial, a privately funded and managed site in the Black Hills of Custer County, South Dakota. Crazy Horse was a Lakota war leader of the Oglala band who went to war against white settlers and the U.S. government in defense of his people's traditional lands and way of life. Crazy Horse is best known for his battles during Great Sioux War of 1876, particularly the Battle of the Little Bighorn in 1876 in which he led a war party to victory against General George Custer. Crazy Horse died of a bayonet wound from a guard while imprisoned at Camp Robinson in 1877. Photo by Sara Kirpes, 16 July, 2018. Creative Commons attribution share alike 4.0 international license*

also designated by President Barack Obama in January 2017.<sup>155</sup>

In addition, the Antiquities Act addressed protection of archaeological sites and Native American artifacts. Prior to passage of the Antiquities Act in 1906, the exploitation of Indian artifacts and archaeological sites was completely unregulated. Harvard's Peabody Museum expeditions made some of the most important early collections of Native American cultural objects. The early expeditions also included privately funded scientific explorers. One such was the Hemenway Southwestern Archaeological Expedition (1886-1894), which brought thousands of Zuni and Hopi artifacts from Arizona and New Mexico.

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<sup>155</sup> *Id.*

The Peabody Museum acquired over 3,000 ceramics from Indian trader Thomas Keam at Hopi for \$10,000.<sup>156</sup> Smaller, but still very substantial collections were also made by Keam for the Berlin Ethnological Museum, the Field Museum in Chicago, and the National Museum of Finland. Keam also sold widely from his trading post to collectors and tourists from across the United States.<sup>157</sup> During the same years and throughout the early 20th century, private collectors purchased from the same sources that supplied museums.

Thus, tens of thousands of Native American cultural objects entered the stream of commerce decades before the first U.S. cultural property legislation was enacted in 1906. The Antiquities Act was the first U.S. law to provide for the preservation of natural and historic monuments in the U.S. In hearings that spanned several years before its passage in 1906, the legislative discussion focused on the importance of preserving historic landmarks and historic and prehistoric structures for scientific purposes.<sup>158</sup> At the time, there was unregulated excavation of sites by Indian traders, who employed tribal peoples to collect artifacts for sale, and by U.S. and foreign museums and scientific societies. Nowhere in the Antiquities Act is there any mention of a Native American or Native Hawaiian interest that should be protected. The Antiquities Act gave the Secretaries of the Interior, Agriculture, and War [Army] the power to grant permits to properly qualified institutions for excavations and gatherings,

“[p]rovided, [t]hat the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.”<sup>159</sup>

Section 433 of the Antiquities Act made it a crime to excavate, injure or destroy any site or appropriate any object of antiquity on lands owned or controlled by the government. The Act was not successful in preventing illicit excavation. Superintendent of Mesa Verde National Park Jesse L. Nusbaum wrote in 1929 that: “*The few scattered settlers of that period are replaced by the thousands of motorists and visitors today, many of whom are potential pothunters... Several years ago... warning signs were posted on and in the vicinity of some of the more important ruins... To the average visitor, only ruins so posted are the property of the United States and protected by the act of June 8, 1906...*”<sup>160</sup>

Fewer than a dozen prosecutions were made under the Antiquities Act from 1906 to the early 1970s, all involving pothunters caught in the act of digging artifacts. Because of the lack of documentation and failure to enforce the provisions of the Antiquities Act, it is not possible to determine which of the tens of thousands of Indian artifacts are pre- or post-Antiquities Act, nor whether they came from federal lands after 1906 in violation of the Act, or legally at any time from private land. While the Antiquities Act has continued importance in granting the President the power to declare sites and lands as National Monuments, its archaeological provisions were superseded in 1979 by new legislation.

### Archaeological Resources Protection Act (ARPA) of 1979

The 1979 Archaeological Resources Protection Act (ARPA),<sup>161</sup> established federal ownership of “archeological resources” on federal or Indian land, made excavation illegal without a permit, and prohibited trafficking in interstate or foreign commerce of any archaeological resources taken or possessed in violation of any U.S. federal, state or local law. One of ARPA’s purposes was to foster cooperation between the government, archaeologists, and private individuals, who all held collections of archaeological resources and data obtained before ARPA’s passage in 1979.<sup>162</sup>

ARPA has very broad definitions of “archaeological resource” and “item of archaeological interest.” An item subject to ARPA

<sup>156</sup> The Peabody collection materials were either bought by Keam and his assistant Alexander Stephen from Hopi suppliers or found in explorations of abandoned Hopi towns. EDWIN WADE ET AL., AMERICA’S GREAT LOST EXPEDITION: THE THOMAS KEAM COLLECTION OF HOPI POTTERY FROM THE SECOND HEMENWAY EXPEDITION, 1890-1894 9 (1980) (See also pp. 18, 25, 26, 39) and EDWIN WADE ET AL., HISTORIC HOPI CERAMICS 84 (1981).

<sup>157</sup> EDWIN WADE ET AL., AMERICA’S GREAT LOST EXPEDITION, *supra* n. 154 at, 2, 15.

<sup>158</sup> See *Preservation of Historic and Prehistoric Ruins, Etc.: Hearing on the Bill (S. 4127) for the preservation of aboriginal monuments, ruins, and other antiquities and for other purposes, introduced by Senator Cullom on February 5, 1904, and the bill (S. 5603) for the preservation of historic and prehistoric ruins, monuments, archaeological objects, and other antiquities, and to prevent their counterfeiting, introduced by Senator Lodge*, 58th Cong. 5 (1904) [https://coast.noaa.gov/data/Documents/OceanLawSearch/Senate%20Hearing\\_Committee%20on%20Public%20Lands%20Apr.%2028%2C%201904.pdf](https://coast.noaa.gov/data/Documents/OceanLawSearch/Senate%20Hearing_Committee%20on%20Public%20Lands%20Apr.%2028%2C%201904.pdf).

<sup>159</sup> American Antiquities Act of 1906, 16 U.S.C. § 431-433 (2).

<sup>160</sup> ANNUAL REPORT OF JESSE L. NUSBAUM, DEPARTMENT ARCHEOLOGIST AND SUPERINTENDENT OF MESA VERDE NATIONAL PARK, TO THE SECRETARY OF THE INTERIOR FOR FISCAL YEAR ENDED JUNE 30, 1929 6-7.

<sup>161</sup> 16 U.S.C. §§ 470aa-mm (1979).

<sup>162</sup> “[T]here is a wealth of archaeological information which has been legally obtained by private individuals for noncommercial purposes and which could voluntarily be made available to professional archaeologists and institutions.” 16 U.S.C. § 470aa(a)(4).



*Tulalip Tribes Hibulb Cultural Center, Tulalip, Washington. Photo by Joe Mabel. 16 September 2015, Creative Commons Attribution-Share Alike 2.0 Generic license.*

must be 100 years old but need not ever have been buried.<sup>163</sup> Under the law, an archeological resource is an object “capable of providing scientific or humanistic understandings of past human behavior.” It covers:

“[A]ny material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in an archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.”<sup>164</sup>

ARPA is a powerful tool for prosecution because it is an umbrella statute. For example, if an object over 100 years old was at any point in its history excavated or removed in violation of any federal, state, or local law, then it is illegal to

<sup>163</sup> The prohibition against trafficking in archeological resources in ARPA specifically excludes arrowheads found on the surface of the ground. 16 U.S.C. § 470ee(g).

<sup>164</sup> *Id.* at § 470bb.

sell, purchase, exchange, transport or receive it after passage of ARPA in 1979.<sup>165</sup> However, a virtually identical object, no matter how ancient, that is obtained legally from private lands is lawful to buy or sell. An object excavated with a permit by a museum or expedition in the early 20<sup>th</sup> century and later sold is also legally acquired. ARPA is now 40 years old, and because it applies to a rolling 100-year threshold, more and more 20<sup>th</sup> century art and artifacts are potentially subject to the law. However, for there to be a violation of ARPA, an object's removal must have been accompanied by an illegal act. Therefore, trade goods of any age that were made for the market, including the 100-year-old Santa Fe Indian Market, or sold to tourists from reservations or pueblos, are generally assumed not to be subject to ARPA.

In most situations, provenance and purchase history for objects collected decades ago is not available. To substantiate an ARPA claim, the burden of proof is on the government to show that there was a violation of law at some point in the chain of transfers.

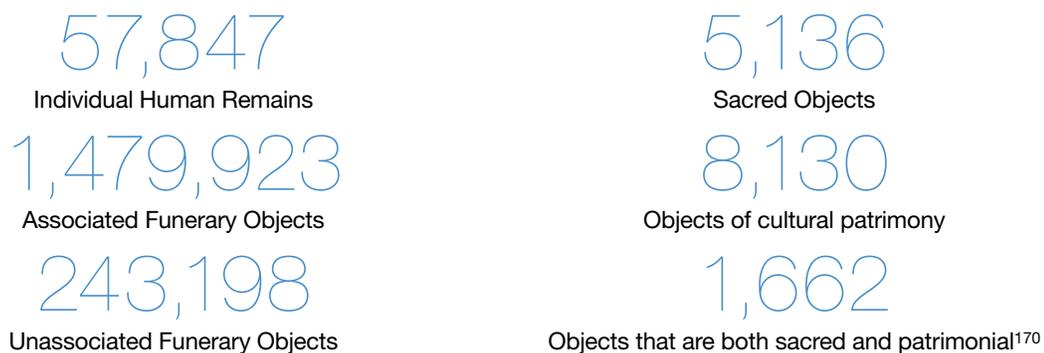
### **Native American Graves Protection and Repatriation Act (NAGPRA) of 1990**

The 1990 Native American Graves Protection and Repatriation Act<sup>166</sup> (NAGPRA) requires museums and other institutions that receive federal funding to inventory Indian and Native Hawaiian human remains and funerary objects in their possession or control and to return them upon request of a descendant or culturally affiliated Indian tribe or Native Hawaiian organization. NAGPRA was intended to right past abuses in which Indian skeletons were collected from battlefields and Native American graves were dug up by the thousands for scientific collections. NAGPRA applies to all “cultural items” that are discovered on Federal or tribal lands after November 16, 1990 and makes trafficking in Native American human remains and cultural items from federal and tribal lands a criminal offense.<sup>167</sup>

NAGPRA provides for restitution of both newly discovered and institutionally held human remains and objects from any U.S. museums receiving funding from the federal government. It requires museums to document all Native American objects and establishes processes for claims from tribes for the return of cultural items that were obtained in violation of NAGPRA. (If a legally owned object in private hands is later donated to a museum that receives federal funds, the museum may be required to repatriate it to a claiming tribe.)

NAGPRA not only protects Native American or Native Hawaiian ownership rights to culturally significant items and funerary objects found on federal and tribal lands after its passage; it also requires inventory and repatriation of earlier-collected items from museums to the related tribes that claim them. Federally funded museums and other institutions must catalog human remains and communally owned sacred objects and return them in the following priority: first to requesting lineal descendants, then to the tribe or Native Hawaiian organization on whose land they were discovered, then to the most closely related tribes.<sup>168</sup> The repatriation of human remains has lagged far behind the timeframe originally envisioned under the Act, a deep frustration for many tribes. The repatriation process for objects is also slow, given the need to document and negotiate claims and determine the correct recipient.

Although a high percentage of the human remains that have been cataloged under NAGPRA have been returned to tribes, only a fraction of the estimated 180,000 human remains in federal and museum collections have so far been cataloged and processed.<sup>169</sup> Since 2015, the number of returned remains has more than doubled as documentation is completed. National NAGPRA statistics state that since its passage in 1990 the following have been returned to tribes:



<sup>165</sup> 40 C.F.R. § 10 (2012).

<sup>166</sup> Pub. L. No. 101-601; 25 U.S.C. § 3001 *et seq.*, 104 Stat. 3048 (1990).

<sup>167</sup> 18 U.S.C. § 1170 (a)-(b).

<sup>168</sup> 25 U.S.C. § 3002(a).

<sup>169</sup> Dylan Brown, *Budget woes, sloppy records undermine law on tribal remains*, E&E NEWS (Mar. 15, 2015) <https://www.eenews.net/stories/1060014465>.

<sup>170</sup> *National NAGPRA: Frequently Asked Questions*, NAT'L PARK SERV., <https://www.nps.gov/nagpra/FAQ/INDEX.HTM>.

NAGPRA divides the “cultural items” it covers into four basic categories: “associated funerary objects,” “unassociated funerary objects,” “sacred objects,” and “objects of cultural patrimony.”<sup>171</sup> Drawing a line between sacred and secular objects is a difficult task that balances current tribal interests in repatriation against national and global interests in preserving and studying artifacts and understanding cultures.<sup>172</sup>

Today, claims from tribes often go beyond what Congress expected when NAGPRA was enacted. In 1990, the U.S. Senate’s Select Committee on Indian Affairs attempted to clarify the issues surrounding the terms used in NAGPRA, stating that, “Members of the scientific community express concern that if Native Americans are allowed to define terms such as “sacred object”, the definition may be so broad as to arguably include any Native American object.” Further, “[t]here has been concern expressed that any object could be imbued with sacredness in the eyes of a Native American, from an ancient pottery shard to an arrowhead. The Committee does not intend this result. The term sacred object is an object that was devoted to a traditional religious ceremony or ritual when possessed by a Native American and which has religious significance or function in the continued observance or renewal of such ceremony. The Committee intends that a sacred object must not only have been used in a Native American religious ceremony but that the object must also have religious significance...The Committee does not intend the definition of sacred object to include objects which were created for purely a secular purpose, including the sale or trade in Indian art.”<sup>173</sup>

The term “cultural patrimony” referred “only [to] those items that have such great importance to an Indian tribe...that they cannot be conveyed, appropriated or transferred by an individual member.” The Senate Committee went on to state: “Objects of Native American cultural patrimony would include such items as Zuni War Gods, the Wampum belts of the Iroquois, and other objects of a similar character and significance to the Indian tribe as a whole.”<sup>174</sup>

Returns to tribes are based upon “cultural affiliation,” another imprecise term that Congress attempted to clarify. The 1990 NAGPRA Senate Report stated that, “The term “cultural affiliation” means a relationship between a present-day Indian tribe and a historic or prehistoric Indian tribe or Native Hawaiian group. The Committee intends the relationship to be reasonably established through an offer of evidence which shows a continuity of group identity from the earlier to the present day group.”<sup>175</sup> Determining cultural affiliation between indigenous cultures separated by hundreds of years, and within a broad geographic region is necessarily a subjective decision; claims of affiliation have been based upon tribal lore or similarities of artistic style as well as more concrete archaeological, documentary, or historical evidence. Some of the challenges of defining continuity of identity over millennia are illustrated in the case of the Kennewick Man,<sup>176</sup> outlined below.

While privately owned objects and artifacts found on private land are not subject to NAGPRA, even if they are of great cultural significance, these objects are not immune to civil claims of superior title by a tribe. For example, an object might be held in the custody of a particular family for generations. If it was eventually sold, the tribe can still argue that the item was actually owned by the community, and could not legally have been sold by any individual.

“Cultural patrimony” is a community-based term. It refers to “items that belong to a tribe or organization as a whole and may not be sold or given away (“alienated”) by an individual. In order to qualify as cultural patrimony under NAGPRA, an item must have been considered inalienable by its tribe or organization at the time it was separated from the group.”<sup>177</sup>

Many tribes consider all information about what constitutes a sacred object to be highly privileged religious information only accessible to initiates. As a result, after almost 30 years, there is considerable confusion about what objects or types of objects are covered by NAGPRA. The legally mandated consultations between museums and tribes are helpful in resolving specific claims, but the results are inconsistent. Some museums have volunteered to repatriate items of dubious cultural significance such as arrowheads, tools, and loose beads. In other cases, museums have been very reluctant to return objects because they disagree with the tribes’ classifications and claims. Museums are also concerned that items returned to tribes may not be preserved; some tribes have declared that the proper treatment of culturally significant items is to bury them or expose them to the elements.

Both in civil claims cases and in museum negotiations, the difference between an object subject to NAGPRA and

171 See 25 U.S.C. § 3001 (c) for definitions of each of these objects.

172 25 U.S.C. § 3001 (c).

173 PROVIDING FOR THE PROTECTION OF NATIVE AMERICAN GRAVES AND THE REPATRIATION OF NATIVE AMERICAN REMAINS AND CULTURAL PATRIMONY, S. REP.101-473 at 7 (1990) [https://www.nps.gov/nagpra/mandates/us\\_senate\\_rpt\\_9-26-90.htm](https://www.nps.gov/nagpra/mandates/us_senate_rpt_9-26-90.htm).

174 *Id.* at 8.

175 *National NAGPRA: Frequently Asked Questions*, NAT’L PARK SERV., <https://www.nps.gov/nagpra/FAQ/INDEX.HTM>.

176 *Bonnichsen v. United States*, 357 F.3d 962 (9th Cir. 2004).

177 Christopher D. Weston, *A Guide to the Native American Graves Protection and Repatriation Act (NAGPRA)*, THE CATHOLIC UNIVERSITY OF AMERICA, <http://counsel.cua.edu/fedlaw/weston.cfm> (last updated July 6, 2010).



*Castillo San Felipe del Morro, part of the San Juan National Historic Site, Old San Juan, Photo by Godot13, 24 March 2016, Andrew Shiva / Wikipedia / CC BY-SA 4.0*

one that is not may not be obvious, or ultimately, provable. A claim may be based on theories of how the object was previously used or whether it was likely to have been blessed. A tribe may claim that an item sold by a tribal member in the past was actually owned communally by the tribe and that the sale was therefore illegal.

Since 2015, in large part as a result of a series of auctions in Paris, France of Native American artifacts from American and European private collections, some Southwestern Native American tribes have alleged that important items used in religious ceremonies are subject to continued looting. However, the only object specifically claimed as stolen from tribal owners is a shield from the Acoma tribe that they say was taken from a family home in the 1970s. It has since been voluntarily returned by a Non-Native owner who inherited it, and who asserts that it was legally acquired decades before. There has been no U.S. prosecution.

In 2018, the Association on American Indian Affairs (AAIA),<sup>178</sup> which strongly supported passage of legislation to repatriate Indian artifacts from abroad,<sup>179</sup> embarked on a novel campaign claiming that a wide range of Native American items in U.S. museums, private collections<sup>180</sup> and auction sales are 'possibly' being exhibited and sold in

<sup>178</sup> ASSOCIATION ON AMERICAN INDIAN AFFAIRS (AAIA), <https://www.indian-affairs.org/>.

<sup>179</sup> *Repatriation*, AAIA, <https://www.indian-affairs.org/repatriation.html>.

<sup>180</sup> CCP Staff, *AAIA Challenges Private Ownership of Native American Art*, CULTURAL PROPERTY NEWS (Nov. 29, 2018) <https://culturalpropertynews.org/aaia-challenges-private-ownership-of-native-american-art/>

violation of federal, state, and tribal laws.<sup>181</sup> The AAIA states that collectors should invest only in new<sup>182</sup> Indian-made arts and crafts, and that auction houses must consult with tribes prior to selling any object.<sup>183</sup> The AAIA has asserted that no one other than an authorized tribal representative has the knowledge and authority to determine if any object is inalienable cultural heritage. According to AAIA press statements, if an object is unsigned, that indicates it was not intended for sale.<sup>184</sup> Museums, they state, should not accept loans or exhibitions of objects that “may be held in violation of state and federal laws, having found their way into collectors’ hands through theft, looting and illegal trafficking.”<sup>185</sup> The AAIA’s claims are based in part on unspecified tribal laws.<sup>186</sup>

There is no centralized gathering of data regarding crimes involving removal of cultural objects on Indian lands that would enable an assessment of whether such crimes continue. Previously, data on looting and damage to sites and monuments was collated by the dozens of federal agencies having jurisdiction over tribal and federal lands and was made available to officials through the National NAGPRA sub-agency at the National Park Service.<sup>187</sup> However, National NAGPRA officials recently informed the Committee for Cultural Policy that data on heritage crimes had not been collated by NAGPRA since 2011.<sup>188</sup>

## PART V. IMPORTANT COURT CASES UNDER ARPA AND NAGPRA<sup>189</sup>

### **United States v. Diaz, 499 F.2d 113 (9th Cir. 1974) (1906 Antiquities Act)**

The appellant was charged in 1973 with violating the Antiquities Act by appropriating “objects of antiquity situated on lands owned and controlled by the Government of the United States without the permission of the Secretary of Interior.”<sup>190</sup> The “objects of antiquity” in question were face masks found in a cave on the San Carlos Indian Reservation. An anthropology professor testified as an expert that the face masks should be considered antiquities since they were part of a traditional culture, they were considered sacred and could not be handled by anyone except the medicine man once they are stored in a cave. The masks were identified as only a few years old by a San Carlos medicine man who knew the maker.

The Ninth Circuit Court of Appeals reversed the conviction, finding the Antiquity Act’s definitions unconstitutionally vague because “[o]ne must be able to know, with reasonable certainty, when he has happened on an area forbidden to his pick and shovel and what objects he must leave as he has found them.”<sup>191</sup> The Court found no definition in the statute of what was a “ruin,” “monument” or “object of antiquity. Without such defined terms, the Court noted that hobbyists who explore the desert and its ghost towns for arrowheads and antique bottles could arguably find themselves within the Act’s proscriptions.

### **United States v. Corrow, 119 F.3d 796 (10th Cir. 1997) (NAGPRA)**

Richard Corrow, an Arizona art dealer and enthusiast of Navajo culture, purchased twenty-two Yei B’Chei, Navajo ceremonial masks from the family of a deceased *hataali* (a Navajo religious singer). According to prosecutors, he convinced the family of the singer to sell them by saying it was his intention to give them to another Navajo ceremonial singer. Instead, Corrow arranged to sell the Yei B’Chei through a gallery to a buyer who was actually a federal agent. The masks were decorated with eagle and owl feathers from protected bird species under the Migratory Bird Treaty Act (MBTA).<sup>192</sup>

181 *Auction Alerts*, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, <https://www.indian-affairs.org/auction-alerts.html>. The AAIA does not have standing to make claims, as it does not represent any sovereign tribe, but it encourages tribes to identify and make claims through crowdsourcing.

182 Statement, *Buyers Should Invest in Contemporary American Indian Art Instead of American Indian Antiquities*, AAIA, (Dec. 6, 2018) [https://www.indian-affairs.org/uploads/8/7/3/8/87380358/2018-12-06\\_final\\_joint\\_statement\\_buyers\\_should\\_invest\\_in\\_contemporary\\_art.pdf](https://www.indian-affairs.org/uploads/8/7/3/8/87380358/2018-12-06_final_joint_statement_buyers_should_invest_in_contemporary_art.pdf).

183 Statement, *Auction Houses Must Consult Tribes on Sales of Native American Heritage*, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, (Dec. 11, 2018), [https://www.indian-affairs.org/uploads/8/7/3/8/87380358/2018-12-11\\_bonhams\\_auctions\\_pr.pdf](https://www.indian-affairs.org/uploads/8/7/3/8/87380358/2018-12-11_bonhams_auctions_pr.pdf).

184 The majority of Indian objects made for sale since the early nineteenth century until the late twentieth century were unsigned, and many are still sold unsigned.

185 *Native American Group Denounces Met’s Exhibition of Indigenous Objects*, THE ART NEWSPAPER (Nov. 6, 2018), <https://www.theartnewspaper.com/news/native-american-group-denounces-met-s-exhibition-of-indigenous-objects>

186 See, *General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL COURT CLEARINGHOUSE, <https://www.tribal-institute.org/lists/jurisdiction.htm>.

187 *National NAGPRA*, Nat’l Park Serv., <https://www.nps.gov/nagpra/>.

188 An email from David J. Tarler, National NAGPRA Program, stated, “The National NAGPRA Program does not know of any central repository for nationwide data on documented instances of looting of cultural property throughout the United States, and would be pleased to be informed if one exists.” E-mail from David J. Tarler, NAGPRA Program, Nat’l Park Serv., to Kate Fitz Gibbon (July 18, 2018) (on file with author).

189 For a full list of important United States cases related to cultural property, please see the charts in the appendices.

190 *Id.* at 113.

191 *Id.* at 114.

192 16 U.S.C. §§ 703–712 (1918).

Corrow was charged and convicted of violation of both the MBTA and for trafficking cultural patrimony under NAGPRA. During Corrow's trial, while Navajo medicine men who gave testimony agreed that the Yei B'Chei were the property of the widow of the *hataali*, they disagreed as to whether the Yei B'Chei must remain within the four sacred mountains of the Navajo. No Native expert testified that it was acceptable to sell Yei B'Chei to non-Navajos who planned to resell them for a profit

Corrow appealed, arguing that that statute's definition of "cultural patrimony" was unconstitutionally vague; that a scienter requirement should be read into the Migratory Bird Treaty Act (MBTA) that would vitiate the government's proof of his possession of prohibited bird feathers, and attacking the sufficiency of the evidence against him. The 10<sup>th</sup> Circuit Court of Appeals upheld all of his convictions, finding that Corrow had notice of the cultural significance of the objects based on his knowledge of Navajo traditions and misrepresentations that he would pass the Yei B'Chei on to another ceremonial singer. His conviction under the MBTA was also upheld.

#### **United States v. Tidwell, 191 F.3d 976 (9th Cir. 1999) (NAGPRA)**

Rodney Tidwell and Ernest Chapella were indicted on twelve counts of illegal trafficking in Native American cultural items, eleven counts of theft of tribal property, one count of trafficking in unlawfully removed archaeological resources, one count of interstate transportation of stolen property, and conspiracy to commit illegal trafficking of Native American cultural items and theft of tribal property. Chapella was a Hopi tribal member who arranged the transfer to Tidwell. An undercover agent for the government purchased or attempted to purchase a number of items that the government later learned were religious, cultural, or historical items, including eleven Hopi masks, also called Kwaatsi or Kachina, and a set of priest robes from the Pueblo of Acoma. Soon after being charged, Chapella committed suicide.

Several Native Americans testified for Tidwell that the masks were not authentic Hopi masks and that the masks Tidwell sold were not the type of cultural item protected by NAGPRA. At his trial, the government introduced expert witnesses who stated that the masks and the robes were cultural patrimony. Tidwell countered that an object's "inalienability" and "ongoing historical, traditional, or cultural importance" within NAGPRA's definition of "cultural patrimony" is unconstitutionally vague because those terms are defined by Native Americans and are not written down, he did not have fair notice of his actions' illegality. On appeal, the Court, referencing *United States v. Corrow*, found that Tidwell had sufficient knowledge of Native American art and culture to put him on notice of NAGPRA's restrictions.

#### **Bonnichsen v. United States, 217 F. Supp. 2d 1116 (D. Or. 2002) and Bonnichsen v. United States, 357 F.3d 962 (9th Cir. 2004)<sup>193</sup>**

Kennewick Man and The Ancient One are the names given to one of the oldest, near-complete skeleton found in the U.S.<sup>194</sup> The skeleton was the subject of a lengthy court battle and scientific investigation that ended when Congress passed a bill requiring its delivery to a consortium of Washington State Indian tribes in 2016.<sup>195</sup> The skeleton, which was more than 9,000 years old, was found by accident in 1996 in the Columbia River, on land under the management of the Army Corps of Engineers. The Corps of Engineers quickly announced that it would be repatriated to the nearby Confederated Tribes of the Umatilla. Neither the Corps nor the Umatilla would allow the skeleton to be studied, and the Corps allowed tribal claimants to collect additional bones on the site and to conduct religious ceremonies where the skeleton was stored.

Eight scientists filed a lawsuit against the USA, Dept. of the Army, Army Corps of Engineers in U.S. District Court in Portland, Oregon, alleging violations of the Archaeological Resource Protection Act by the Corps, among other claims, and mounted a public campaign in support of scientific access to the skeleton. Another federally recognized tribe, the Confederated Tribes of the Colville Reservation, objected to the Corps' decision to deliver the skeleton immediately to the Umatilla without following the claims process mandated by NAGPRA requiring repatriation of human remains to the most closely related tribe. In 1997, the Army Corps of Engineers did a limited site study that produced (according to the scientist plaintiffs) inadequate and conflicting data,<sup>196</sup> and then, in 1998, covered the site where the skeleton was found with a massive deposit of rocks, preventing further study. The Corps announced it had "unintentionally" turned over bones found during its site investigation to a tribal coalition.

There was continuing disagreement about the validity of evidence based upon oral traditions submitted by the claiming Indian tribes, and about various scientific hypotheses of the origins of the Kennewick Man. Many in the scientific community urged that freedom of scientific investigation could be curtailed and the factual understanding of the past jeopardized if a particular interest group could decide whether and how ancient archaeological remains could be studied.<sup>197</sup>

<sup>193</sup> *Bonnichsen v. United States*, 969 F. Supp. 628 (D. Or. 1997), *appeal after remand*, 217 F. Supp. 2d 1116 (D. Or. 2002), *aff'd* 357 F.3d 962 (9th Cir. 2004), *as amended*, 367 F.3d 864 (9th Cir. 2004).

<sup>194</sup> For a general summary, see *Kennewick Man*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Kennewick\\_Man](https://en.wikipedia.org/wiki/Kennewick_Man).

<sup>195</sup> The Water Infrastructure Improvements For The Nation Act, S.612, 114th Cong. (2015), Pub. L. No. 114-322, December 16, 2016.

<sup>196</sup> *But see* F.P. MacManamon, *Kennewick Man*, NAT'L PARK SERV. ARCHAEOLOGICAL PROGRAM (May 2004) <https://www.nps.gov/Archeology/kennewick/Index.htm>.

<sup>197</sup> The Kennewick Man Case, FRIENDS OF AMERICA'S PAST, <https://www.friendsofpast.org/kennewick-man/>.



*Bishop Museum - Hawaiian Hall, Photo by Daniel Ramirez from Honolulu, HI USA, 2015. Wikimedia Commons.*

In 1999 the federal government began studies of the skeleton, which was removed to the Burke Museum at the University of Washington in Seattle, for improved safe storage. In 2000, the Department of the Interior announced that meaningful DNA results were not obtained and gave its position that anyone who died on the American continent more than 500 years ago is a Native American.

In 2002, the District Court ruled that Kennewick Man was not subject to NAGPRA, that the Department of the Interior's definition of Native American was not valid, that the decision to give the skeleton to the claiming tribes was arbitrary, that no tribe had sufficiently established that there was a shared group identity or a previously existing related tribe to which the skeleton belonged as required by NAGPRA, that the Archaeological Resources Protection Act applied to the remains, and that the Army Corps of Engineers violated the National Historic Preservation Act when they buried the site.<sup>198</sup> The Court further ruled that scientists have a statutory right to study ancient artifacts and remains such as Kennewick Man. The U.S. Department of Justice and a coalition of federally-recognized tribes appealed.

In 2004, the Ninth Circuit Court of Appeals upheld the District Court decision and scientific study was allowed to continue. In 2013, the DNA was reexamined by scientists in several countries, and the result, announced in 2015, was that among living peoples, Kennewick Man had most in common with Native American tribes, including those in the Columbia River region where the skeleton was found.

In December 2016, Congress passed a general Water Infrastructure Improvements Act, one provision of which required the Corps of Engineers to transfer the remains of Kennewick Man to five Indian tribes. The tribes jointly reburied the

<sup>198</sup> *Bonnichsen*, F. Supp. 2d at 1164.



*White House Ruin. Canyon De Chelly National Monument, Arizona. Photo by Andreas F. Borchert, 7 September 2006, Creative Commons Attribution-Share Alike 3.0 Germany license.*

skeletal remains in an undisclosed location in 2017.

#### **NAGPRA and Hawaiian Organizations: The First Case**

Accusations of theft and breach of fiduciary duty in the first NAGPRA case in Hawaii illustrate some of the practical difficulties and risk to objects in applying NAGPRA when there are conflicting claims of ownership by Native peoples. Key to this tangled controversy is the nature of a Native Hawaiian Organization, defined under NAGPRA as an organization that has as a "stated purpose the provision of services to native Hawaiians."<sup>199</sup>

Edward Halealoha Ayau, an attorney on the staff of Senator Daniel Inouye, founded one of the first Hawaiian Organizations to be accredited under NAGPRA, the Hui Malama I Na Kupuna O Hawaii Nei, or "Group Caring for the Ancestors of Hawaii." After passage of NAGPRA, Ayau worked to repatriate and rebury numerous Native Hawaiian human remains. In the mid-1990s, Ayau requested the repatriation of 83 objects from the 1905 Forbes Collection at Hawaii's Bernice Pauahi Bishop Museum. The eight main objects in the Forbes Collection are considered among the most beautiful and important examples of Hawaiian carving in the world.

Many Hawaiian experts hold that Hawaiians were very rarely buried with funerary objects. Nevertheless, Ayau asserted that Forbes' collections were funerary objects subject to NAGPRA because they were discovered in a cave that also held some human remains, and that they were illegally taken, although there was no law prohibiting removal at the time. In 2000, the museum turned over the Forbes Collection and 200 other objects to Ayau. The Hui Malama I Na Kupuna O Hawaii Nei group placed them in Kawaihae Caves, in a remote location on Hawaii Island and sealed the caves.

Two other Native Hawaiian Organizations sued the Bishop Museum and Hui Malama I Na Kupuna O Hawai'i Nei for inappropriately distributing the objects in violation of NAGPRA. Thirteen more Native Hawaiian Organizations persuaded the NAGPRA Review Committee to hold hearings on the transfer, the Committee held that the museum

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<sup>199</sup> 43 CFR §10.2(b)(3)(i). *Id.* at §10.2(b)(3)(ii).

had made a mistake in transferring the items,<sup>200</sup> and the Bishop Museum attempted to recall them.<sup>201</sup> The Hui Malama I Na Kupuna O Hawaii Nei accused the National Park Service and National NAGPRA of obstruction.<sup>202</sup> There was considerable public controversy over the role of the “white” museum, and accusations of racist behavior by it.<sup>203</sup>

In 2004, several items from another early collection, repatriated by the Bishop Museum and Peabody Essex Museum to Hui Malama I Na Kupuna O Hawaii Nei in 1997, were offered for sale in Hawaii, still bearing their museum labels. Hui Malama I Na Kupuna O Hawaii Nei denied having anything to do with removing or selling artifacts.<sup>204</sup> A few weeks later, local reporters found one of the caves lying open, with the boulders that had blocked access removed.<sup>205</sup> State officials stepped in to seal the caves. In March 2006, two Hawaii island men were charged and pled guilty to conspiring to steal the Peabody Essex and Bishop Museum artifacts from the caves.<sup>206</sup>

In September 2006, a U.S. District Judge ruled that 83 artifacts buried in two Big Island caves must be returned to the Bishop Museum; Hui Malama I Na Kupuna O Hawaii Nei refused to comply or to disclose where items were buried. Eventually, through a settlement agreement, the 83 artifacts from Forbes Cave were returned to the Bishop Museum.<sup>207</sup> The organization Hui Malama I Na Kupuna O Hawaii Nei was officially dissolved on December 20, 2014.<sup>208</sup> and is no longer on the official Native Hawaiian Notification List. However, it appears to still be accepting international repatriations of human remains.<sup>209</sup>

## PART VI. ARPA AS APPLIED TO FOREIGN CULTURAL PROPERTY

In several prosecutions, ARPA’s single reference to foreign commerce and the omission of the phrase *from public or Indian lands* in section 470ee(c) have been used to expand the reach of ARPA to cover trafficking in foreign artifacts.<sup>210</sup>

Proponents of the use of ARPA for thefts of foreign cultural property argue that if an object originates in a foreign country, and it is characterized as stolen property under that state’s laws, then its possession in the United States would therefore be a violation of that foreign state’s property laws and may therefore be prosecuted under ARPA.<sup>211</sup> However, critics of such expanded application of ARPA to beyond U.S. borders argue that this is contrary to Congress’ express intent in enacting ARPA to protect only Native American and other U.S. archaeological materials.<sup>212</sup> The regulations stemming from ARPA appear to set the Act firmly within a framework of purely domestic archaeological concerns.<sup>213</sup> Application of ARPA to foreign contexts also raises substantive questions about the jurisdictional reach of U.S. courts over activities in foreign countries.

200 NAGPRA National Review Committee Meeting In St. Paul, Minnesota May 9-11, 2003 (Focusing On Forbes Cave Controversy) - Findings, Recommendations, And Minutes Of The Meeting (Aug. 20, 2003), <http://www.angelfire.com/hi2/hawaiiansovereignty/nagpranatlmtngmay2003.html>.

201 Robbie Dingeman, *Panel to Rule on Hawaiian Artifacts*, HONOLULU ADVERTISER (Apr. 30, 2003) <http://the.honoluluadvertiser.com/article/2003/Apr/30/In/In01a.html>.

202 See Kenneth R. Konklin, *The Forbes Cave Controversy During and After The NAGPRA Review Committee Meeting of May 9-11, 2003, including official findings of the review committee published August 20, 2003 and Bishop Museum position paper of June 30, 2004* (2004), <http://www.angelfire.com/hi2/hawaiiansovereignty/nagpraforbesafterreview.html>.

203 *Bishop Museum Statement Of June 30, 2004 Regarding Its Obligations Under NAGPRA, Including Historical And Legal Reasons Why Bishop Museum Is A “Native Hawaiian Organization” Entitled To Possess Native Hawaiian Bones And Artifacts* (June 30, 2004) <http://www.angelfire.com/hi2/hawaiiansovereignty/nagprabishmus063004.html> (originally posted to Bishop Museum’s website).

204 Vicki Viotti, *Access to burial cave sought*, HONOLULU ADVERTISER (Aug. 21, 2004) <http://the.honoluluadvertiser.com/article/2004/Aug/21/In/In19a.html>.

205 Sally Apgar, *A Sacred Big Island Burial Cave Lies Open And Exposed*, HONOLULU STAR-BULLETIN (Aug. 26, 2004) <http://starbulletin.com/2004/08/26/news/story2.html>.

206 Peter Boylan, *Man pleads guilty in theft of artifacts*, HONOLULU ADVERTISER (May 27, 2006) <http://the.honoluluadvertiser.com/article/2006/May/27/In/FP605270341.html>.

207 Gordon Y.K. Pang, *Retrieval of cave artifacts settled*, HONOLULU ADVERTISER (Dec. 6, 2006) <http://the.honoluluadvertiser.com/article/2006/Dec/08/In/FP612080350.html>.

208 *Articles of Dissolution, State of Hawaii Department of Commerce & Consumer Affairs Business Registration Division* (Jan. 9, 2015) <https://www.nps.gov/nagpra/DOCUMENTS/DCCA-Hui-Malama-dissolved.pdf> (dissolution authorized Dec. 20, 2014).

209 See *Dresden Museum of Ethnology returns ancestral remains to Native Hawaiian group*, THE ART NEWSPAPER (Oct. 26, 2017) <https://www.theartnewspaper.com/news/dresden-museum-of-ethnology-returns-ancestral-remains-to-native-hawaiian-group>.

210 See, for example, *United States v. Melnikas*, 929 F. Supp. 276 (S.D. Ohio 1996) (ARPA violation charged in the theft of European manuscripts stolen from European collections and imported into the U.S.) and Patty Gerstenblith, *The Legal Framework for the Prosecution of Crimes Involving Archaeological Objects*, 64 U.S. ATT’Y BULL. CULTURAL PROP. L. 5, 14 (2016).

211 Gerstenblith, *supra* n. 210.

212 Andrew Adler, *An Unintended and Absurd Expansion: The Application of the Archaeological Resources Protection Act to Foreign Lands*, 38 N.M.L.Rev. 135, 158 (2008). ARPA’s text and its legislative history repeatedly emphasize domestic archeological materials. *Id.* at 146, citing 16 U.S.C. § 470aa(b). The bill’s principal sponsor, Congressman Morris Udall, stated that, “it does not affect any lands other than the lands of the United States and lands held in trust by the United States for Indian tribes...” *Id.* at 146–47, quoting 125 Cong. Rec. 17,393–94 (1979) (statement of Rep. Udall).

213 See, for example, permits for excavation and removal under 43 C.F.R. § 7.6 (2014).

## PART VII. OTHER FEDERAL LAWS AFFECTING NATIVE AMERICAN OBJECTS AND LANDS

### Depredation And Embezzlement Laws

Federal law 18 U.S.C. §1361 (1948) covers damage to lands, sites, resources under the land, forests, and personal property of the United States government. It may also be cited to add additional charges to a cultural property prosecution. It protects any U.S. government property from willful or attempted depredation, for example, illegal logging on federal lands or stealing government equipment. While the code does not expressly define the term, "depredation" has been defined as plundering, robbing, pillaging or laying waste.<sup>214</sup>

There can be confusion between apparently legitimate, lawful activities under one statute that are unlawful under another. A federal law, 16 U.S.C. §641 (1948), applies to theft or embezzlement of a "thing of value" of the United States or any department of the U.S. The theft provision applies to items taken from either federal or Indian lands. This embezzlement provision of U.S. law was originally focused on organized crime and Indian casino gambling, but it has also been used in the cultural property context. Law enforcement has charged individuals under 16 U.S.C. §641 for picking up arrowheads and other stone points from the surface of federal lands, although the ARPA Regulations' Civil Penalties section expressly states that "Violations limited to the removal of arrowheads located on the surface of the ground shall not be subject to the penalties prescribed in this section."<sup>215</sup>

### The Lacey Act, 18 U.S.C §§ 42-43, 16 U.S.C. §§ 3371-3378 (1900)

The oldest U.S. environmental law, the 1900 Lacey Act,<sup>216</sup> provides umbrella coverage making it a crime to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant if any U.S., state, Indian tribal, or foreign law was violated in its taking, import, export or sale. The Lacey Act was amended in 2008 to cover a wider range of plants and woods.

Materials from endangered species were, and sometimes still are used to decorate American Indian and other forms of tribal art. Many Native American artworks, from decorated Indian baskets to fetishes, may include feathers from bird species protected under the Lacey Act. Antique Native American crafts and jewelry may include ivory or tortoise shell inlay or beads. Any individual or institution working with such materials carefully consider the age of the object and the source and date of its materials to be sure that it does not fall into the wide range of protections under U.S. environmental laws.

<sup>214</sup> *Criminal Resource Manual No. 1666*, Department of Justice, <https://www.justice.gov/jm/criminal-resource-manual-1666-destruction-government-property-18-usc-1361>.

<sup>215</sup> *Id.* at § 7.16(a)(3).

<sup>216</sup> Lacey Act, 18 U.S.C. §§ 42-43, 16 U.S.C. §§ 3371-3378 (1900).

**The Bald and Golden Eagle Protection Act (BGEPA) 16 U.S.C. § 668-668c (1940)<sup>217</sup>**

The Bald Eagle Protection Act was originally passed in 1940 and continues to be strictly enforced. Golden eagles were added in 1962 because the two birds were often confused by hunters. It is not legal to buy, sell, or barter bald or golden eagle feathers or body parts regardless of when the birds were killed or collected. It is illegal even to possess feathers or parts of bald or golden eagles that were killed or collected after 1940 and 1962 respectively. Feathers and other parts collected before passage of this law are legal to possess, transport, and give away, but not to sell. A sale may not be disguised as a gift – one cannot sell a feathered object without the feathers and then “give” the feathers to the buyer.

A 1962 amendment allowed Native Americans from federally registered tribes access to eagle feathers through a permitting system that distributes the feathers for ritual use. Eagle feathers that are acquired under a permit may not later be transferred to another person, even another Native American. They must be returned to the federal government for distribution.

**Migratory Bird Treaty Act (MBTA) 16 U.S.C. §§ 703–712 (1918)**

Under the Migratory Bird Treaty Act (MBTA),<sup>218</sup> feathers or bird parts that were legally collected prior to the signing of the treaties in which the species is listed are legal to possess and transport without a permit. They may not be imported, exported, purchased, sold, or bartered. All shipments of bird parts must be specially marked.

The earliest Migratory Bird Treaty Act (MBTA) was passed in 1918 to protect declining populations of birds that were hunted for sport, food, and feathers for ladies’ hats. Between 1918 and 1976, four international conventions<sup>219</sup> were signed by the U.S. to protect migratory birds from commercial destruction. The Migratory Bird Treaty Reform Act of 2004 (MBTRA)<sup>220</sup> added all species native to the United States or its territories.<sup>221</sup> With these recent additions, over 1,000 U.S. bird species are now listed under the MBTA.

Prosecutions under the MBTA have more often been used in cases where violations of NAGPRA for dealing in sacred cultural materials are also alleged.<sup>222</sup> The MBTA covers a wide range of birds from South and Central America, Alaska, Russia, and Japan, whose feathers were used to decorate everything from elegant armor to traditional tribal ornaments of indigenous peoples or decorative trinkets such as music boxes.

<sup>217</sup> See 16 U.S.C. §707(a); see also *Permits: Laws/Treaties/Regulations*, U.S. FISH & WILDLIFE SERVICE, <http://www.fws.gov/permits/ltr/ltr.html>.

<sup>218</sup> Migratory Bird Treaty Act of 1918 (MBTA), codified at 16 U.S.C. §§ 703–712 (§709 is omitted).

<sup>219</sup> The Canadian Convention of 1916, as amended in 1996, Mexican Convention of 1936, as amended in 1972, Japanese Convention of 1972, as amended, and Russian Convention of 1976. See also *Migratory Bird Treaty Act*, U.S. FISH & WILDLIFE SERVS., <https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php>.

<sup>220</sup> Pub. L. No. 108-447, 118 Stat. 2809, 3071-72 (2004).

<sup>221</sup> Final List of Bird Species to Which the Migratory Bird Treaty Act Does Not Apply, 70 Fed. Reg. 12,710 (Mar.15, 2005).

<sup>222</sup> See, e.g. *United States v. Corrow*, 119 F.3d 796 (10th Cir. 1997).

<p><b>Marine Mammal Protection Act, 16 U.S.C. §1361-1407 (1972)</b></p>	<p>The 1972 Marine Mammal Protection Act protects sea otter, walrus, polar bear, dugong, and manatee. The Act prohibits the taking and trading of marine mammals and their products but allows certain exemptions under State management. New marine mammal ivory may be carved only by Alaska Natives and sold only after it has been carved. Old ivory can be carved by non-Natives. Fossilized mammoth ivory may be used by both Alaska Natives and non-Natives. Beach-found ivory is legal to own if registered, but cannot be bartered or sold. Fossil ivory may not be collected on any State or federal lands but may be collected on private lands with permission of the owner.</p>
<p><b>CITES and the Endangered Species Act</b></p>	<p>The chief regulatory scheme for the international movement of flora and fauna is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)<sup>223</sup>. It is also known as the Washington Convention. The CITES Convention, which has been in force since 1975, has been signed by 182 countries. It covers 35,000 animal and plant species. Listing a species in the CITES Appendices creates an obligation for signatory governments to control its trade.</p> <p>The 1973 Endangered Species Act (ESA), 16 U.S.C. § 1531 (1973) <i>et seq.</i><sup>224</sup> is the U.S. enacting legislation for CITES. The ESA is founded on the CITES Convention, and on international treaties related to the Migratory Bird Treaty Act, the Convention on Nature Protection and Wildlife Preservation and international conventions on Fisheries.</p> <p>The ESA does not cover antique objects made of endangered species that are more than 100 years old,<sup>225</sup> which are legal to buy and sell under the ESA. However, if the same species are listed under another law, such as the Migratory Bird Treaty Act, a sale that is legal under the ESA may be illegal under the other law. In addition, some U.S. state endangered species' laws expand federal endangered species protections, while others cover only local species.</p>

## PART VIII. U.S. RESTRICTIONS ON IVORY

A July 2013 Executive Order from U.S. President Barack Obama established a multi-agency task force to examine wildlife crime.<sup>226</sup> In particular, the task force was to find measures to reduce demand for elephant ivory in response to fears that elephants in parts of Africa were being pushed to the brink of extinction by worldwide demand for poached ivory. After promulgation of a tentative rule in 2014, the U.S. Fish and Wildlife Service published a final rule for African elephant ivory on July 6, 2016,<sup>227</sup> under the authority of 16 U.S.C. §1533(d) of the ESA. The rule builds on and expands restrictions already in place under the African Elephant Conservation Act of 1989 (AfECA) and prohibits all commercial import, export, and interstate trade of African elephant ivory, with some exceptions. These exceptions include antiques that are proven to be more than 100 years old.

African ivory items less than 100 years old can be sold in intrastate (within state) sales within any state in which there is not a state ivory law if the ivory is lawfully owned. In order to be deemed lawfully owned, ivory must have been lawfully imported prior to the date that the African elephant was listed in CITES Appendix I (January 18, 1990). The U.S. Fish and Wildlife Service website states that, "This documentation could be in the form of a CITES pre-Convention

<sup>223</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), *supra* n.11.

<sup>224</sup> Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (1973); see also 50 C.F.R. § 17 *et seq.*

<sup>225</sup> 16 U.S.C. § 1539(h)(1)(A).

<sup>226</sup> Combating Wildlife Trafficking, Exec. Order. 13,468 (2007).

<sup>227</sup> 50 C.F.R. §17 (2016) (pursuant to Director's Order No. 210, revising the Code of 50 Fed. Reg. § 17.40(e)).



*Lamassu, the Gate of Nimrud, Metropolitan Museum, NY, photo by Rosmanios, 30 December 2005, Creative Commons Attribution 2.0 Generic license.*

certificate, a datable photo, a dated letter or other document referring to the item, or other evidence.”<sup>228</sup>

If ivory meets the criteria to be considered an ESA antique, it may be sold in interstate sales (from a state without an ivory law, to a state in which there is no ivory law). The criteria for an item to be considered an ESA antique are:

- A: It is 100 years or older.
- B: It is composed in whole or in part of an ESA-listed species;
- C: It has not been repaired or modified with any such species after December 27, 1973; and
- D: It is being or was imported through an endangered species “antique port.”<sup>229</sup>

Under Director’s Order No. 210, as a matter of enforcement discretion, antique items imported prior to September 22, 1982, and items created in the United States and never imported must comply with elements A, B, and C above, but not element D. “Enforcement discretion” means that although there is not an exclusion for this category of pre-1982 imports and USA-made items, the U.S. Fish and Wildlife Service has decided not to enforce Section D. However, the exemption is wholly dependent upon the decision of the officer handling the matter.

Intrastate sale of ivory (transactions entirely within a specific state) is still lawful in many U.S. states. However, New York, New Jersey, Washington, Hawaii, California, Oregon, and Illinois have all enacted state laws prohibiting sales of

<sup>228</sup> *What Can I Do With My Ivory?*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/international/travel-and-trade/ivory-ban-questions-and-answers.html>.

ivory within that state.<sup>230</sup> While some states allow limited in-state trade in antique ivory with *de minimis* ivory content, New Jersey does not. New York prohibits trade in mammoth ivory. California prohibits trade in fossilized ivory and walrus and other marine ivories. Illinois prohibits trade in elephant, hippopotamus, mammoth, narwhal, walrus, or whale ivories, and of rhinoceros horn. Each state law varies and should be read individually.

## PART IX. NOTE ON PENDING US LEGISLATION ON NATIVE AMERICAN AND NATIVE HAWAIIAN CULTURAL PROPERTY

Recent bills introduced into the 115th U.S. Congress could have significantly impacted U.S. cultural property policy, but failed to pass during that 2017-2018 legislative session.<sup>231</sup> One was the Safeguard Tribal Objects of Patrimony Act (known as the “STOP Act”).<sup>232</sup> This legislation, which was opposed by museums, art dealers and collectors, would have enacted an export ban on items obtained in violation of ARPA, NAGPRA, or the Antiquities Act, in an effort to prevent the illicit trafficking of Native American cultural patrimony.

Proponents have argued that without export controls, Native American sacred objects and items of cultural patrimony would find a ready market overseas and unlawfully taken objects could not be claimed and returned to the U.S. The 2017 STOP Act went much further, however, and made it official U.S. government policy to call for the return of all “significant objects, resources, patrimony, or other items,” and “items affiliated with a Native American Culture,” which could include commercial jewelry, and ceramics, items which are among the most popular and widely collected types of art in the U.S. Opponents were concerned that the unfettered discretion given to tribes to claim objects under the STOP Act would encompass not only communally owned religious objects improperly taken from tribes, but also lawfully owned objects in private hands, undermining existing U.S. policy under NAGPRA and ARPA.

Opponents argued that the STOP Act would destroy antique Indian markets and harm contemporary Indian artisans. In addition, the STOP Act failed to explicitly place the burden of proof on the Federal government, and opened the door to abuse of due process by giving Customs officials broad discretion—and no guidance—to seize miscellaneous items, since U.S. tribes are unwilling to identify sacred items.<sup>233</sup> The Association of Art Museum Directors opposed the STOP Act in part because it undercut museum protections under NAGPRA because “[i]f cultural items subject to the STOP Act are known only to certain representatives of a tribe and are not identified in any way to the outside world, it is impossible for a museum, attempting to acquire a work in good faith, not to run afoul of the STOP Act.”<sup>234</sup>

The Native American and Native Hawaiian Cultural Protection Act of 2018, H.R. 7075,<sup>235</sup> was introduced into the House of Representatives in October 2018 as an alternative to the STOP Act. This bill also made it unlawful to export Native American or Native Hawaiian objects obtained in violation of ARPA, NAGPRA, the Antiquities Act, or any other U.S. law. It required reporting through the U.S. Customs Automated Export System (AES)<sup>236</sup> of all exports of Native American and Native Hawaiian materials and issuance of a certification to accompany the object on export. The legislation included tribal review of items to be exported to identify any objects for which there is evidence that they were acquired in violation of ARPA, NAGPRA or another U.S. law. Despite having the support of both the Acoma tribe, the most active tribe in introducing the STOP Act, and the tribal trade and collecting group ATADA, H.R. 7075 failed to pass during the 2017-2018 legislative session.

In July 2019, a third iteration of the STOP Act was introduced (H.R. 3846, S. 2165) into Congress.<sup>237</sup> This most recent version of STOP is the most extreme so far: it would prohibit export of virtually all Indian-made objects without prior

<sup>230</sup> N.Y. ENVTL. CONSERV. LAW § 11-0535-A (Consol. 2019); WASH., REV. CODE § 77.15 (2017); HAW. REV. STAT. § 183D (2017); CAL. FISH & GAME CODE § 2022 (2017); N.J. REV. STAT. § 23:2A-13.3 (2014); Wildlife Trafficking Prevention, Measure 100 (2016) *amending* OR. REV. STAT. § 498.022 (2017) ILL. COM. STAT. 815 ILCS 357 (2019).

<sup>231</sup> In early 2019, draft legislation containing similar provisions was in preparation but had not been made public.

<sup>232</sup> Safeguard Tribal Objects of Patrimony Act, S. 1400, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1400>.

<sup>233</sup> ATADA Written Testimony submitted to U.S. Senate Committee on Indian Affairs, on the Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act), S. 1400 (Nov. 8, 2017) <https://static1.squarespace.com/static/56e89d039f7266c5a6811f78/t/5a062b4e0d92971978c49e31/1510353742548/2017-11-08+STOP+Testimony+ATADA.pdf>.

<sup>234</sup> *Letter from Anita Difanis, Director of Government Affairs and International Relations, Association of Art Museum Directors, to Senator Tom Udall*, January 18, 2018, in possession of the author.

<sup>235</sup> Native American and Native Hawaiian Cultural Heritage Protection Act of 2018, H.R. 7075, 115th Cong. (2018).

<sup>236</sup> AES: *An Introduction*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/trade/aes/introduction#> (last modified May 29, 2018).

<sup>237</sup> H.R. 3846, S. 2165. 116th Cong. (2019)



*Lanterns at the Higashi Honganji Buddhist Temple, Photo by Dietmar Rabich / Wikimedia Commons/“Los Angeles (California, USA), - Little Tokyo - 2012 - 4908” / CC BY-SA 4.0*

passage through a tribal review process that has no time limits; export restrictions could be placed on lawfully-owned objects; the bill places the burden of proof on the exporter, not the government; the tribal review process would be secret and not even subject to Freedom of Information Act requests; commercially-made objects would not be excluded; and the law would require tourists as well as commercial exporters to submit photos and forms and obtain permissions for exports as low as \$1 value. As of this writing, H.R. 3846, S. 2165 is still in Congressional committee.

Passage of any law limiting export would be the first time the U.S. government placed specific export requirements upon a category of U.S. cultural property.

## **PART X. THE CULTURAL PROPERTY IMPLEMENTATION ACT: PRIMARY LAW ON FOREIGN CULTURAL PROPERTY**

The United States has two independent and at times conflicting international cultural property legal regimes. One, the 1983 Convention on Cultural Property Implementation Act (CPIA), is the implementing legislation under which the U.S. Congress adopted many, but not all of the provisions of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which was ratified by the U.S. Senate in 1972.

The second legal regime operates under a theft statute, the 1934 National Stolen Property Act.<sup>238</sup> It is a criminal violation of the National Stolen Property Act to knowingly possess, conceal, sell, or dispose of any goods of the value of \$5,000 or more, which have crossed a State or U.S. boundary after being “stolen.”<sup>239</sup> Much of the debate surrounding enforcement of foreign governments’ claims under the NSPA has to do with whether foreign laws that vest ownership of all cultural property in the state (privately owned, known or unknown to the state, above or below ground) create a national ownership interest in those objects that renders them “stolen” under U.S. law if they are exported without permission.

Civil forfeiture, under which property may be seized as “stolen” without having to prove the elements of a National Stolen Property Act violation, is commonly used in cultural property cases. Finally, goods may be seized from an importer or a successor holder if a U.S. Customs law is violated because the object was not properly declared upon import.

#### **Foundation: 1970 UNESCO Convention**

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>240</sup> (1970 UNESCO Convention) is often seen as the fulcrum upon which international cultural policy has balanced for the last fifty years. The 1970 UNESCO Convention has also provided a description of what constitutes “cultural property” that is widely used in both international instruments and the domestic laws of many nations.<sup>241</sup>

The U.S. acted independently to create a working system of law based upon the 1970 UNESCO Convention to address international concerns about the depredation of archaeological sites around the world. The U.S. Congress enacted key elements of the 1970 UNESCO Convention into a U.S. domestic law, the 1983 Convention of Cultural Property Implementation Act (CPIA). The CPIA enables state parties to the 1970 UNESCO Convention to make claims to their cultural property in the U.S. and imposes rigorous import restrictions on cultural heritage “in jeopardy.” While 137 nations have so far signed the 1970 UNESCO Convention, few have implemented domestic legislation that provides a mechanism for UNESCO state parties’ requests for bilateral agreements to restrict imports similar to those undertaken by the U.S.<sup>242</sup>

In implementing the 1970 UNESCO Convention, the U.S. Congress sought a compromise that would protect archaeological sites by imposing import restrictions upon designated objects of cultural property of “cultural significance” and halt traffic in objects that were “stolen” from museums, churches, and other inventories. At the same time, Congress addressed museum, dealer, and collector concerns that the law would impede the free movement of art to the detriment of both public and private interests. Congress authorized seizure and forfeiture of designated objects that were imported illegally into the U.S. It was unwilling, however, to grant foreign nations *carte blanche* to determine what types of objects should be covered by U.S. law, or to grant a private right of action to foreign nations to recover cultural property.

The CPIA, the only law specific to international cultural property in the U.S., has not been altered or amended since it was first enacted in 1983, but the scope of agreements under the CPIA has radically expanded in the 21<sup>st</sup> century, and U.S. import restrictions have been interpreted to make importation increasingly difficult.

Over the last twenty years, agreements under the Cultural Property Implementation Act have restricted importation of cultural property from entire regions as well as individual nations on a quasi-permanent basis, a policy that some scholars have termed “extra-legal.”<sup>243</sup>

<sup>238</sup> 18 U.S.C. §§ 2314–2315 (2017).

<sup>239</sup> The full text is [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.” 18 U.S.C. § 2314.

<sup>240</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *supra* n. 5.

<sup>241</sup> *Id.* at art. 1(a-k).

<sup>242</sup> Only Switzerland has implemented domestic legislation similar to the U.S. under which a requesting country can enter into an agreement to impose import restrictions. LOI FEDERALE DU 20 JUIN 2003 SUR LE TRANSFERT INTERNATIONAL DES BIENS CULTURELS, RS 444.1 (2003) <https://www.admin.ch/opc/fr/classified-compilation/20001408/index.html>.

<sup>243</sup> Stephen K. Urice & Andrew L. Adler, *Unveiling the Executive Branch’s Extralegal Cultural Property Policy* 28–30 (Miami L. Res. Paper Series, Working Paper No. 2010-20, Sept. 2010).

**Cultural Property Implementation Act, 19 U.S.C. §§ 2601–2613 (1983)**

Congress passed the CPIA in 1983 to enact the 1970 UNESCO Convention. Passage of the CPIA required a decade of negotiation and discussion between various interest groups, including the Department of State, the Department of Justice, specialists in international law, major U.S. museums and museum organizations, art dealers, auction houses and collectors. The CPIA established statutory guidelines for determining when the United States will impose import restrictions upon particular items of cultural property of “cultural significance.” The US legislation rejected the “blank check” approach of UNESCO, in which art source nations would identify whatever they chose as cultural property in jeopardy, and instead established an independent U.S. process for review of foreign nations’ requests for import restrictions and for the enactment of agreements with foreign nations. Congress’ decision to utilize selective import controls, as opposed to across-the-board import restrictions, was intended to balance the interest in preventing looting with the concern for maintaining free trade and circulation of art for the U.S. public.<sup>244</sup>

Administration of the Convention on Cultural Property Implementation Act (CPIA) is in the Executive Branch, in the Department of State’s Cultural Heritage Center within the Bureau of Educational and Cultural Affairs (ECA). The Cultural Property Advisory Committee to the President (CPAC) consists of a panel of eleven experts appointed by the President to advise him on the response to the requests for import restrictions. The Presidential authority to enter into agreements with art-source countries is delegated to a Deputy Secretary of State at the ECA.<sup>245</sup>

The CPIA implements Article 7(b) and Article 9 of the UNESCO Convention. Article 7(b) concerns cultural property stolen (in the traditional sense of the word “stolen”), from another person or from inventory, for example, from a church, a public institution, or a documented site. Article 9 concerns looted or pillaged cultural property.

Prior to passage of the CPIA, a foreign claimant would have had to file a civil replevin action with respect to a specific object or objects in U.S. court, a time consuming and expensive proceeding.<sup>246</sup> The CPIA authorized U.S. Customs and Border Protection to seize and forfeit designated types of objects as well as objects stolen from inventory on import.

Under the CPIA, the U.S. can enter into bilateral agreements with source countries, or in emergency situations, can act unilaterally to identify objects at risk and block their entry. Importation of cultural property included on the Designated Lists of MOUs constitutes unlawful importation and is a ground for seizure and civil forfeiture. If an importer cannot establish that they meet criteria for lawful import the property will be delivered over to the foreign country or its U.S. representatives.

Under Article 9 of the UNESCO Convention, its signatories agreed to participate in a concerted international effort to discourage the pillage of a nation’s cultural patrimony through measures that include selective import controls. Sections 303 and 304 of the CPIA establish processes to create import controls in critical situations in which the signatory nation’s cultural heritage is in jeopardy from pillage.<sup>247</sup> Section 303 enables the signing of bilateral or multilateral agreements known as Memoranda of Understanding (MOU) with these nations for U.S. import restrictions on certain categories of designated archaeological or ethnological materials. Section 304 addresses unilateral import restrictions by the U.S. without the requirement to negotiate a MOU.

Designated Lists of items subject to import restrictions are supposed to be recommended by CPAC, however the final lists are created by the Department of State in conjunction with representatives of the source country, Customs officials and academic specialists. The Designated Lists are published in the Federal Register on the same date that Emergency or Bilateral Agreements are announced.

Agreements between source countries and the U.S. under the CPIA last for five years, with 5-year renewals allowed indefinitely. Every agreement but one<sup>248</sup> has been renewed every five years since its inception, so some agreements have been in force for 30 years. Under the CPIA, the United States has entered into memoranda of understanding (MOU) with every foreign country that has requested one. The U.S. now has an emergency or bilateral agreement with 18 nations: Algeria, Belize, Bolivia, Bulgaria, Cambodia, China, Colombia, Cyprus, Egypt, El Salvador, Greece,

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<sup>244</sup> Pearlstein, *supra* n. 51 at 569

<sup>245</sup> 19 U.S.C. § 2605 (1984).

<sup>246</sup> An American art dealer was prosecuted under the NSPA at the same time that Guatemala filed suit for the return of illegally exported pre-Columbian stelae. *United States v. Hollinshead*, 495 F.2d 1154, 1155 (9th Cir. 1974).

<sup>247</sup> 19 U.S.C. § 2602–2603.

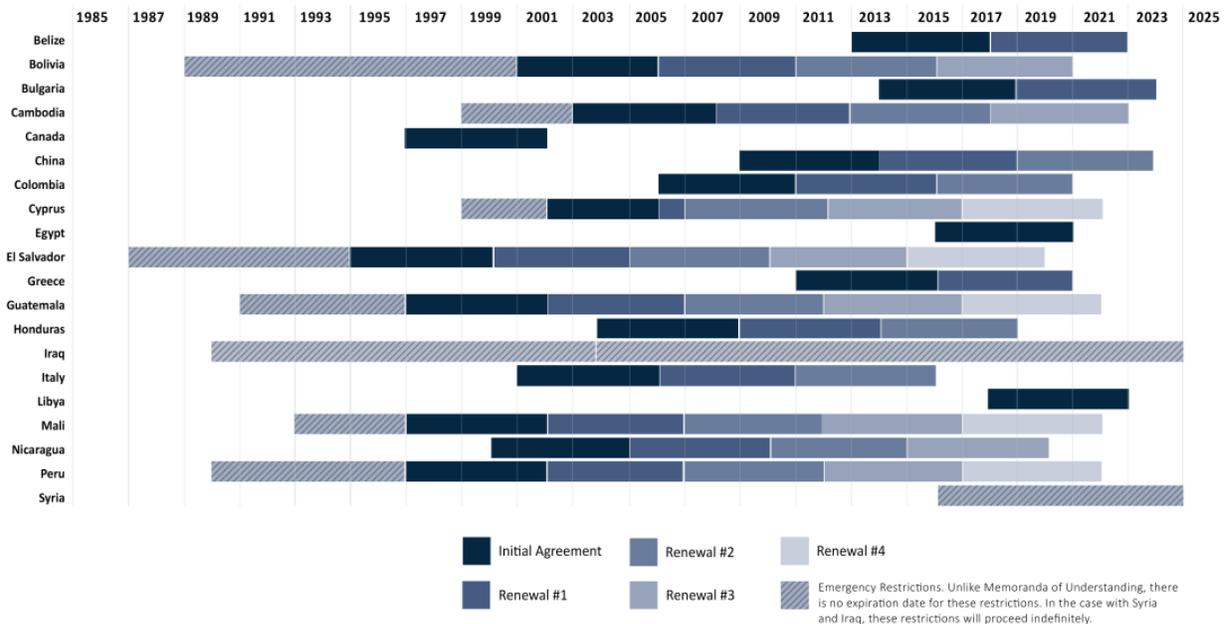
<sup>248</sup> A Canada agreement was signed on April 10, 1997, and expired on April 9, 2002, when it was evident that “Canada had the problem of pillage well under control, obviating the need to extend the Agreement.” *Canada*, DEP’T OF STATE: BUREAU OF EDUC. & CULTURAL AFF., <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/canada>.

Guatemala, Honduras, Italy, Libya, Mali, Nicaragua, and Peru.<sup>249</sup>

In addition, in the cases of Iraq in 2004<sup>250</sup> and Syria in 2016,<sup>251</sup> in which there was no government capable of making a request under the CPIA, the U.S. Congress passed laws restricting imports that replicated many of the terms of MOUs under the CPIA. See the below chart for a full timeline of U.S. import restrictions.

## UNITED STATES IMPORT RESTRICTIONS

Bilateral Agreements recognizing U.S. import restrictions of States' cultural property under the CPIA.



For a small, bureaucratic agency dealing with obscure, even arcane matters, the Department of State's Cultural Heritage Center at the Bureau of Educational and Cultural Affairs is surrounded by controversy. For more than twenty years, critics of the State Department's operation of CPAC, including Senator Patrick Moynihan, who sponsored the original legislation that resulted in the CPIA, together with Senator Robert Dole,<sup>252</sup> and former members of CPAC,<sup>253</sup> have argued that the MOUs entered into by the United States have blatantly disregarded the requirements of the law.<sup>254</sup> Critics have cited the failure to acknowledge the "concerted international agreement" requirement, the promulgation of across-the-board embargos extending to a nation's entire cultural history, and the negotiated agreements permitting a requesting nation to sell in its markets the very items it wants to deny to the U.S. market.

<sup>252</sup> Senator Moynihan later sponsored several bills critical of the operation of the CPAC. Moynihan stated that the administration lacked transparency and was adopting excessively broad import restrictions. See Douglas C. McGill, *Senators to Weigh Limits on Claims to Stolen Art*, N.Y. TIMES, Jan. 9, 1986, <https://www.nytimes.com/1986/01/09/arts/senators-to-weigh-limit-on-claims-to-stolen-art.html>.

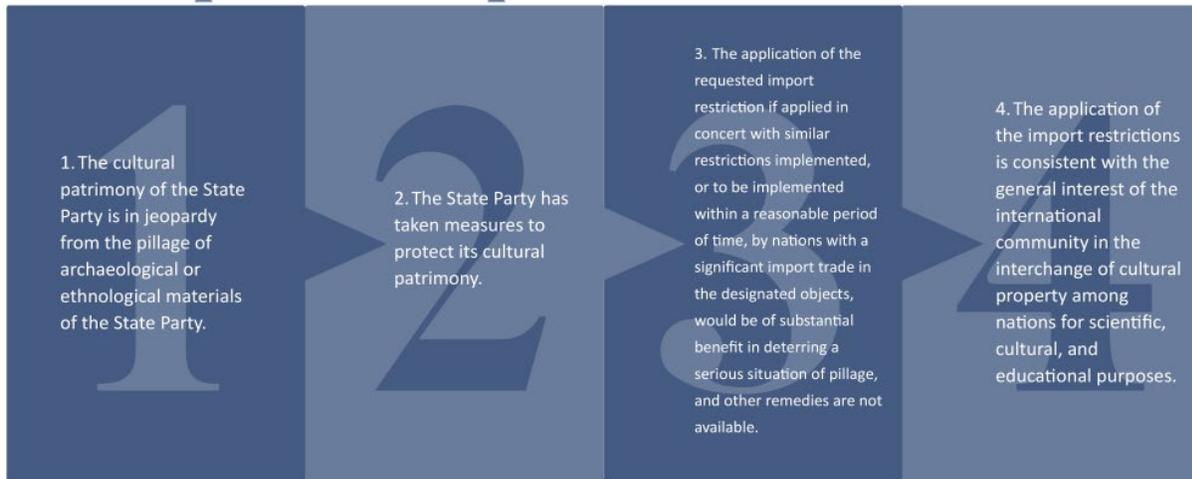
<sup>253</sup> Kate Fitz Gibbon, *CPAC – Building a Wall Against Art*, CULTURAL PROPERTY NEWS (June 28, 2018) <https://culturalpropertynews.org/cpac-building-a-wall-against-art/>.

<sup>254</sup> James F. Fitzpatrick, *Falling Short – the Failures in the Administration of the 1983 Cultural Property Law*, 2 A.B.A. SEC. INT'L L. 24, 24 (Panel: International Trade in Ancient Art and Archeological Objects Spring Meeting, New York City, Apr. 15, 2010).

### The Four Criteria for an Agreement Under the CPIA

To recommend import restrictions, the CPAC must determine whether the request satisfies all four requirements set forth in the statute.<sup>255</sup> The requirements are:

## Four CPAC Requirements to impose import restrictions:



In an emergency, the U.S. can unilaterally impose import restrictions without requiring a formally negotiated MOU. Section 304 of the CPIA provides for emergency import restrictions when the President, through his designee, makes a finding that the cultural property is:

1. A newly discovered type of material which is of importance for the understanding of the history of mankind and is in jeopardy from pillage, dismantling, dispersal, or fragmentation;
2. Identifiable as coming from any site recognized to be of high cultural significance if such site is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; or
3. A part of the remains of a particular culture or civilization, the record of which is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; and application of the import restrictions set forth in section 307 on a temporary basis would, in whole or in part, reduce the incentive for such pillage, dismantling, dispersal or fragmentation.

The country seeking the import restrictions must still make a request under Article 9 of the 1970 UNESCO Convention.

### Criteria for Archaeological Material and Ethnological Material for Import Restrictions

Agreements under the CPIA are limited to specific types of material under the statute. A key element differentiating the CPIA from the terms of the UNESCO Convention was the United States' retention of the right to establish the criteria for objects restricted from import, rather than to accept a foreign nation's definition of what constituted cultural property for the purpose of restrictions:

1. "Archaeological material" under the CPIA is more narrowly defined than under UNESCO. Under the CPIA, it must be any object of archaeological interest first discovered within and subject to export controls by the State Party, that is of cultural significance, at least 250 years old, and discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or water<sup>256</sup>

2. "Ethnological material" means any object of ethnological interest first discovered within and subject to export controls by the State Party, that is the product of a tribal or non-industrial society and that is important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or contribution to the knowledge of origins, development or history of that people.<sup>257</sup>

<sup>257</sup> *Id.* at §2601(2)(ii).



Three native girl curio vendors at Yakutat, Alaska / Miles Bros., 1903, Library of Congress, <https://lccn.loc.gov/97509808>

### The Expansion of Designated Lists

Critics have argued that the CPIA's implementation disregards the definitions in the law itself.<sup>258</sup> They also note the all-inclusive nature of Designated Lists, which commonly cover all materials created in a country from the Prehistoric period to 1750, if not later, fail to meet the requirements that the objects named be in jeopardy of pillage and be of "cultural significance." Instead of restricting import of specific items at risk of looting, the agreements now serve as blanket embargos on nearly all cultural property from countries that have requested agreements under the CPIA.

James Fitzpatrick, an attorney who was personally involved in the negotiations surrounding passage of the CPIA in 1983 has stated, "Not only was the scope of the Act meant to be narrow, it was never contemplated that the President's authority would extend to restricting the import of the entire cultural patrimony of a country... on their face, wall-to-wall embargoes fly in the face of Congress' intent. Congress spoke of archeological objects as limited to "a narrow range of objects..."<sup>259</sup> Import controls would be applied to "objects of significantly rare archeological stature..." and not "to trinkets or to other objects that are common or repetitive or essentially alike in material, design, color or other outstanding characteristics with other objects of the same type."<sup>260</sup>

258 See e.g., CCP Staff, *An Epic Battle: U.S. v. 3 Knife Shaped Coins*, CULTURAL PROPERTY NEWS (Oct. 15, 2018) <https://culturalpropertynews.org/an-epic-battle-u-s-v-3-knife-shaped-coins/>; AAMD, STATEMENT OF THE ASSOCIATION OF ART MUSEUM DIRECTORS CONCERNING THE PROPOSED EXTENSION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF BULGARIA CONCERNING THE IMPOSITION OF IMPORT RESTRICTIONS ON CATEGORIES OF ARCHAEOLOGICAL AND ECCLESIASTICAL ETHNOLOGICAL MATERIAL OF THE REPUBLIC OF BULGARIA: MEETING OF THE CULTURAL PROPERTY ADVISORY COMMITTEE 2 (July 31, 2018) <https://aamd.org/sites/default/files/key-issue/AAMD%20Statement%20Bulgaria%202018.pdf>.

259 See Fitzpatrick, *supra* n. 252; See S. REP. NO. 97-564, at 6 (1982).

260 See Fitzpatrick, *supra* n. 252; See S. REP. NO. 97-564, at 5.



*A window in the Ellis Island Immigrant Hospital, closed since 1930, and now run by the National Park Service. The photograph pasted on the window is one from the early 20th century, when the hospital was operational. In 2014 the French artist JR put up large reproductions of such photographs around the hospital grounds. Artwork by JR. Photo by Rhododendrites, 30 June 2018. Creative Commons Attribution-Share Alike 4.0 International license.*

### **The Cultural Property Advisory Committee to the President**

Section 303 of the CPIA established the Cultural Property Advisory Committee to the President. The Cultural Property Advisory Committee (CPAC) provides recommendations on requests for import restrictions after a State Party to the Convention submits an Article 9 request to enter into a MOU with the United States.

Congress intended CPAC's makeup to balance competing viewpoints regarding importation of cultural objects into the United States. By statute, three members are expert in the fields of archaeology or ethnology, two members represent the interests of museums, three members are expert in the international sale of cultural property, and three members represent the interests of the general public.<sup>261</sup> In March 2019, there is only one art dealer on CPAC, instead of the three required by statute (the other 'dealer' seats are held by individuals who do not represent dealer or collector interests), and there are four archaeologist and anthropologist members, overflowing the three designated archaeological seats.<sup>262</sup>

Congress was also wary of placing the CPAC at the Department of State, where it feared that diplomatic interests might take precedence over U.S. public interest,<sup>263</sup> and the CPIA was originally administered by the United States Information Agency.<sup>264</sup> However, CPAC was transferred to the Bureau of Educational and Cultural Affairs at the Department of State in 1998 where it remained under the direction of the same individual, Maria Kouroupas, for 18 years.<sup>265</sup>

<sup>261</sup> 19 U.S.C. § 2605(b).

<sup>262</sup> Kate Fitz Gibbon, *CPAC – Building A Wall Against Art*, *supra* n. 254.

<sup>263</sup> See Mark B. Feldman, Symposium, *Reform of U.S. Cultural Property Policy*, N.Y., CULTURAL PROPERTY NEWS (Apr. 10, 2014) <https://culturalpropertynews.org/mark-b-feldman-reform-of-u-s-cultural-property-policy/>.

<sup>264</sup> Exec. Order No. 12,555 on the Protection of Cultural Property, Mar. 10, 1986.

<sup>265</sup> Stephen Vincent, *The Secret War of Maria Kouroupas*, ART & AUCTION (March 2002): 63-9.

### Seizure, Forfeiture and Safe Harbor Under the CPIA

Section 308 of the CPIA<sup>266</sup> has provisions for the seizure and civil forfeiture of cultural property that is stolen (in the traditional sense of “stolen”) from the inventory of a museum or religious or secular public monument or similar institution in the source country. In this provision, the very broad definition of “cultural property” under the 1970 Convention applies. Through Section 308, the CPIA gives Immigration and Customs Enforcement (or ICE) the authority to seize stolen cultural property at the border. To meet the criteria for seizure, the cultural property must be shown to have been stolen from an institution after the date on which both the United States and the country of origin became State Parties to the UNESCO Convention and the cultural property must have been documented, i.e. formed part of an inventory. The cultural property may be seized even if the importer had no knowledge of or intent to commit a crime.<sup>267</sup>

Section 309 provides for the temporary disposition of objects imported in violation of import restrictions by placing them in safe harbor in a U.S. institution on the request of that institution.

Section 310 deals with seizure and forfeiture of cultural property imported in violation of sections 307 or 308 of the CPIA. Objects seized and forfeited after entry in violation of section 307 (objects subject to import restrictions under a MOU or emergency situation) must first be offered for return to the State Party of origin, then to a claimant who establishes good title, or then to a claimant who is a bona fide purchaser for value, or finally disposed of pursuant to U.S. customs laws. Typically, the U.S. delivers seized cultural property to a foreign embassy, unless the foreign State pays for shipping elsewhere.

### Congress required demonstration of source countries’ self-help in 2017

In July 2017, after hearing concerns over art source countries’ lack of effort to protect their own cultural resources, U.S. Congressional appropriators required the Department of State to report on self-help measures taken by countries requesting U.S. assistance under the CPIA. The CPIA requires countries participating in MOUs restricting cultural property take measures “consistent with the Convention to protect its cultural patrimony.”<sup>268</sup> The House Appropriations Subcommittee included language in the federal year 2018 State, Foreign Operations and Related Programs Appropriation Bill directing CPAC to consider source countries’ annual expenditures in its reviews required for the extension of MOUs.<sup>269</sup>

### Policy Changes Driven By Middle East Crises

Particularly since 2011 and the rise of ISIS in Syria and Iraq, social perspectives on cultural property in the U.S. have been strongly affected by a sense of crisis over the wholesale destruction of major monuments by extremist movements in the Middle East, Africa, and Asia. This international instability has awakened the public to the vulnerability of art and monuments that have existed for thousands of years to wars and internal conflicts. Changes in social attitudes are also driven by media claims that terrorists are profiting from the trade in cultural property, an idea that has taken root in the public mind despite multiple evidences to the contrary.<sup>270</sup>

In 2015, the State Department announced a \$5 million dollar reward as part of its “Reward for Justice” program for information on illicit oil sales and trafficking in looted archaeological material from Syria and Iraq, stating that these operations are “key sources of revenue, helping the terrorist organization to generate millions of dollars in hard currency and enabling ISIL to carry out its brutal tactics and oppress innocent civilians.”<sup>271</sup> No finds of illicit antiquities or prosecutions have been announced. According to James McAndrew, formerly Department of Homeland Security head of the International Art and Antiquity Theft Investigations Program, “since the Arab Spring no looted archaeological item derived from ISIS was intercepted, seized, identified or discovered at any U.S. port of entry by any law enforcement agency.”<sup>272</sup>

266 Corresponding to Article 7(b)(i) of the 1970 UNESCO Convention.

267 19 U.S.C. § 2606 (b).

268 19 U.S.C. § 2602(a)(1)(B).

269 STATE, FOREIGN OPERATIONS, AND RELATED PROGRAMS APPROPRIATIONS BILL, H.R. REP. 115-253, at 14 (2018). <https://www.congress.gov/115/crpt/hrpt253/CRPT-115hrpt253.pdf>.

270 See Brennan & Kate Fitz Gibbon, *supra* n.103. See also TIM VAN LIT, CULTURAL PROPERTY, WAR CRIMES AND ISLAMIC STATE: DESTRUCTION, PLUNDER AND TRAFFICKING OF CULTURAL PROPERTY AND HERITAGE BY ISLAMIC STATE IN SYRIA AND IRAQ 6 (2016) <http://iadaa.org/wp-content/uploads/2016/05/Cultural-Property-War-crimes-and-Islamic-State-2016.pdf> (“These claims are largely not supported by available government reports. (International and National) Customs Authorities have not reported growing influxes of illegal cultural property over their borders. Law enforcement agencies have not reported growing arrests of criminal art dealers or seizures of illegal cultural property from Syria and Iraq.”) (Report commissioned by the Dutch National Police Central Investigation Unit, War Crimes Unit).

271 *Information on Trafficking Oil and Antiquities*, REWARDS FOR JUSTICE, [https://rewardsforjustice.net/english/trafficking\\_oil\\_and\\_antiquities.html](https://rewardsforjustice.net/english/trafficking_oil_and_antiquities.html). See also Rebecca Kheel, US offers \$5 million reward to stop ISIS from plundering antiquities, THE HILL (Sept. 30, 2015) <http://thehill.com/policy/defense/255442-us-offers-5-million-reward-to-stop-isis-from-plundering-antiquities>.

272 James McAndrew, Speech at the Art Market and Money Laundering Symposium, presented by the Fashion Institute of Technology’s (FIT) Art Market Studies MA Program at the School of Graduate Studies & Case Western Reserve University’s School of Law (Oct. 12, 2018).

## PART XI. CPIA-BASED COURT DECISIONS

### ***United States v. An Original Manuscript*, No. 96-6221, 1999 U.S. Dist. LEXIS 1859 (S.D.N.Y. Feb. 19, 1999).**

In 1996, an original, signed manuscript from 1778 that had been stolen from Mexico's National Archives was put up for auction at Sotheby's by a dealer who claimed to have acquired it at a Mexico City flea market. The CPIA states that if an importer or current possessor "establishes that it purchased the article for value without knowledge or reason to believe it was stolen," forfeiture shall not be decreed unless the State Party pays the claimant the amount that the claimant paid unless the claiming State Party, "as a matter of law or reciprocity, would in similar circumstances recover and return an article stolen from such an institution in the United States without requiring the payment of compensation." The Court found that the importer was not an innocent buyer, but rather was "willfully blind" to the object's suspicious origin and lack of documentation. The court also found that the importer was not entitled to compensation as part of the forfeiture action because Mexico would not have asked the U.S. to pay compensation if the circumstances were reversed.

### ***Ancient Coin Collectors Guild v. U.S. Customs and Border Prot.*, 801 F. Supp. 2d 383 (D. Md. 2011), *aff'd*, No. 11-2012 (4th Cir. 2012), and *United States v. 3 Knife Shaped Coins*, 246 F. Supp.3d 1102 (D. Md. 2017)**

In a 2007 renewal of a prior agreement with Cyprus under the CPIA, import restrictions were extended to Cypriot coins. Based on FOIA releases and consultations with CPAC members, the Ancient Coin Collectors Guild (ACCG) learned that the State Department had rejected CPAC's recommendations and then misled Congress and the public about it in official government reports. That prompted the Guild to seek judicial review. Soon after, the Cypriot "precedent" was used as a basis to impose import restrictions on Chinese coins, including very common "cash coins" that circulated widely all over the Far East and parts of Africa. The Guild imported Chinese and Cypriot coins for purposes of its test case. U.S. Customs and Border Protection (CBP) seized the coins, but after ten months passed without a forfeiture action, the Guild brought a declaratory judgment (DJ) action to compel the Government to file one.

The Guild alleged that the State Department and CBP's actions were subject to judicial review under the Administrative Procedure Act ("APA"), or alternatively, under the doctrine of "non-statutory" or *ultra vires* review. The District Court acknowledged that "Congress only authorized the imposition of import restrictions on objects that were 'first discovered within, and [are] subject to the export control by the State Party,'"<sup>273</sup> but declined to conduct the requested judicial review and dismissed the Guild's action, prompting an appeal.

The Appeals Court held that anything but the most cursory review would draw the judicial system too heavily into negotiations between the State Department and foreign countries. It also rejected the Guild's *ultra vires* argument, wrongfully assuming that CPAC agreed with the Government's decision and ignoring the sworn declaration by CPAC's chairman that the State Department had misled both CPAC and the Congress.<sup>274</sup> Still under this misapprehension of CPAC's recommendations, the Appeals Court affirmed the District Court's decision predicated on the assumption that the Guild be given a chance to contest the Government's detention of its property in a forfeiture action.<sup>275</sup>

The Government brought a forfeiture action, *United States v. 3 Knife Shaped Coins*.<sup>276</sup> In it, the District Court held that the Government made out its *prima facie* case in its forfeiture complaint, struck the Guild's Amended Answer *sua sponte*, and precluded any meaningful discovery before forfeiting fifteen coins to the Government.<sup>277</sup> The Guild appealed, focusing on the 5th Amendment Constitutional issues arising out of the Government's burden of proof in CPIA forfeiture actions and the Guild's required showing on rebuttal.

The Guild had consistently maintained that the Government must establish for its *prima facie* case that an archaeological object: (1) is of a type that appears on the designated list; (2) that was first discovered within and hence was subject to the export control of the UNESCO State Party for which restrictions were granted; and (3) that it was illegally removed from the State Party after those restrictions were granted.<sup>278</sup> The Guild based its analysis on rules of statutory construction, CPIA and other civil forfeiture case law, statements by the State Department during the CPIA legislation, and government admissions about the burden of proof and use of expert testimony in the action for declaratory judgment. The Guild also argued that the District Court could not assume that the Government made out the second and third elements of its *prima facie* case solely based on the presumption these determinations were made as part of the process of "designating" like types of archaeological objects for restrictions: Fifth Amendment

<sup>273</sup> *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection* (ACCG v. CBP), 801 F. Supp. 2d 383, 407 n. 25 (D. Md. 2011).

<sup>274</sup> 698 F.3d at 175, 179-81 (4th Cir. 2012).

<sup>275</sup> 698 F.3d at 185. The Appeals Court subsequently denied a petition for rehearing *en banc* and the Supreme Court denied certiorari.

<sup>276</sup> *United States v. 3 Knife Shaped Coins*. 246 F. Supp.3d 1102 (D. Md. 2017)

<sup>277</sup> 246 F. Supp.3d at 1109-1124; Pet. App. 8a-38a.

<sup>278</sup> 19 U.S.C. §§ 2606, 2609, and 2610, incorporating §§ 2601, 2604.



*Jesse Cornplanter, descendant of Cornplanter, the famous Seneca chief, making a ceremonial mask, Tonawanda Community House, Tonawanda, New York, 1940 National Archives Identifier 519161*



*National Museum of African American History and Culture Director Lonnie Bunch and Congressman James Clyburn (DSC), and Deputy Director Kinshasha Holman Conwill participate in a "Save Our African American Treasures" program in May 2009 in Charleston, South Carolina. The program educates the public in the preservation of African American historical objects. Photo by Michael Barnes, 8 May 2012. Wikimedia Commons.*

due process precluded altering the burden of proof Congress assigned to the Government to the Guild's detriment; due process also precluded seizure and forfeiture based on regulations and guidance that contradict the CPIA, and the constitutional claims at issue also meant that the earlier decision was not binding. The Guild argued that the District Court made erroneous factual assumptions about Government decision-making that led to its determination that Cypriot and Chinese coins were properly designated. It noted additional evidence that the decision-making was marred by evidence of cronyism and conflicts of interest, which again suggested that the *ACCG v. CBP* should not bind the Court in a forfeiture proceeding which raised 5th Amendment Takings and Due Process concerns.<sup>279</sup> The Fourth Circuit affirmed the District Court's decision without addressing the substance of the Guild's constitutional claims or whether they preempted the Court's reliance on the flawed reasoning found in *ACCG v. CBP*.<sup>280</sup> The Appeals Court denied rehearing *en banc*, and the Guild filed a Petition for Writ of Certiorari asking the Supreme Court to review the decision of the lower court, but it was not granted.<sup>281</sup>

<sup>279</sup> Appellate ECF No. 14 at 29-30; Pet. App. 171a-173a

<sup>280</sup> 899 F.3d 295; Pet. App. 40a.

<sup>281</sup> Petition for Writ for Certiorari, *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*. (No. 18-767) (U.S. 2018) (petition denied Feb. 19, 2019).

## PART XII. OTHER ASPECTS OF THE DEPARTMENT OF STATE'S ADMINISTRATION OF US CULTURAL POLICY

The activities of the Department of State's Bureau of Cultural and Educational Affairs, especially in State's administration of the Cultural Property Advisory Committee are now so deeply entwined in the development of U.S. cultural policy that, at least with respect to ethnological art and antiquities, it serves as an ad hoc Ministry of Culture for the U.S. A fuller description of its administrative role is merited here.

### Cultural Exchange

U.S. cultural diplomacy, in the most formal sense, takes place through the U.S. Department of State in its relations with foreign governments, but this traditional diplomatic role is today the least impactful of the State Department's culture-related activities, and affects only that small fraction of the cultural exchanges between the US and the rest of the world that ordinary international commerce does not already handle on its own. When needed, the State Department does facilitate communication between federal agencies and their foreign ministerial counterparts.

Government to government communication regarding cultural activities, sponsorships, visas and travel of artists and artworks, and members of archaeological expeditions often requires at least the peripheral involvement of U.S. embassies and their staff on the ground in foreign countries. Nonetheless, most cultural exchanges (musical, dance, exhibitions) are handled directly by the participating U.S. and foreign cultural organizations. Similarly, foreign archaeological or conservation projects, unless State Department grantees are participants, are generally directly organized by U. S. universities and other institutions that sponsor the activities.

U.S. museum loans and exchanges are also usually organized by the museums themselves, although their foreign museum counterparts may work through a cultural ministry or other government organization. However, the State Department, as the President's designee, must make the determination that artworks are "significant" in order for state-owned artworks to be immune from seizure under the 1965 Immunity from Seizure Act ("IFSA")<sup>282</sup> and the 2016 Foreign Cultural Exchange Jurisdictional Immunity Clarification Act ("FCEJICA").<sup>283</sup>

State Department staff also work together with international cultural organizations such as UNESCO, the International Council for Museums (ICOM), and the International Committee of the Blue Shield to establish policy and facilitate the exchange of cultural goods.

### Conservation, Documentation and Training Projects

The State Department's Bureau of Educational and Cultural Affairs in Washington, DC supervises or contributes to a variety of cultural programs, such as the Ambassadors' Fund for Cultural Preservation (AFCP), which supports projects for preserving and conserving cultural sites around the world.<sup>284</sup> Another major project, the Iraqi Institute for the Conservation of Antiquities and Heritage (IICAH), was initially established under the State Department but was turned over to an Iraqi board backed by a U.S.-Iraqi advisory council; the program is supported with US government and US private museum and university funding. State Department funding for preservation and anti-trafficking work by the American Schools for Oriental Research (ASOR) is extensive, and in recent years amounted to approximately a million dollars per year.<sup>285</sup>

The State Department's Cultural Heritage Coordinating Committee (CHCC) was established in 2016 under the Protect and Preserve International Cultural Property Act,<sup>286</sup> and tasked with coordinating twelve different US agencies from Homeland Security to the National Endowment for the Humanities, primarily to pursue diplomatic and law enforcement efforts to combat antiquities trafficking.

### State Department and the Native American Community's Foreign Claims

In the past, the State Department was not involved in Native American cultural issues. However, since 2016, the State Department has been directly working with U.S. tribes, particularly those in the states of New Mexico and Arizona, to repatriate cultural items offered for sale overseas.<sup>287</sup> The State Department coordinates these efforts with the Department of the Interior, the Department of Justice, and the Department of Homeland Security.

<sup>282</sup> 22 U.S.C. § 2459 (1965).

<sup>283</sup> Pub. L. No. 114-319 (2016).

<sup>284</sup> *Ambassador Fund for Cultural Preservation*, U.S. DEP'T OF STATE: BUREAU OF EDUC. & CULTURAL AFF., <https://eca.state.gov/cultural-heritage-center/ambassadors-fund-cultural-preservation>.

<sup>285</sup> *ASOR Cultural Heritage Initiatives: Safeguarding the Heritage of the Near East Initiative Collaborative Service Award*, THE AMERICAN SCHOOLS OF ORIENTAL RESEARCH, May 22 2017, [http://www.asor-syrianheritage.org/press-release-2017-05-22/..](http://www.asor-syrianheritage.org/press-release-2017-05-22/)

<sup>286</sup> Pub. L. No. 114-151 (2016).

<sup>287</sup> In particular, the State Department was actively involved in seeking repatriation from France of a painted shield that was said to have been stolen from an Acoma tribal family that held it for their local community. After several years of stalemate, a negotiated return of the shield without blame to the owner was arranged with the assistance of tribal art dealer organization ATADA in the summer of 2019. See also: *Feds: US tribal items sold a Paris auction houses decline*, ASSOCIATED PRESS, Sept. 7, 2018, <https://www.apnews.com/39c0f2e5878e415e853d5d5caafc4629>.

The State Department is now perceived in the Native American community to be more willing to exert itself on behalf of the tribes in cultural matters than the Department of the Interior, with which tribes have a longer and more complex relationship. The Department of the Interior is the primary agency for coordinating Native American economic issues, mineral and other resource exploitation, agricultural, infrastructure-related, educational, medical, social welfare, and relationships between the tribal government and U.S. federal government.

State Department staff now regularly attend Native American organization-sponsored conferences and participate along with representatives of the Department of the Interior in closed ‘inter-governmental’ meetings with tribal government leaders. The State Department has also created a social media campaign featuring videos of tribal leaders speaking about the damage their communities have suffered when cultural artifacts are sold commercially, press events, and Twitter campaigns asserting the harm done to tribes by selling tribal artifacts overseas. Although the media campaign has been effective in deterring interest in Native American art among overseas consumers, no artifacts have yet been returned through State Department efforts,<sup>288</sup> and the State Department has no recorded success in obtaining the return of objects from foreign museums. Nor has the Department of State succeeded in achieving the repatriation of “ancestors” (the proper current term for human remains) from foreign institutions that hold them, an issue of great concern to US tribes

### **PART XIII. THE NATIONAL STOLEN PROPERTY ACT: A GENERAL THEFT LAW SUPERSEDES THE CPIA**

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The 1934 National Stolen Property Act<sup>289</sup> (NSPA) is a U.S. general theft law. The NSPA makes it a crime to knowingly possess, conceal, sell, or dispose of any goods of the value of \$5,000 or more, which have crossed a State or US boundary after being “stolen.” This general theft law, not the CPIA, is now the primary legal foundation in the U.S. for foreign ownership claims for antiquities and other cultural property.

Under U.S. law, no thief can pass good title. Therefore, if an object is “stolen,” it retains that stolen status forever, no matter how long ago the theft occurred or how many hands the object passed through, and regardless of the claims of a purchaser in good faith who had no knowledge of the original theft.

The Court in the 1979 *McClain* case<sup>290</sup> (see below) found a foreign national patrimony law to be enforceable in the U.S. if it met certain criteria. An object could be considered “stolen” in the US if the country of origin could show that the object was discovered within its territory; that a patrimony law that vested ownership of all such objects in the State was in effect when the object was removed from that country; and that the foreign patrimony law was not so vague as to violate the due process requirements of the US Constitution.

Today, as a result of *McClain* and the *Schultz* case<sup>291</sup> that followed it decades later, foreign nationalizing laws, if held valid by a U.S. court, can determine the ownership of foreign cultural property in the U.S. Foreign countries often protect cultural property through both export controls and national patrimony laws (which vest ownership of all cultural property, whether known or unknown, or above or below ground, in the state). The U.S. does not enforce foreign export control laws, but under the *McClain* doctrine, it does recognize national patrimony laws as creating an ownership interest in the state.

Now, an object sold by a private owner in a foreign country but exported without permission of the foreign government may be considered “stolen” under the foreign government’s national ownership law. The allegedly stolen property in the U.S. may be seized, and if deemed stolen, the object is forfeit to the U.S. government.

#### **Foreign Patrimony Claims Conflict with the CPIA**

The ability to use a foreign nationalizing statute rather than the Congressionally-mandated regime under the CPIA has made prosecutions of dealers or collectors of art easier and eliminated the protections in the CPIA granting repose to art long in the United States, or art which enters the U.S. after a lengthy stay in a third country.

The congressional architects of the CPIA, Senators Patrick Moynihan and Bob Dole, sought to ensure that the CPIA, which reserved independent judgment to the U.S. on the scope of import controls, was not overcome through use of the National Stolen Property Act (NSPA). A different Congressional committee had jurisdiction over the National Stolen

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<sup>288</sup> *Supra*, n. 178.

<sup>289</sup> National Stolen Property Act, 18 U.S.C. §§ 2311-2318 (2011).

<sup>290</sup> *United States v. McClain*, 551 F.2d 52 (5th Cir. 1977), 545 F.2d 998 (5th Cir. 1977), 593 F.2d 658 (5th Cir. 1970, *cert. denied*, 44 U.S. 918 (1979)).

<sup>291</sup> *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), *cert. denied*, 540 U.S. 1106 (2004).

Property Act, however, so separate legislation was needed to exclude cultural property deemed stolen solely on the basis of nationalizing legislation from coverage under the NSPA. The Senators introduced a companion bill, S. 2963 in 1982, and again as S. 605 in 1985, soon after passage of the CPIA, to amend the National Stolen Property Act to so that it would not “apply to any... archaeological or ethnological materials taken from a foreign country where the claim of ownership is based only upon... a declaration by the foreign country of national ownership of the material...”<sup>292</sup>

However, the State and Justice Departments opposed S. 605, based upon their desire to retain the ability to use the NSPA in a limited number of “egregious” cases. Without their support S. 605 failed to pass. Their rejection of any limitations on the NSPA, made the NSPA and its related doctrine of civil forfeiture the defining cultural property law of the U.S.

Thus, there is a conflict between the CPIA’s selective import restrictions and foreign nations’ blanket assertions of ownership of all cultural property. It is possible for an importer, art collector or institution to be in compliance with the CPIA, and at the same time to be in violation of the NSPA, a criminal law with harsh penalties.

U.S. courts have examined foreign national patrimony statutes in several cases, coming to somewhat different conclusions but essentially laying out criteria that may determine whether a specific national patrimony statute is valid. Key cases include *United States v. McClain*, *Peru v. Johnson*,<sup>293</sup> and *United States v. Schultz*, each of which is discussed below. However, whether a foreign statute will qualify as an ownership law for the purpose of a prosecution under the NSPA is not decided until a case comes to trial. There have been very few such prosecutions, and only a handful of source country laws have been examined in the courts. The uncertainty and expense of a defense leaves U.S. collectors and collecting institutions unwilling to risk opposing a foreign claim. This lack of legal certainty also chills individual and museums’ willingness to participate in the global art trade.<sup>294</sup>

#### **Criminal Possession or Transportation related to NSPA**

In order to be charged with criminal possession under the National Stolen Property Act, an individual must know that the cultural property in his or her possession was either “stolen” in the traditional sense or removed from a foreign country without permission after enactment of a national patrimony law. In many cultural property cases, there is not sufficient evidence of knowledge to proceed criminally. In these cases, the “stolen” property can be forfeited administratively or through a civil *in rem* action. Civil forfeiture enables law enforcement to seize art without proving all the elements required to obtain a criminal conviction.

Section 2315 of the NSPA provides that “whoever receives, possesses, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise, securities, or money 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 . . . shall be fined under this title or imprisoned not more than ten years, or both.”

To obtain a seizure warrant, a law enforcement agent writes an affidavit explaining the facts of a case to the judge (i.e., probable cause to believe the cultural property in question is stolen). Once the agent obtains a seizure warrant, the property may be seized. Then, if an item is determined to be stolen under the NSPA, it is forfeited to the U.S. government, and in cases of foreign national ownership, delivered to the nation of origin.

The *McClain* and *Schultz* cases established the elements necessary to prove theft under the National Stolen Property Act on the basis of a foreign patrimony law:

1. The law must make a clear and unambiguous declaration of national ownership;
2. It must be domestically enforced; it must be in effect on the date of export;
3. The importer must know or have consciously avoided knowledge of the applicable law at the date of export.

## **PART XIV. NATIONAL STOLEN PROPERTY ACT CASES**

Because the National Stolen Property Act is a general theft law, used initially to prohibit taking stolen cars across state lines, and not drafted with consideration of national ownership matters, the major cases under the Act are what define the parameters of the NSPA’s reach into cultural property cases. The first case to establish the principle that a foreign statute would qualify as an ownership law triggering liability under the National Stolen Property Act was *United States v. McClain*, decided by the Fifth Circuit over thirty years ago, in 1979.

<sup>292</sup> S. 2963, 97th Cong. (1982); S. 605, 99th Cong. (1985).

<sup>293</sup> 720 F. Supp. 810 (C.D. Cal. 1989).

<sup>294</sup> Kate Fitz Gibbon, *No More Good Provenance*, CULTURAL PROPERTY NEWS (Mar. 29, 2013) <https://culturalpropertynews.org/no-more-good-provenance/>.



Section of the Blue Mountain Crossing Segment, Oregon National Historic Trail in Wyoming. The Oregon, Mormon Pioneer, California, and Pony Express routes, along which some 500,000 emigrants made their way overland to the far western edge of the continent. All are now managed as national historic trails. BLM-managed sections are part of the National Landscape Conservation System. Photo by Bureau of Land Management, 14 September 2010.

**United States v. McClain, 551 F.2d 52 (5th Cir. 1977), 545 F.2d 998 (5th Cir. 1977), 593 F.2d 658 (5th Cir. 1979), cert. denied, 44 U.S. 918 (1979).**

The *McClain* defendants were convicted of conspiring to violate the NSPA by importing artifacts from Mexico that were covered by a Mexican patrimony law declaring all such artifacts to be owned by the Mexican government. At the heart of the case was the meaning of the term “stolen.” The defendants claimed that the NSPA did not apply to objects that were taken in violation of foreign patrimony laws, but the Fifth Circuit concluded that the NSPA did apply to such objects.

The defendants had made a sizable collection of pre-Columbian artifacts in Mexico, buying from local pot hunters who were taking them illicitly from archaeological sites. They brought the artifacts into California and approached a man in Texas who unbeknownst to them, was the Director of the Mexican Cultural Institute. He contacted the FBI, which set up a sting operation. They were arrested and charged with receiving, concealing or selling stolen goods in interstate or foreign commerce, as well as conspiracy to do the same, in violation of the NSPA.

The *McClain* District Court held that taking possession of a cultural object in violation of a foreign patrimony law can give rise to criminal liability under the NSPA. When a cultural object is removed without permission from a country with a national patrimony law covering that object, the object is deemed “stolen.” Certain limitations applied to this principle. There must be *scienter* or knowledge that a foreign nation has claimed ownership of the cultural object. A declaration of national ownership is necessary before an illegally exported object can be considered “stolen” within the meaning of the NSPA. Unlawful export alone is not enough. A foreign patrimony law must be clear enough to provide adequate notice of its effect. The cultural object must originate from the territory of the nation claiming ownership and any alleged theft must have occurred after the effective date of the relevant patrimony law. US District Court for the Western District of Texas convicted the defendants under the NSPA. They appealed. The U.S. Court of Appeals for the Fifth Circuit reversed the lower court ruling, based on the lower court’s jury instructions regarding the date of a valid Mexican national patrimony law. The Court held that because the laws vesting ownership of cultural property in the Mexican government prior to 1972 were too vague, only objects discovered and removed from Mexico after enactment of the 1972 law could be considered “stolen.” The *McClain* defendants were nonetheless convicted of conspiracy.

The *McClain* doctrine was later litigated in a civil case, *Peru v. Johnson*, which helped to outline the extent to which the *McClain* doctrine would apply in future cases.

**Peru v. Johnson, 720 F.Supp. 810 (C. D. Cal. 1989).**

The Peruvian government brought a civil suit in which it claimed to be the legal owner of 89 pre-Columbian artifacts seized from Johnson by U.S. Customs. Although Peru's 1929 law stated that artifacts in historical monuments were "the property of the State," Peruvian citizens collected and possessed such objects and they could be transferred by gift, bequest or intestate succession. The Court determined that the criteria set for a foreign national patrimony law to be enforced in the U.S. were not satisfied. The Peruvian government had allowed private ownership within Peru and not exercised its ownership rights except on export, so in effect, Peruvian patrimony laws before 1985 were merely export restrictions. The government also did not establish that the imported objects had come from within the present national borders of Peru and that the Peruvian government was the legal owner; similar objects were found in neighboring Bolivia, Ecuador, and Columbia.

The decision in *Peru v. Johnson* indicated that despite the *McClain* doctrine, foreign patrimony laws that declared all cultural property to be state-owned would not necessarily be recognized as valid proof of ownership by U.S. courts, depending on how those laws were drafted and actually enforced.

However, in *United States v. Schultz*, the Second Circuit reaffirmed that the NSPA applies to property that is stolen in violation of a foreign patrimony law.

**United States v. Schultz, 333 F.3d 393 (2d Cir. 2003), cert. denied, 540 U.S. 1106 (2004).**

In 1983, Egypt had enacted Law 117, which vested ownership of all antiquities in the Egyptian government. Prior to 1983, the Egyptian government licensed approximately 150 art dealers to sell antiquities. However, after that date, any antiquities removed without permission were stolen property under Egyptian law. Although corruption and illicit excavation is sometimes tolerated in Egypt, the Egyptian government took seriously its nationalization laws, attempted to secure archaeological sites, and prosecuted Egyptian art dealers who sold items illegally.

Frederick Schultz, a prominent New York art dealer, and his British partner, Jonathon Tokeley-Parry, purchased a cache of Egyptian antiquities from corrupt police authorities in Cairo and transported them to England disguised as modern reproductions. One object was a valuable head of the 18<sup>th</sup> Dynasty pharaoh, Amenhotep III. Once in England, Tokeley-Parry created fake provenances for the items, prepared fake labels, and 'restored' the Amenhotep III head in 1920s style. He identified them as coming from a fictitious older collection called the "Thomas Alcock Collection." The head was sent to the U.S. and offered to the Metropolitan Museum of Art under the Thomas Alcock provenance.

Schultz was arrested and was convicted in district court for the Southern District of New York under the NSPA for conspiring to deal in antiquities stolen from Egypt. On appeal, Schultz argued that the Egyptian patrimony law was not an ownership law, but an export control law and therefore the head was not stolen under the NSPA. He challenged the validity of *McClain*, arguing that under the NSPA, the U.S. did not regard objects taken in violation of a foreign ownership law as stolen property.

The Second Circuit held that Egypt's patrimony law was a true ownership law, based on the clear language of Egypt's Law 117. The Egyptian law asserted state ownership of all antiquities, required their recording by the state, prohibited their private ownership or possession, and required anyone discovering a new antiquity to notify the Antiquities Authority. The Second Circuit also held that the NSPA applies to property that is taken in violation of a foreign patrimony law, finding no meaningful difference between property stolen from a foreign nation and property stolen from a foreign museum or private home. Further, the Court stated that the CPIA is not the exclusive means of dealing with stolen artifacts and antiquities.

Taken together, *McClain* and *Schultz* indicate that national patrimony laws significantly affect what antiquities U.S. buyers may legally purchase. A number of legal scholars have criticized the *McClain/Schultz* doctrine as poor public policy, arguing that objects covered by a foreign patrimony law are not really owned by the nation and that recognition of such ownership rights greatly decreases the availability of objects for both private collectors and museums in the United States. Proponents of *McClain/Schultz* doctrine argue that patrimony laws are an effective means of reducing incentives to purchase undocumented antiquities because they deny title to the finder. Given that the vast majority of antiquities are undocumented and most art source countries have enacted national patrimony laws, this argument amounts to a general assertion that the antiquities market, as it operates today, should not exist.

## PART XV. STATE AND COUNTY-LEVEL CIVIL FORFEITURE CASES BASED ON FOREIGN PATRIMONY CLAIMS

Cultural property cases are not limited to federal government actions. State and even county-level authorities have implemented ad hoc anti-antiquities trade policies in which civil forfeiture is used to seize objects that are assumed to be “stolen” without proof of the circumstances required by the courts in *McClain* and *Schultz*.

In New York City, the art capital of the United States, an Assistant District Attorney for the County of New York, Matthew Bogdanos, has recently raised the stakes for collectors, auction houses, and art dealers even higher with a series of seizures of antiquities that have been in private collections (and even in a museum) for many decades. Seizures and threatened prosecutions of allegedly ‘stolen’ cultural property made in 2017-2018 by the New York County (Manhattan) District Attorney’s office involved objects from well-known U.S. and Canadian private and public art collections dating back 20-70 years. New York police have also delivered warrants and seized objects at New York art fairs, which are important international marketplaces. The most recent seizures were made under a New York State law that requires secondhand dealers and pawnbrokers to have invoices showing the ownership history and transfer records of goods they deal with. (A dealer in secondhand items has a duty to inquire into the provenance of goods he acquires.) The seized items were alleged by the prosecutor to have been ‘stolen’ based upon foreign ownership laws nationalizing artworks or on theft claims that were not raised by foreign governments until they were contacted by New York prosecutors.<sup>295</sup>

The New York District Attorney’s office relied on the same national patrimony laws that are litigated in NSPA cases to establish for the purpose of warrants that the cultural property seized under the NY pawnbroker’s law was actually stolen.<sup>296</sup> Both the costs of defending against such charges and the potential damage to an owner’s reputation are very high, and even the obviously innocent owners who purchased their antiquities from an insurance company for a museum declined to fight the seizures.<sup>297</sup> Under these circumstances, civil forfeiture has become “a third theory of liability.”<sup>298</sup>

## PART XVI. CUSTOMS LAWS AND ENFORCEMENT

Customs laws regulate the flow of goods into and out of the United States, categorize them according to a tariff schedule, collect duties, and ensure proper labeling, with the goal of “protecting the public from dangerous people and materials while enhancing the Nation’s global economic competitiveness.” The U.S. Customs and Border Protection (CBP) illustrates its enormous responsibilities with the following statement: “On a typical day, CBP welcomes nearly one million visitors, screens more than 67,000 cargo containers, arrests more than 1,100 individuals, and seizes nearly 6 tons of illicit drugs.”<sup>299</sup>

Among the important laws and procedures applied to entry of foreign goods are:

### 1. False declaration of country of origin or value.

Customs violations can form the basis for a cultural property investigation and prosecution. These include: Entry Via False Classification, 18 U.S.C. § 541 (1976); Entry Via False Statements, 18 U.S.C. § 542 (1976); Unlawful Export, 18 U.S.C. § 554 (1976); and Unlawful Import, 18 U.S.C. § 545 (1976).

### 2. Customs Civil and criminal forfeiture

Under Customs laws and regulations for failure to properly declare.

### 3. 19 U.S.C. § 1595a(c)(1)(A) (2015):

<sup>295</sup> Kate Fitz Gibbon, *New York District Attorney Goes After Art Collections*, CULTURAL PROPERTY NEWS (Feb. 11, 2018) <https://culturalpropertynews.org/new-york-district-attorney-goes-after-art-collections/>. See also Instant Conviction of a Japanese Dealer (Mar. 30, 2016) CULTURAL PROPERTY NEWS, <https://culturalpropertynews.org/instant-conviction-of-japanese-dealer/>.

<sup>296</sup> Kate Fitz Gibbon, *New York District Attorney Goes After Art Collections*, *supra* n. 296.

<sup>297</sup> *Id.*

<sup>298</sup> William Pearlstein, Symposium, *Reform of U.S. Cultural Property Policy: Accountability, Transparency, and Legal Certainty*, CULTURAL PROPERTY NEWS (Apr. 10, 2014), <https://culturalpropertynews.org/reform-of-u-s-cultural-property-policy-accountability-transparency-and-legal-certainty/>.

<sup>299</sup> *About CBP*, U.S. CUSTOMS & BORDERS PROT., <https://www.cbp.gov/about>.

Merchandise entered into the US can be seized and forfeited if stolen, smuggled, or clandestinely imported or introduced into the United States contrary to law. The burden of proof is on the importer to show that import is not contrary to law. General Customs provisions provide for either criminal prosecution, 18 U.S.C. §§ 542 and 545, or civil forfeiture, 19 U.S.C. § 1595a(c)(l) (A). A forfeiture action under Section 545 authorizes the civil forfeiture of substitute assets if the property forfeited is unavailable.

The extent and scope of import restrictions and the specific circumstances in which Customs and Border Protection seize objects subject to CPIA-based import restrictions differs from the expectations of U.S. lawmakers and the Department of State at the time of drafting UNESCO and the CPIA. At the time, Mark Feldman, the State Department Deputy Legal Adviser and delegate to both the UNESCO Convention and the Congressional committee hearings on what became the CPIA represented to Congress that “it would be hard . . . to imagine a case” where coins would be restricted under what would become the CPIA.<sup>300</sup> Today, coins that circulated very widely in ancient times are routinely included in Designated Lists pertaining to agreements under the CPIA.

The burden of proof required for seizure has also changed, despite the intent and plain text of the law. During the drafting of the 1970 UNESCO Convention, Mr. Feldman allayed concerns about the government meeting its burden of proof in what ultimately became CPIA. He stated:

“The Government must show both that it [the artifact] fits in the proscribed category and that it comes from the country making the agreement. So the burden of proof of provenance is on the Government . . . . This means in a significant number of cases it will not be possible to require an object’s return . . . . The only country that would have the right to claim such an object under the bill is the country where it was first discovered. It would have to be established that the object was removed from the country of origin after the date of the regulation.”<sup>301</sup>

Some observers have expressed concerns that the current Customs procedure with respect to the import of cultural property is not consistent with the above statements or the rule of law. According to attorney Peter K. Tompa, writing in April 2019:

“Import restrictions, as applied by CBP, controversially embargo all undocumented items of types on designated lists *imported* after the effective date of the regulations, not just items *illegally exported* from a UNESCO State party after the effective date of import restrictions as required under CPIA, 19 U.S.C. §§ 2601, 2604, 2606, 2610. Such regulatory actions have converted CPIA import restrictions into embargos of all cultural goods of restricted types rather than targeted, prospective import restrictions that do not impact the purchase of such items from the legitimate marketplace abroad.”<sup>302</sup>

300 *Cultural Property Treaty Legislation: Hearing on H.R. 3403 Before the H. Subcomm. on Trade of the Comm. on Ways and Means*, 96th Cong. 8 (1979).

301 Statement of Deputy Legal Adviser Mark Feldman, in Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 4 SYRACUSE J. INT’L L. & COM. 97, 129–30 (1977).

302 Email from Peter K. Tompa to Author (Apr. 24, 2019) (on file with author).

## PART XVII. CASES UNDER CUSTOMS LAWS

### ***United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999), *aff'g*, F.Supp. 222 (S.D.N.Y. 1997).**

The Second Circuit avoided having to deal with the *McClain* doctrine in a 1999 case, *United States v. An Antique Platter of Gold*, by confining its opinion to the illegal importation of an antiquity into the United States. This case involved a 4th Century BC libation bowl, called a phiale, of hammered gold with intricately worked rows of acorns, beechnuts, bees and lotuses, and an inscription in a Doric dialect on its edge.<sup>303</sup> It was not known in the art world until 1980, when one Sicilian art collector sold it to another Sicilian art collector. The second art collector transferred it to a Zurich art dealer who offered it to Robert Haber, a New York art dealer. He, in turn, entered into an agreement on behalf of Michael Steinhardt, a well-known New York collector, to purchase the phiale for over \$1 million.

Haber, acting for Steinhardt, flew to Switzerland where he took possession of the phiale. According to the prosecution, Robert Haber, while acting for Mr. Steinhardt, had attempted to conceal its Italian origins. The commercial invoice and customs form prepared by Haber indicated that the country of origin was Switzerland – where he took possession of the object.

The Italian government requested that the United States government investigate the circumstances of the phiale's exportation and confiscate it for return to Italy. The U.S. Attorney's Office filed an in rem civil forfeiture action asserting that forfeiture was appropriate because Steinhardt made false statements on the customs form, a violation of Customs law 18 U.S.C. § 542, and that a false statement on a customs form renders an illegally imported object subject to forfeiture under 18 U.S.C. § 545. The U.S. Attorney also charged that forfeiture was appropriate because the phiale was stolen property under the NSPA because Italy had a patrimony law vesting ownership in the state. On appeal, the Second Circuit affirmed, finding that Steinhardt had made a material misstatement on the customs form when he represented that the antiquity was from Switzerland, not Italy. The Court declined to address the charge under the National Stolen Property Act, because the customs violation alone was sufficient ground for seizure and civil forfeiture.

## PART XVIII. OTHER U.S. LAWS AFFECTING INTERNATIONAL CULTURAL PROPERTY AND MUSEUMS

Other Federal Laws Utilized in Cultural Property Cases:	
<b>Theft of Government Property, 18 U.S.C. §§ 641 and 2114</b>	When an individual embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof.
<b>The Hobbs Act, 18 U.S.C. § 1951</b>	Interference with commerce by threats or violence, utilized when art crimes involve robbery or extortion.
<b>False Statements, 18 U.S.C. § 1001, Obstruction of Justice, 18 U.S.C. §§ 1501–1521, and Perjury, 18 U.S.C. §§ 1621–1623</b>	All could apply when someone falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes a false statement was made to a federal officer
<b>Wire Fraud, 18 U.S.C. § 1343, or Mail Fraud, 18 U.S.C. § 1341</b>	Statutes could apply if object being sold was fake.

<sup>303</sup> Robert D. McFadden, *Judge Rules Ancient Sicilian Golden Bowl was Illegally Imported*, N.Y. TIMES, Nov. 18, 1997, <https://www.nytimes.com/1997/11/18/nyregion/judge-rules-ancient-sicilian-golden-bowl-was-illegally-imported.html>.

<b>Money Laundering, 18 U.S.C. § 1956</b>	Allows a \$500,000 fine or twice the amount involved, whichever is greater, for using proceeds of unlawful activity or failing to report transactions.
<b>Aiding and Abetting, 18 U.S.C. § 2(a), Causing, 18 U.S.C. § 2(b), and Conspiracy, 18 U.S.C. § 371</b>	Applies to co-conspirators to a crime involving cultural property
<b>Theft of Major Artwork Act, 18 U.S.C. § 668(a) (1) (1994)</b>	applies to thefts from U.S. museums only. Stolen property must qualify as an “object of cultural heritage,” meaning an object that is either over 100 years old and worth more than \$5,000, or worth more than \$100,000. The Theft of Major Artwork Act has a twenty-year statute of limitations, much longer than most crimes under U.S. law.
<b>Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091–2095 (1972)</b>	This statute directed that a descriptive list be made identifying pre-Columbian stone carvings and wall art, and provided that no pre-Columbian monumental or architectural sculpture or mural of the type listed that was exported from the country of origin after October 27, 1972 could be imported into the United States without certification that its exportation was not in violation of the laws of the exporting country. Any pre-Columbian monumental or architectural sculpture or mural imported into the United States in violation of this law could be seized and forfeited. If forfeited, it should by preference be returned to its source country.

## PART XIX. ENFORCEMENT OF CULTURAL PROPERTY LAWS, SENTENCING AND THE 2002 CULTURAL HERITAGE RESOURCE CRIMES SENTENCING GUIDELINES

The general penalty provisions for the cultural property related crimes discussed above are shown in the below chart.

<b>Federal law</b>	<b>Penalties – 5 year statute of limitations (SOL) unless noted.</b>
<b>American Antiquities Act, (1906) 16 U.S.C. §§ 431-433</b>	\$500 fine, 90 day imprisonment, or both.
<b>Archaeological Resources Protection Act (1979) 16 USC §§ 470aa-mm</b>	Civil: fine equaling cost of repair to archeological site or value of objects. Criminal: For objects valued under \$500: up to \$10,000 fine, one year. For objects valued over \$500: up to \$20,000 fine, two years imprisonment. Subsequent offense subject to higher fines and up to five years imprisonment.
<b>Native American Graves Protection and Repatriation Act (1990) 25 USC § 3001 et seq.</b>	Criminal penalties for trafficking under 18 U.S.C. § 1170 include fines in accordance with Title 18, imprisonment up to one year or both. Subsequent violation subject to further fines, imprisonment up to five years, or both.
<b>Lacey Act (1900) 16 USC §§ 3371 - 3378</b>	Civil: up to \$10,000 per violation. Criminal: up to \$20,000 per violation, five years imprisonment, or both.
<b>Migratory Bird Treaty Act (1918) 16 USC §§ 703-712</b>	Misdemeanor: fine up to \$15,000, six months imprisonment, or both. Felony for sales: fines up to \$2,000, up to two years imprisonment, or both. Baiting: Fined under title 18, imprisoned up to 1 year, or both.

<b>Bald and Golden Eagle Protection Act (1940-1962) 16 U.S.C. §§ 668-668d</b>	Criminal: \$5,000 or one year imprisonment or both. Subsequent offense: fine not more than \$10,000 or not more than two years imprisonment.
<b>Marine Mammal Protection Act 16 U.S.C. §§ 1361-62 16 U.S.C §§ 1371-1423</b>	Civil: not more than \$10,000 fine for each violation. Criminal: not more than \$20,000 for each violation, one year, or both.
<b>16 U.S.C. § 641 Theft of government property.</b>	Misdemeanor: If object(s) valued between \$100-\$999 then \$1000 fine, less than 1 year imprisonment, or both. Felony: If object(s) valued greater than \$1,000+: \$10,000 fine, ten years imprisonment or both.
<b>18 U.S.C. § 1361 Intentional destruction of government property.</b>	Misdemeanor: If damage is less than \$1,000, fine up to \$100,000, up to one-year imprisonment, or both. Felony: If damage is greater than \$1,000, fine up to \$250,000, up to ten years imprisonment, or both. 8-year Statute of Limitations.
<b>Endangered Species Act (1973) 7 U.S.C. § 136, 16 U.S.C. § 1531-1543</b>	Continuing offense, no Statute of Limitations. ESA penalty schedule is complex, see <a href="http://www.gc.noaa.gov/schedules/6-ESA/EndangeredSpeciesAct.pdf">www.gc.noaa.gov/schedules/6-ESA/EndangeredSpeciesAct.pdf</a>
<b>National Stolen Property Act (1934) 18 U.S.C. § 2311, §§ 2314-15</b>	If object valued at greater than \$5,000, then fine pursuant to title 18, up to 10 years imprisonment, or both.

Crimes involving cultural property can include:

- theft of objects from public and private collections,
- looting of archaeological and ethnographic objects from sites
- illegal export and import
- smuggling across borders
- objects not properly declared, mislabeled objects
- neglect during peacetime and destruction in war and terrorist activity

Administration and enforcement of federal laws involving cultural property in the U.S. are dealt with by a variety of public agencies in the Executive Branch of the federal government. Most U.S. states also have state-level agencies and laws dealing with destruction of archaeological remains on state lands, theft and damage to property, and state-level environmental laws. These state laws often replicate federal statutes in scope and content on a state level, but these are too numerous to discuss in this report.

The Department of Homeland Security (DHS), a cabinet level federal agency, has a Cultural Property, Art and Antiquities Program specifically focused on illegal trafficking. U.S. Immigration and Customs Enforcement (ICE), a subagency within the Department of Homeland Security, investigates violations of Customs laws, and together with its sister agency U.S. Customs and Border Protection, administers import and export laws, initiates forfeitures and seizures and investigates Customs violations. Homeland Security/Customs has a special unit focused on art and cultural property crime.<sup>304</sup> The Federal Bureau of Investigation investigates U.S. domestic crimes involving domestic and international cultural property and coordinates with foreign law enforcement and with INTERPOL. The FBI becomes involved in cases in which there is interstate transportation of stolen property. The FBI also has an Art Theft Program and manages a publicly available database of art stolen within the United States known as the National Stolen Art File.<sup>305</sup> The Department of Justice administers civil and criminal forfeitures and prosecutions for violations of customs laws and National Stolen Property Act and other theft law cases.

The 2002 Cultural Heritage Resource Crimes Sentencing Guideline provided a new guideline (§2B1.5) for offenses involving the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources.<sup>306</sup> The phrase “cultural heritage resource” includes human remains; “cultural objects” as defined under NAGPRA, “archaeological resources” under ARPA,

<sup>304</sup> Cultural Property, Art, and Antiquities Investigations, U.S. IMMIGRATION & CUSTOMS ENF'T, <https://www.ice.gov/cultural-art-investigations> (last reviewed Mar. 29, 2017).

<sup>305</sup> *FBI Art Theft Program*, F.B.I., <https://www.fbi.gov/video-repository/newss-fbi-art-theft-program/view>.

<sup>306</sup> U.S. SENTENCING GUIDELINES MANUAL § 2B1.5 (U.S. SENTENCING COMM'N 2016); UNITED STATES SENTENCING COMMISSION, 2002 ANNUAL REPORT: CHAPTER TWO, THE SENTENCING GUIDELINES 13 (2002).



*Orthodox Holy Trinity St. Nicholas Chapel at Fort Ross, Sonoma County, California, part of the Fort Ross State Historic Park. Originally built in the mid-1820s but destroyed in the 1906 earthquake. In 1970, a restored version of the chapel was destroyed in an accidental fire. The reconstructed chapel, built in 1973, is used for Orthodox religious services. Frank Schulenburg (1969–), 18 December 2016. © Frank Schulenburg / CC BY-SA 4.0*

and archaeological or ethnological materials designated under the CPIA. Examples given by the U.S. Sentencing Commission included “vandalizing the Vietnam Memorial, stealing a Native American ceremonial mask, [and] destroying the Liberty Bell.”<sup>307</sup>

The sentencing guidelines allow increased penalties if the crime is deemed to have “special offense characteristics” because the crime took place at a site associated with cultural heritage. This might include a national monument, park, cemetery, memorial, marine sanctuary, or museum. Sentences could also be increased if a defendant had a pattern of misconduct involving cultural heritage resources. Penalty increases could result from a crime being committed for profit, or if the defendant used a weapon in committing the crime. The increases in punishment would result from an increase in a defendant’s “base offense level” through a numeric formula that would add to the base offense level depending on the factors above.

## PART XX. FOREIGN SOVEREIGN IMMUNITY FROM SEIZURE LAWS

Following the 1965 Immunity From Judicial Seizure statute,<sup>308</sup> the Foreign Sovereign Immunities Act (FSIA) of 1976<sup>309</sup> limited jurisdiction in a civil lawsuit against a foreign state to the federal courts, providing that they would only have jurisdiction if the following three elements were met: (1) rights in property were taken in violation of international law, (2) the property is present in the United States, and (3) the property has a connection to a commercial activity in the United States conducted by the foreign state.<sup>310</sup>

307 Press Release, Sentencing Commission Increases Penalties For Crimes Against Cultural Heritage, U.S. Sentencing Comm’n (Mar. 25, 2002) <https://www.ussc.gov/about/news/press-releases/march-25-2002>.

308 22 U.S.C. §2459 (1965).

309 Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602–1607 (1976).

310 28 U.S.C. § 1605(a)(3).

Enactment of the FSIA was in part spurred by the Soviet Union's concerns that art loaned for public exhibition might be subject to claims by descendants of pre-Revolutionary owners from whom it had been confiscated. The FSIA granted broad immunity to foreign governments for cultural objects and works of art imported for temporary exhibition in U.S. museums. Prior to importation, the U.S. Information Agency would make the determination that the works were "of cultural significance" and that public exhibition would be "in the national interest." Today, review and certification under the FSIA is done by the Department of State.

Under the FSIA, the extent of a lending institution's commercial activity in the U.S. or how directly that commercial activity is related to artworks claimed in a civil lawsuit has been an issue for courts determining whether there was jurisdiction over the claim. A 2007 case regarding such a claim, *Malewicz v. City of Amsterdam*,<sup>311</sup> not only raised doubts about the ability of the FSIA to protect loaned objects from seizure, but also discouraged loans from foreign collections to U.S. museums. Making such loans, even if profitable to the foreign museums that packaged them, had not previously been deemed commercial activities that could subject loaned materials to U.S. claims. The Court found that the City of Amsterdam's loan of the artworks to a U.S. museum was a "commercial activity" and that there "is nothing "sovereign" about the act of lending art pieces" and denied the city's motion to dismiss.<sup>312</sup> The case was ultimately settled in 2008.

The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act<sup>313</sup> (FCEJICA) of 2016 amended the FSIA to clarify the circumstances in which foreign governments and foreign state museums are protected from having artworks loaned to a U.S. museum seized by creditors or individuals claiming superior title. The law clarifies that foreign government or foreign state museum-owned works imported for the purpose of exhibition may not be considered part of "commercial activity" and are immune from U.S. litigation under the doctrine of sovereign immunity. For immunity to attach, the U.S. State Department must review and certify that a proposed exhibition is culturally significant and in the national interest.

Exceptions to sovereign immunity remain: claims concerning works taken by the Nazi government or its allies during World War II, and claims concerning works taken through a systematic government campaign against members of a targeted group.

## PART XXI. HOLOCAUST RESTITUTION CLAIMS

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Laws and cases related to Holocaust-era artworks are not covered in this report. Holocaust-related claims are a specialized area of legal practice due to the complexity of laws in the different countries in which art and other property was stolen, expropriated, held under the cover of law, and eventually claimed by owners and their heirs.<sup>314</sup>

However, it should be noted that a recent U.S. law, the Holocaust Expropriated Art Recovery Act of 2016 (HEAR),<sup>315</sup> was enacted to harmonize the varied statutes of limitation under different U.S. state laws, and thereby reduce the incentive for forum shopping among claimants. The HEAR Act requires claims for art taken under the Nazis to be brought within six years from the time when the claimant knew that he had an ownership interest in the object claimed and had discovered the object's location. The law also sets a six-year limit from December 16, 2016 to bring an existing claim, even if that claim was previously time-barred. The HEAR Act defines the very broad range of objects that may be claimed as pictures, paintings, and drawings; statuary art and sculpture; engravings, prints, lithographs, and works of graphic art; applied art and original artistic assemblages and montages; books, archives, musical objects and manuscripts, sound, photographic, and cinematographic archives and media, and sacred and ceremonial objects and Judaica.

Prior to passage of the HEAR Act, laws affecting Holocaust claims that set different statutes of limitation included a California statute, the Civil Procedure Code § 354.3, Action to recover Holocaust-era artwork, and a federal statute, the Holocaust Victims Redress Act (HVRA)<sup>316</sup>.

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311 *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 301-04 (D.D.C.2005); 517 F. Supp. 2d 322 (D.D.C. 2007).

312 *Id.* at 314.

313 Pub. L. No. 114-319, 130 Stat. 1618 (Dec. 16, 2016).

314 An admirable resource is NICHOLAS M. O'DONNELL, *A TRAGIC FATE: LAW AND ETHICS IN THE BATTLE OVER NAZI-LOOTED ART* (2017).

315 Holocaust Expropriated Art Recovery Act of 2016 (HEAR), Pub. L. No. 114-308 (2016).

316 Pub. L. No. 105-158, 112 Stat. 15 (1998) and the Law of Acquisitive Prescription, LA. CIV. CODE ANN. ARTS. 3489-91 (1982).

## **PART XXII. THE NATIONAL HISTORIC PRESERVATION ACT, NATIONAL ENVIRONMENTAL POLICY ACT AND CULTURAL RESOURCE MANAGEMENT<sup>317</sup>**

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In addition to protections on ‘domestic’ heritage of the indigenous inhabitants of the lands now comprising the U.S., there are thousands of U.S. properties, from civic monuments to archaeological sites to shipwrecks, that receive various degrees of ‘protection’ by federal, state, county, and city governments because of their historic associations, scientific value, outstanding architecture or natural beauty.

Specific federal, state and local laws are intended to ensure preservation of places, buildings and landscapes that represent a part of American history integrated into our civic lives. Although there is legal overlap with the Native American Graves Preservation and Repatriation Act and especially the Archaeological Resources Protection Act, many of these places are not usually thought of as ‘cultural properties’ but rather as ‘cultural resources.’ There are general principles, standards, and guidelines for their administration, and Congress has passed laws designed to protect them from harm from the public, from business interests and the government itself.

The National Historic Preservation Act of 1966 (NHPA)<sup>318</sup> begins with the premises that:

- (1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;
- (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;
- (3) historic properties significant to the Nation’s heritage are being lost or substantially altered, often inadvertently, with increasing frequency;
- (4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.

The NHPA acknowledges that “the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role,” but asserts that it is the federal government’s responsibility to encourage and assist the private sector, state and local governments, Indian tribes and Native Hawaiian organizations in this task.

The Act creates a hierarchy linking federal historic preservation officers in the Department of the Interior with State Historic Preservation Officers for consultation, the development of statewide historic preservation plans, and applications for federal funding for conservation projects. The NHPA authorizes the Secretary of the Interior to expand and maintain a National Register of Historic Places, and to establish criteria for and designate National Historic Landmarks (designations as Historic Places and Historic Landmarks existed prior to passage of the NHPA). Private owners of properties can object to their being included in the National Register of Historic Places or designated as National Historic Landmarks. The properties will not be included until the objection is withdrawn.

There are very detailed and rigorously applied regulations under the NHPA’s Section 106,<sup>319</sup> which require the head of any Federal agency with jurisdiction over a project to consider the effects of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register before licensing the project or approving the expenditure of Federal funds. The proper implementation of these regulations is the most complex aspect of the NHPA.

The 1970 National Environmental Policy Act<sup>320</sup> (NEPA) was the first major U.S. law regulating actions affecting the environment. NEPA requires Federal Agencies to assess the environmental effects of their proposed actions prior to making decisions. Performing Environmental Assessments (EAs) and Environmental Impact Statements (EISs) may be necessary as part of the consultation that takes place within a NAGPRA context. These analyses may be part of a major development project with what one thinks of as typical environmental contexts - toxicity or pollution directly resulting from a proposed activity. However, environmental impact detrimental to cultural heritage can also be more indirect, and a construction project may result in harm to a population that does not live in immediate proximity to it. For example, Native peoples may use a distant site for gathering herbs for spiritual purposes or for ceremonies.

The National Environmental Policy Act works together with NAGPRA. If there is an accidental discovery of human

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317 See THOMAS F. KING, CULTURAL RESOURCE LAWS AND PRACTICE, AN INTRODUCTORY GUIDE, (2004).

318 National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* (1966).

319 16 U.S.C. § 470f.

320 42 U.S.C. § 4321 *et seq.* (1970).



*The mission church of San Esteban Rey at Acoma Pueblo, 14 April 2009, Photo by Karla Kaulfuss, Creative Commons Attribution 2.0 Generic license.*

remains, or as more often happens, cultural items are discovered on federal land during construction, work must be halted and the area and objects protected. The agency with management authority must be notified, and the project can only be resumed 30 days after certification by the agency head that the notification was received. The federal agency must “take appropriate steps to identify the lineal descendant, Indian tribe, or Native Hawaiian organization entitled to custody of the human remains, funerary objects, sacred objects, or objects of cultural patrimony” by notifying them in writing.<sup>321</sup> Clearly, this could result in significant, possibly repeated delays to a project. In order to mitigate this possibility, NAGPRA provides for developing a written ‘plan of action’ in advance of construction after consultation with tribes or Native Hawaiian organizations that are likely to have a cultural affiliation with any objects that may be discovered.<sup>322</sup> This plan of action sets forth detailed information on what objects might be expected to be found, how custody would be determined, the planned treatment, care, and handling of such remains or objects, how archaeological recording will be done, the analysis that found items might be subject to, who to contact in the tribal government or organization, appropriate traditional treatment of remains, sacred objects, etc., the type of reports to be prepared, and the planned disposition of any remains or objects found.<sup>323</sup>

## **PART XXIII. NON-GOVERNMENT SOLUTIONS TO CULTURAL PROPERTY ISSUES**

There is tremendous uncertainty inherent in the application of U.S. laws on cultural property today. If it is legal to import and trade in objects that meet the criteria for lawful import under the Cultural Property Implementation Act, then the vast majority of objects in trade in the primary international markets in the U.S., U.K. and Europe meet those criteria. If there is a chance that an object was exported from a source country after passage of a nationalizing patrimony law that meets the criteria set forth in *U.S. v. Schultz*, then that object could be illegal to trade or possess, if a court held that the national patrimony law in question was valid under *Schultz*.

<sup>321</sup> 43 C.F.R. § 10.5(b) (1995); 60 Fed. Reg. 62,158 (Dec. 4, 1995), (as amended in 62 Fed. Reg. 41,293 (Aug. 1, 1997).

<sup>322</sup> 43 C.F.R. §10.5(e)

<sup>323</sup> *Id.*

With hundreds of thousands if not millions of undocumented antiquities in circulation, exported from well over 100 source countries at different times over the last 500 years or so, it is unworkable to rely on prospective court determinations. The effect of *Schultz* is to render objects long held in U.S. museum collections potentially subject to decades-old source country claims, and to chill, even to freeze the antiquities market by uncertainty.

The difference between the two U.S. legal regimes is irreconcilable. What is lawful under one may be unlawful under the other. This conflict forms an insuperable barrier to a predictable, coherent, and lawful U.S. market. Art dealers, auction houses, collectors and museums have adopted compromise measures, from limiting acquisitions to pre-1970 exports (as most museums have done, but which has no actual legal relevance) to requiring a pre-2000 record of ownership (as some auction houses have done, which also has no legal relevance). None of this is workable, in part because the current approaches all require documentation that either never existed or has been lost, in part because many source countries passed nationalizing laws but did not enforce them, and their validity under *Schultz* is questionable.

Below are several approaches taken by U.S. museums and the art trade to find practical and ethical solutions outside of the law to these legal uncertainties and inequities.

### U.S. Museums, Acquisition Policies and the “1970 Rule”

U.S. museum policies on acquisition and acceptance of gifts of art and antiquities today are as much a consequence of the prosecutions of old-time Italian art smugglers Giacomo Medici and Gianfranco Becchina<sup>324</sup> (and a never-convicted English dealer<sup>325</sup>) as they are a considered response to the problems of looting and archaeological depredation. In September 1995, a raid on a free-port warehouse in Switzerland exposed a smuggling operation run by Italian antiquities dealer Giacomo Medici. Investigators found antiquities, written records of purchases from looters, and snapshots of illegal diggings.<sup>326</sup> A number of well-known artworks that had been acquired by the J. Paul Getty Museum and other major museums appeared in photographs: some were in unrestored condition and others encrusted with dirt. (The photographs from the 22-year-old Medici seizure and 17-year-old documentation from Sicilian dealer Gianfranco Becchina still have not been made public so that museums and auction houses can identify looted objects.<sup>327</sup>)

Over the next decade, the head of Italy’s Carabinieri art squad visited U.S. museums—among them the Metropolitan Museum of Art in New York, the Museum of Fine Arts Boston, the Princeton Museum of Art, the Cleveland Museum of Art and Toledo Museum of Art in Ohio, and the Virginia Museum of Fine Art—to deliver official requests from the Italian government for return of artworks in their collections. The museums complied, in large part, and Italy agreed to future loans of antiquities in exchange. However, the claims of trafficking in looted antiquities tarnished the reputation of U.S. museums as well as costing them important artworks of great value<sup>328</sup>. The Archaeological Institute of America called upon the major museums to institute clearer acquisition policies to prevent the circulation of recently looted antiquities.<sup>329</sup>

The Association of Art Museum Directors (AAMD), whose members included the directors of the concerned museums, imposed guidelines, starting in 2008 and strengthening them in 2013,<sup>330</sup> that restricted member museums from acquiring or accepting donations or even loans of ancient art unless certain criteria are met. These same criteria have been adopted by many museums outside of the AAMD as well.

The 2013 AAMD *Guidelines on the Acquisition of Archaeological Material and Ancient Art* state that while the museum community was strongly committed to a lawful global trade in art, and believed that the artistic achievements of all civilizations should be represented in art museums, it deplored the illicit and unscientific excavation of archaeological materials and ancient art and the destruction of ancient monuments. The AAMD committed itself to due diligence in the acquisition process, transparency in acquisitions policies, and prompt disclosure following acquisitions.

<sup>324</sup> Neil Brodie, *Gianfranco Becchina*, TRAFFICKING CULTURE (last modified Aug. 20, 2012) <https://traffickingculture.org/encyclopedia/case-studies/gianfranco-becchina/>, and Neil Brodie, *Giacomo Medici*, TRAFFICKING CULTURE (last modified Apr. 10, 2012) <https://traffickingculture.org/encyclopedia/case-studies/giacomo-medici/>.

<sup>325</sup> Howard Swains, *London’s Loot: The legacy of Robin Symes*, MEDIUM (Sept. 24, 2017) <https://medium.com/@howardswains/robin-symes-looted-antiquities-9e4dc232059d>.

<sup>326</sup> Elisabetta Povoledo, *Photographs of Getty Griffins Shown At Antiquities Trial in Rome*, N.Y. TIMES June 1, 2006 <https://www.nytimes.com/2006/06/01/arts/01gett.html>.

<sup>327</sup> *Tsirogiannis: Master of the Blame-Game Goes After Frieze Masters*, CULTURAL PROPERTY NEWS, (Oct. 28, 2017) <https://culturalpropertynews.org/tsirogiannis-master-of-the-blame-game-goes-after-frieze-masters/>.

<sup>328</sup> The public embarrassment suffered by the Getty and the museum’s vilification in the press was a lesson not lost on the Metropolitan Museum of Art in New York, among others.

<sup>329</sup> Professional Responsibilities Committee, *Principles for Museum Acquisitions of Antiquities*, ARCHAEOLOGICAL INSTITUTE OF AMERICA (2006) [https://www.archaeological.org/pdfs/archaeologywatch/museumpolicy/AIA\\_Principles\\_Museum\\_Acquisition.pdf](https://www.archaeological.org/pdfs/archaeologywatch/museumpolicy/AIA_Principles_Museum_Acquisition.pdf).

<sup>330</sup> *Guidelines on the Acquisition of Archaeological Material and Ancient Art*, ASSOCIATION OF ART MUSEUM DIRECTORS (2013) <https://aamd.org/sites/default/files/document/AAMD%20Guidelines%202013.pdf>.

The AAMD chose the date of the UNESCO Convention, November 17, 1970, as the threshold for the application of more rigorous standards to the acquisition of archaeological materials and ancient art as well as for the development of a unified set of expectations for museums, sellers and donors. For museum acquisition or acceptance as a donation, there must be sufficient provenance to demonstrate that the artwork was lawfully exported—i.e. with a permit from the source country—or was already outside the country of its probable modern discovery prior to 1970, to qualify to be purchased or accepted as a donation.

These guidelines have changed the rules for many thousands of U.S. collectors who intended to make gifts or bequests to a museum but are now unable to gift them because they are unable to provide the requisite provenance information under the new standards. They have also created an estimated million-plus ‘orphan’ objects in US collections that, unless they are deemed to have met the discretionary criteria that museums can apply under the guidelines, cannot have the benefit of museum ownership, exhibition, publication or conservation.

Given that this “1970 Rule” pertains to an almost unrestricted, undocumented trade that continued until the late 1990s, its application has been problematic. U.S. museums are still seeking a way to balance an arbitrary date of export before 1970 (the date of the 1970 UNESCO Convention) or proof of lawful export (almost never available) for an artwork to be accepted for accession into their collections. The AAMD’s assumption (under Article I(E) of the guidelines) that a pre-1970 acquisition will be granted repose by a source country has not been fulfilled: no art-source country has limited its claims against museums only to objects exported after 1970; in fact, some claims have been made for items that have been in museums for 100 years or more.<sup>331</sup>

Under the AAMD guidelines, if a museum reviews the information available on an artwork and determines that it is unlikely to have been recently looted or that it is reasonable to assume that an object has been in the US since 1970, then it may acquire or accept the object. However, many museums appear to view the 1970 date as an absolute cutoff date and few are willing to risk criticism for acquiring an object, especially one that is not considered very important. This results in the inability to donate works that while not spectacular, do merit a museum placement for their historical, aesthetic or educational value.

According to former Getty Museum curator, scholar, and U.S. diplomat Arthur Houghton:

The consequences of the AAMD’s rulemaking are not pretty. A recent study suggests that the volume of material excluded from museum acquisition by the guidelines is truly enormous. The study... which excludes objects under \$1000 value, fragments, and coins, indicates that from 68,000 to 112,000 objects of Greek, Roman or related make already in the U.S. could not be donated, shown to the public by our museums, or conserved for the benefit of future generations. Extending the study to other cultures —pre-Colombian, Near Eastern, Asian, Oceanic—the number of significant objects now denied to museum acquisition almost certainly exceeds one million, and may reach two or more.<sup>332</sup>

In emphasizing the massive orphan problem, Houghton also noted the absurdity of condemning legitimate objects for lacking documentation that they never had either because it was simply unavailable or because they were never required to have it before 2004, when the AAMD first adopted the 1970 Rule.<sup>333</sup>

The AAMD *Registry of New Acquisitions of Archaeological Material and Works of Ancient Art* is a database where museums can post information on acquisitions of artworks and artifacts by AAMD member museums.<sup>334</sup> This database

331 For example, Turkey seeks the return of a number of objects from German museums based upon an Ottoman Empire law forbidding export from 1884 to 1906. *Museum Wars: Ankara Demands Artifacts from Berlin*, SPIEGEL ONLINE, Mar. 14, 2013, <http://www.spiegel.de/international/germany/dispute-heats-up-between-germany-and-turkey-over-contested-artifacts-a-888398.html>. Turkey is also seeking the return of Objects from U.S. museums in their collections since 1966. Jason Felch, *Turkey asks U.S. museums for return of antiquities*, L.A. TIMES, Mar. 30, 2012, <http://articles.latimes.com/2012/mar/30/entertainment/la-et-turkey-antiquities-20120331>.

332 Arthur Houghton, Debate shows antiquities question far from settled, THE ART NEWSPAPER, April 2013, at 46.

333 *Id.*

334 *New Acquisitions of Archaeological Material and Works of Ancient Art*, Association of Art Museum Directors, <https://aamd.org/object-registry/new-acquisitions-of-archaeological-material-and-works-of-ancient-art/more-info>



*Setting up a robotic camera just above the 3 in "2013" above the Times Square NYC ball. Photo by Anthony Quintano. 30 December 2012. Creative Commons Attribution 2.0 Generic license.*

gives notice of the whereabouts of the object to a broad class of potential claimants. In addition, many museums are in the process of putting their entire collections, along with each object's ownership history, on globally accessible Internet sites.

The AAMD has also developed protocols to offer safe haven to works in danger of looting or destruction in war, terrorist activity or natural disasters in its 2015 *Protocols For Safe Havens For Works Of Cultural Significance From Countries In Crisis*.<sup>335</sup> By offering straightforward, practical solutions to safeguard art in danger, the AAMD member museums have given primacy to the key task of protecting art, however and from whomsoever it is received, without undue bureaucratic process, and provided concrete assurance to source countries that art given safe harbor will be returned.

**Voluntary Returns Program of ATADA (Native American objects), Voluntary adoption of standards for sale by professional organizations dealing in antiquities and Native American art**

The U.S. largest tribal and ethnographic art dealers' association, ATADA, set up a Voluntary Returns Program in late 2016 to encourage the return of certain legally-owned but ceremonially important objects to tribes. Since its inception, the Voluntary Returns program has facilitated the return of over 200 ceremonially important objects to Southwest tribes, including items of great sacred import, such as an altar, a Zuni war god, and numerous Hopi and Navajo masks, jish, and flat dolls from Southwestern tribes. Most of the items were gathered from collectors who had owned them for 40-60 years.<sup>336</sup>

ATADA and other art dealer associations have recognized that some lawfully traded items have cultural and religious significance to tribes and that sales of such items, though legal, are not appropriate. ATADA has rewritten its bylaws and guidelines for members in recent years in order to encourage returns of sacred items. ATADA's Bylaws prohibit the sale by its members of items "known to be of important, current, sacred, communal use" by tribes. Such rules are in addition to performing due diligence in all acquisitions to ensure that an accurate provenance is obtained and that

<sup>335</sup> *Protocols For Safe Havens For Works Of Cultural Significance From Countries In Crisis*, AAMD (Sept. 28, 2015) <https://aamd.org/sites/default/files/document/Save%20Haven%20Protocols%2010%2015%20282%29.pdf>.

<sup>336</sup> *Voluntary Returns Program*, ATADA, <https://atada.org/voluntary-returns/>.

professional standards are met in all financial transactions.<sup>337</sup>

### **Committee for Cultural Policy Proposals for Cultural Property Reform and Creation of an Antiquities Database**

An antiquities database would be of inestimable help in resolving cultural property disputes by creating a baseline of objects already outside of countries of origin, by giving notice to source countries, and repose to objects long in circulation. William Pearlstein, in *A Proposal to Reform U.S. Law and Policy*, a 2014 White Paper sponsored by the Committee for Cultural Policy and published in the *Cardozo Law School Arts and Entertainment Law Journal*, suggested that a universally accessible database of objects be created that would encourage transparency among market participants, motivate claimants to come forward, and restore legitimacy and value to non-1970 compliant objects.<sup>338</sup> A digital database could provide for digital records of ownership that would travel with the object through its hopefully infinite lifespan. A database of both museum and privately-owned objects is certainly technologically feasible today, but Pearlstein suggested that passage into law would be the only way to ensure that conditions set for a timely claim would be binding on foreign and domestic governments and agencies.<sup>339</sup>

## **PART XXIV. SUMMARY RESPONSES TO SUPPLEMENTARY QUESTIONS**

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### **1. Are there prohibitions on export of cultural property?**

Only unlawfully held or owned objects are prohibited from being exported from the United States; Native American and Native Hawaiian objects may be exported unless obtained in violation of federal, state, or local law. Anything legal to possess or trade domestically may be exported unless prohibited under environmental or endangered species type laws.

### **2. Are there permitting system, or other mechanisms, for the export of cultural property, and for what purposes (sale, exhibition, exchange)?**

No permitting system specifically for cultural property is currently in existence. The U.S. is signatory to the Convention on International Trade in Endangered Species (CITES) and CITES regulations are followed on export/import. There are export restrictions on ivory, bird parts and feathers, and endangered species under both Federal and state laws.

### **3. Does the law recognize religious or other cultural institutional ownership of cultural property?**

Yes, all forms of institutional ownership are recognized as private property. The U.S. has a system of tax credits for donation of art and cultural property to U.S. and certain foreign museums and other charitable entities.

### **4. Does the law clearly vest title to cultural property in the state from a certain date?**

Title to U.S. cultural property (including objects protected under NAGRPA, ARPA, etc.) does not vest in the U.S. government unless unlawfully taken from federal lands.

### **5. Does the state allow domestic trade (shop or gallery or auction sales, private sales or other transfers) in the same kinds of cultural property that it restricts export in?**

Legally acquired objects of American heritage of types categorized as “cultural property” under UNESCO 1970 can be legally sold in the U.S. However, although prosecutions are rare, if an object was exported from a foreign country after passage of a national ownership law vesting title in the foreign state, it is possible that transfer, and even possession of the object could result in a prosecution under the National Stolen Property Act.

### **6. Does the State allow export of cultural property to any other nation that is restricted under a U.S. law or MOU under the US Cultural Property Implementation Act?**

Yes, in general. Goods already in the U.S. are presumed to be lawfully acquired and are not covered by export restrictions. Restrictions under MOUs and the CPIA are on the import of covered objects—not their export. Goods unlawfully acquired or subject to a U.S. MOU or other agreement with a source country may be seized on entry, even if in transit to another country via the U.S.

### **7. Does the state maintain an inventory of cultural property so that it is possible to establish the date of illicit removal or of export?**

As noted above, in the U.S., cultural property is not owned by the nation, except objects in the limited number of national museums, in the Library of Congress, or otherwise belonging to federal agencies. There is no national inventory of cultural property. All U.S. museums have inventories. Most of the larger collecting US museums now have

<sup>337</sup> *Bylaws & Policies*, ATADA, <https://atada.org/bylaws-policies/>.

<sup>338</sup> Pearlstein, *supra* n. 51 at 579.

<sup>339</sup> *Id.* at 580.



*An aerial view of the Getty Center museum in Brentwood, Los Angeles, viewed from the south. Photo by Jeslon25, 25 July 2009, Creative Commons Attribution-Share Alike 4.0 International license.*

publicly available online inventories that include detailed records and images of hundreds of thousands of objects.

Communally owned Native American objects (the most likely objects to have legal restriction of any kind) are not cataloged, nor have the 573 federally recognized tribes created a list of ceremonial or communally owned items. Information on what items tribes consider sacred is deemed secret, accessible only to initiates within the tribes.

**8. Does the state make its laws available domestically or internationally so that an exporter (or a subsequent owner or holder) could reasonably know at the time of export (or later come to know) that the object was exported in violation of the law?**

All U.S. federal, state, and most local laws and regulations are readily available online.

**9. Which government agencies or cultural institutions document and track cultural property?**

All cultural institutions track the art/cultural property in their possession to facilitate preservation, management, exhibitions and exchange, and to serve their public purposes. The U.S. government tracks only cultural property owned by the government, a very small subset of the total property in inventory.

Stolen cultural property is tracked by the Federal Bureau of Investigation in the FBI National Stolen Art File.<sup>340</sup> A few other law enforcement agencies also have online lists of stolen artworks, including Los Angeles County Police Department,<sup>341</sup> but most do not share inventories of stolen works with the public.

The FBI shares stolen property lists with the international organization INTERPOL, which has an online inventory accessible to anyone who applies.<sup>342</sup> The world's largest database of stolen art is the Art Loss Register, now located in England.<sup>343</sup> The Art Loss Register has reduced or free rates for searching for art lost in the Holocaust.

<sup>340</sup> *National Stolen Art File*, F.B.I., <https://www.fbi.gov/investigate/violent-crime/art-theft/national-stolen-art-file>.

<sup>341</sup> *Art Theft Detail*, L.A. POLICE DEPT., [http://www.lapdonline.org/art\\_theft\\_detail/](http://www.lapdonline.org/art_theft_detail/).

<sup>342</sup> *Database of Stolen Art*, INTERPOL, <https://www.interpol.int/Crime-areas/Works-of-art/Database>.

<sup>343</sup> THE ART LOSS REGISTER, <http://www.artloss.com/en>.

**10. Are there procedures for the recovery of cultural property (under treaties, or other agreements) that has been 'lost' to foreign nations?**

Government to government requests for return through diplomatic offices is one mechanism listed under Article 7(b) (ii) of the 1970 UNESCO Convention. Government to government mediation regarding cultural property claims is available through the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation (1978). This body has an advisory nature and is available to Member States and Associate Members of UNESCO.

A foreign state police or investigative agency can contact U.S. law enforcement to make enquiries on the foreign nation's behalf under a Mutual Legal Assistance Treaty. U.S. law enforcement agencies such as the FBI, or federal prosecutor's office will deliver letters demanding return of objects placed at auction from source country claimants, or issue subpoenas to auction houses requiring production of information on consignors.

**11. What is the funding for law enforcement and prosecutions?**

Extensive funding is available for federal law enforcement and prosecutions, as federal prosecutions are handled by the office of the U.S. Attorney. Homeland Security/ICE have made cultural property issues a focus of their public relations programs, dedicating space on websites to seizures and repatriations. However, in large part due to the cost of defending against a charge, most prosecutions end in a plea agreement, and most civil lawsuits result in settlement. Very few prosecutions come to trial.

**12. How many prosecutions are there each year for violation of cultural property laws, export laws and related offences?**

This information is not publicly available at this time. Over thirty federal agencies previously collected data on vandalism and theft of domestic cultural property of Native Americans and Native Hawaiians. However, this information is no longer collated to form a national assessment.<sup>344</sup>

**13. Is there information available on the financial value of seizures of cultural property?**

Law enforcement will ascribe a financial value to objects seized or the subject of a prosecution in individual cases. However, the values ascribed by prosecutors in cases involving seized American Indian art have been criticized as inflated.<sup>345</sup> The Manhattan District Attorney's office has alleged that Indian sculptures and artifacts seized in raids on storage sites as part of the investigation of art dealer Subash Kapoor were worth approximately \$100 million dollars. Art experts agreed that values were wildly exaggerated<sup>346</sup> and that many objects were fakes.<sup>347</sup>

**14. Can the classification of an object or a real estate property as a cultural property be extinguished? (Can something revert from being cultural property to not being cultural property? Who manages this?)**

In the U.S., there is no mechanism for classifying movable objects as national cultural property. However, President Donald Trump has reduced the size of national monuments. The Bears Ears National Monument in Utah was established in 2016 at over 1.3 million acres. It was reorganized into two monuments one year later totaling 228,784 acres).

**15. Are there requirements for archaeological review and excavation as part of government or private development and construction?**

Yes. Contractors working in both government and private construction are obliged to have prior archaeological review of likely sites, especially on public lands. Government and private contractors must perform archaeological review of plans under most federal, state and county regulations. If human remains are found during construction, then work is halted pending further review. There is no protection for archaeological sites on private land, unless human remains are found. State archaeologists and contracting private archaeologists routinely halt construction for archaeological review and excavation. (See Part XXII: The National Historic Preservation Act, National Environmental Policy Act and Cultural Resource Management).

<sup>344</sup> See Kim Dohner & Karen Mudar, *The Listing of Outlaw Treachery (LOOT) Clearinghouse*, NAT'L PARK SERV., <https://www.nps.gov/archeology/sites/npsites/loot.htm> (last updated May 9, 2019); *The SRC Data: Background*, NAT'L PARK SERV., <https://www.nps.gov/archeology/src/data.htm> (last updated May 9, 2019).

<sup>345</sup> Susan Montoya Brian, *After FBI Raids, Dealers Slowly Regain Trust*, NBC NEWS, Aug. 19, 2011, [http://www.nbcnews.com/id/44206108/ns/technology\\_and\\_science-science/t/after-raids-artifact-dealers-slowly-regain-trust/#.W-PLkCdRe7A](http://www.nbcnews.com/id/44206108/ns/technology_and_science-science/t/after-raids-artifact-dealers-slowly-regain-trust/#.W-PLkCdRe7A).

<sup>346</sup> Personal communications after review of video and Manhattan District Attorney's valuation of Kapoor seizures from two former museum directors, two international Indian art dealers, in possession of the author.

<sup>347</sup> See Amrita Madhukalya, *UNESCO portal to act as global directory of stolen antiquities*, DAILY NEWS & ANALYSIS, Oct. 7, 2016, <https://www.dnaindia.com/india/report-unesco-portal-to-act-as-global-directory-of-stolen-antiquities-2262007>.

## PART XXV: APPENDIX

Chart 1: Chronological Order of United States Cultural Property Legislation

Chart 2: Important Cultural Property Case Law in the United States

Chart 3: U.S. Environmental Laws & Native American Ritual Use (Summary)

Chart 4: Development of U.S. Ivory Law

### United States Cultural Property Legislation

<b>1906</b>	<b>Antiquities Act</b>	Made it a crime to excavate, injure or destroy any site or appropriate any object of antiquity on lands owned or controlled by the government.
<b>1934</b>	<b>National Stolen Property Act</b>	Makes it a crime to knowingly possess, conceal, sell, or dispose of any goods of the value of \$5,000 or more, which have crossed a State or US boundary after being “stolen.” This general theft law, not the CPIA, is now the primary legal foundation in the U.S. for foreign ownership claims for antiquities and other cultural property.
<b>1972</b>	<b>Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091–2095</b>	No pre-Columbian monumental or architectural sculpture or mural of the type listed that was exported from the country of origin after October 27, 1972 may be imported into the United States without a certificate, certifying that its exportation was not in violation of the laws of that country.
<b>1976</b>	<b>Foreign Sovereign Immunities Act (FSIA)</b>	Limits jurisdiction in a civil lawsuit against a foreign state to the federal courts, if three elements are met: (1) rights in property were taken in violation of international law, (2) the property is present in the United States, and (3) the property has a connection to a commercial activity in the United States conducted by the foreign state.
<b>1979</b>	<b>Archaeological Resources Protection Act (ARPA)</b>	Established federal ownership of “archeological resources” on federal or Indian land, made excavation illegal without a permit, and prohibited trafficking in interstate or foreign commerce of any archaeological resources taken or possessed in violation of any U.S. federal, state or local law.
<b>1983</b>	<b>Cultural Property Implementation Act</b>	Established statutory guidelines for determining when the United States will impose import restrictions upon particular items of cultural property of “cultural significance” and established an independent U.S. process for review of foreign nations’ requests for import restrictions and for the enactment of agreements with foreign nations.

<b>1990</b>	<b>Native American Graves Protection and Repatriation Act (NAGPRA)</b>	<p>Provides for restitution of both newly discovered and institutionally held human remains and objects from any government-funded U.S. museums.</p> <p>Requires museums to inventory all Native American objects and establishes processes for claims from tribes.</p> <p>Prohibits trafficking in Native American human remains without the right of possession and in cultural items that were obtained in violation of NAGPRA.</p>
<b>1994</b>	<b>Theft of Major Artwork Act</b>	<p>Thefts from museums only. Stolen property must qualify as an “object of cultural heritage,” meaning an object that is either over 100 years old and worth more than \$5,000, or worth more than \$100,000.</p>
<b>2016</b>	<b>Holocaust Expatriated Art Recovery Act of 2016 (HEAR)</b>	<p>Requires claims for art taken under the Nazis to be brought within six years from the time when the claimant knew that he/she had an ownership interest in the object claimed and had discovered the object’s location.</p>

Applies to Foreign Cultural Property

### Important Cultural Property Case Law in the U.S.

<b>1974</b>	<p><b>United States v. Diaz.</b> 499 F.2d 113 (9th Cir. 1974)  <b>Disputed Object:</b> Western Apache face masks  <b>Underlying Legislation:</b> 1906 Antiquities Act  <b>Holding:</b> Ninth Circuit held that the Antiquity Act’s definitions of “object of antiquity” unconstitutionally vague.</p>
<b>1977</b>	<p><b>United States v. McClain,</b> 551 F.2d 52 (5th Cir. 1977), 545 F.2d 998 (5th Cir. 1977), 593 F.2d 658 (5th Cir. 1970, cert. denied, 44 U.S. 918 (1979))  <b>Disputed Object:</b> Pre-Columbian artifacts  <b>Underlying Legislation:</b> National Stolen Property Act  <b>Holding:</b> Held that taking possession of a cultural object in violation of a foreign patrimony law can give rise to criminal liability under the NSPA. When a cultural object is removed without permission from a country with a national patrimony law covering that object, the object is deemed “stolen.”</p>
<b>1989</b>	<p><b>Peru v. Johnson,</b> 720 F.Supp. 810 (C. D. Cal. 1989)  <b>Disputed Object:</b> Pre-Columbia Artifacts  <b>Underlying Legislation:</b> National Stolen Property Act  <b>Holding:</b> Held that despite the McClain doctrine, foreign patrimony laws that declared all cultural property to be state-owned would not necessarily be recognized as valid proof of ownership by U.S. courts, depending on how those laws were drafted and actually enforced.</p>

- 1997** [\*\*United States v. Corrow, 119 F.3d 796 \(10th Cir. 1997\)\*\*](#)  
**Disputed Object:** Navajo ceremonial masks  
**Underlying Legislation:** NAGPRA; Migratory Bird Treaty Act (MBTA)  
**Holding:** The 10th Circuit Court of Appeals upheld all convictions of Richard Corrow, an art dealer and Navajo art enthusiast, finding that Corrow had notice of the cultural significance of the objects, based on Corrow's expert knowledge of Navajo traditions and his misrepresentations regarding the objects' future.
- 1997** [\*\*United States v. An Antique Platter of Gold, 184 F.3d 131 \(2d Cir. 1999\), aff'g F.Supp. 222 \(S.D.N.Y. 1997\)\*\*](#)  
**Disputed Object:** Ancient Sicilian phiale  
**Underlying Legislation:** United States Customs laws  
**Holding:** Finding that well-known art dealer had made a material misstatement on the customs form when he represented that the antiquity was from Switzerland (where possession was taken), and not Italy (the object's origin location). The Court declined address the charge under the National Stolen Property Act, because the customs violation alone was sufficient ground for seizure and civil forfeiture.
- 1999** [\*\*United States v. Tidwell. 191 F.3d 976 \(9th Cir. 1999\)\*\*](#)  
**Disputed Object:** Hopi masks, also called Kwaatsi or Kachina, and a set of priest robes from the Pueblo of Acoma  
**Underlying Legislation:** NAGPRA  
**Holding:** Found that Tidwell had sufficient knowledge of Native American art and culture to put him on notice of NAGPRA's restrictions
- 2002** [\*\*Bonnichsen v. United States, 217 F. Supp. 2d 1116 \(D. Or. 2002\) and Bonnichsen v. United States, 357 F.3d 962 \(9th Cir. 2004\)\*\*](#)  
**Disputed Object:** Kennewick Man (pre-historic skeleton)  
**Underlying Legislation:** NAGPRA, ARPA, National Historic Preservation Act  
**Holding:** In 2002, the District Court ruled that Kennewick Man was not subject to NAGPRA, based on the DOI's definition of "Native American" and that no tribe had sufficiently established that there was a shared group identity or a previously existing tribe to which the skeleton belonged. Instead finding that ARPA applied to the remains, and that the Army Corps of Engineers violated the National Historic Preservation Act when they buried the site. The Court further ruled that scientists have a statutory right to study ancient artifacts and remains such as Kennewick Man. (Upheld on appeal)
- 1999** [\*\*United States v. An Original Manuscript, No. 96-6221, 1999 U.S. Dist. LEXIS 1859 \(S.D.N.Y. Feb. 19,1999\)\*\*](#)  
**Disputed Object:** Spanish Franciscan manuscript dated 1778  
**Underlying Legislation:** CPIA; United States customs laws  
**Holding:** The Court found that the manuscript's importer was not an innocent buyer, but rather was "willfully blind" to the object's suspicious origin and lack of documentation. The court also found that the importer was not entitled to compensation as part of the forfeiture action because Mexico would not have asked the U.S. to pay compensation if the circumstances were reversed.

**2004****United States v. Schultz**, 333 F.3d 393 (2d Cir. 2003), cert. denied, 540 U.S. 1106 (2004).**Disputed Object:** Egyptian antiquities**Underlying Legislation:** NSPA**Holding:** Egypt's patrimony law was a true ownership law, based on the clear language of Egypt's Law 117. The Egyptian law asserted state ownership of all antiquities, required their recording by the state, prohibited their private ownership or possession, and required anyone discovering a new antiquity to notify the Antiquities Authority.**2005****Malewicz v. City of Amsterdam**, 362 F. Supp. 2d 298, 301-04 (D.D.C.2005), 517 F. Supp. 2d 322 (D.D.C. 2007)**Disputed Object:** Collection of artworks by Russian artist Kazimir Malewicz**Underlying Legislation:** Foreign Sovereign Immunities Act**Holding:** Denying the City of Amsterdam's motion to dismiss, finding that the City's loan of the artworks to a U.S. museum was a "commercial activity" and there is "is nothing 'sovereign' about the act of lending art pieces."**2011****Ancient Coin Collectors Guild v. U.S. Customs and Border Prot.**, 801 F. Supp. 2d 383 (D. Md. 2011), aff'd, No. 11-2012 (4th Cir. 2012).**Disputed Object:** Ancient Cypriot and Italian coins**Underlying Legislation:** CPIA**Holding:** On appeal, the Fourth Circuit construed CPIA import restrictions as de facto embargoes on archaeological objects found on designated lists. The importer bears the burden of establishing that the object left the country that has requested import restrictions "before those restrictions went into effect or more than ten years before the date of import."

# U.S. Environmental Laws & Native American Ritual Use

## The Lacey Act (1900)

Makes it a crime to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife, plant or wood if any U.S., state, or foreign law was violated in its taking, import, export or sale.

**Excludes:** Objects and materials (e.g. tribal art) made outside of covered dates

## Migratory Bird Treaty Act (MBTA) (1962)

Protects declining populations of migratory birds from commercial destructions (e.g. sport, food, fashion) and all species native to the U.S. and its territories which are those that occur as a result of natural biological or ecological processes

**Excludes:** Feathers or bird parts that were legally collected prior to the signing of the treaties in which the species are legal to possess and transport without a permit, but they may not be purchased imported or exported.

## The Bald and Golden Eagle Protection Act (BGEPA) (1940)

Prohibits the trade of bald or golden eagle feathers or body parts regardless of date. Feathers and other parts collected before passage of this law are legal to possess, transport, and give away, but not to sell. It is illegal even to possess feathers or parts of bald or golden eagles that were killed or collected after 1940 and 1962 respectively.

**Excludes:** A 1962 amendment allows Native Americans from federally registered tribes access to eagle feathers through a permitting system that distributes the feathers for ritual use

## Marine Mammal Protection Act (1972)

Prohibits the taking and trading of marine mammals (sea otter, walrus, polar bear, dugong, and manatee) and their products but allows certain exemptions under State management.

**Excludes:** New marine mammal ivory may be carved only by Alaska Natives and sold only after it has been carved. However, old ivory maybe carved by non-Natives. Fossilized mammoth ivory may be used by both Alaska Natives and non-Natives. Beach-found ivory is legal to own if registered, but may not be bartered or sold.

## Endangered Species Act (1973)

Covers objects protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

**Excludes:** Antique objects made of endangered species that are more than 100 years old.

# DEVELOPMENT OF U.S. IVORY LAW

## Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1975)

CITES grouped plant and animal species in need of protection into three categories based on the level of threat to the survival of each species. Each category had different restrictions on trade; species may move between categories based upon their current threat level. The CITES member countries agreed that all importing, exporting, and other actions of restricted species would be controlled through a licensing system. The CITES licensing system excluded antique specimens as not relevant to its conservation program. The United States joined CITES on January 14, 1974.

## Endangered Species Act (ESA)

The ESA implements CITES under U.S. law, but uses different categories than CITES, categorizing protected species as either “endangered” or “threatened.” The Asian elephant has always been listed as endangered under the ESA, and, therefore, Asian and African elephant ivory less than 100 years old has not been legal to trade in the US since 1975. Trade of African elephant ivory is further controlled by AfECA and 50 C.F.R. § 17.40(e).

However, if ivory meets the criteria to be considered an ESA antique, it may be sold in interstate sales (from a state without an ivory law, to a state in which there was no ivory law). The criteria for an item to be considered an ESA antique are: (A) It is 100 years or older; (B) It is composed in whole or in part of an ESA-listed species; (C) It has not been repaired or modified with any such species after December 27, 1973; and (D) It is being or was imported through an endangered species “antique port.”

## African Elephant Conservation Act of 1989 (AfECA)

Imposed a moratorium on importing most African elephant ivory into the United States or exporting African elephant ivory out of the United States. However, Sport-hunted trophies, which required permits from the African nations that promoted hunting, were an exception to the moratorium and could be imported into the United States. The rule also allowed persons to import carved ivory with a permit, but exporting raw ivory from the United States was not allowed.

## 50 C.F.R. § 17.40(e) (2016)

Builds on and expands restrictions already in place under the AfECA and prohibits all commercial import, export, and interstate trade of African elephant ivory with some exceptions. These exceptions include antiques that are proven to be more than 100 years old. There are also exceptions, subject to certain criteria, if the ivory is *de minimis*, if the ivory is imported or exported for law enforcement or scientific purposes, or if it is part of a musical instrument, part of a travelling exhibition or part of a household move or inheritance. Sport-hunted trophies may also be imported if certain criteria are met.

## State Laws Prohibiting Trade or Possession of Ivory:

### California

CAL. FISH & GAME CODE § 2022 (2017)

### Hawaii

HAW. REV. STAT. § 183D (2017)

### New Jersey

N.J. STAT. ANN. § 23:2A-13.3 (2014)

### New York

N.Y. ENVTL. CONSERV. LAW § 11-0535-A (Consol. 2019)

### Oregon

OR. REV. STAT. § 498.022 (2017)

### Washington

WASH. REV. CODE § 77.15 (2017)