

White Paper: An Executive Summary



Executive Summary – [CCP White Paper](#): A Proposal to Reform U.S. Law and Policy Relating to the International Exchange of Cultural Property

Today, it is widely understood that many foreign governments have enacted ownership laws that cover virtually all ancient art and archeological materials, whether in or out of the ground. It is relatively little known that U.S. criminal law — both Federal and state — can automatically be triggered by foreign national ownership laws, and that Federal agents can and frequently do seize objects that have been legally acquired abroad but presumptively fall within a foreign ownership claim. The U.S. has deviated sharply from the policy set by Congress to enable a reasonable transfer of art and artifacts in the public interest. The consequences for museums, private collectors, and the trade in art are profound.

The purpose of this White Paper is to frame the issues and propose specific measures that need to be taken to rectify the imbalance between domestic public policy and enforcing foreign laws. Its goal is to generate a dialogue that can lead to reforms needed to restore Congressional intent and to halt practices that harm U.S. cultural life and the public interest.

In the past, it was broadly understood that cultural property policy should balance the competing interests of national heritage, archaeological context and international cultural exchange. Congress saw a lawful international trade in antiquities as an important medium of cultural exchange. Today, this view has been discarded by many Federal agencies. The Executive Branch and the courts appear determined to give the fullest effect to foreign laws, intentionally disregarding the essential precepts of past policy and the public interest. Enforcement agencies have made it clear that they are prepared to take extra-legal actions, including seizures of objects without specific evidence based on a presumption of foreign ownership.

The consequence of current Executive Branch policies and actions is dramatic. Museums, collectors and buyers and sellers of ancient art are concerned that collecting, trading and even possessing objects acquired in good faith may result in legal action or seizures prompted by the claims of foreign states. The belief is growing that current U.S. policy has undermined the legitimacy of objects acquired in good faith and legally held.

Adding to the uncertainty, the Association of Art Museum Directors (AAMD) has imposed guidelines that restrict member museums from acquiring or even accepting loans of ancient

material unless it meets certain criteria. Prior to 1970, the work must have been outside the country of its probable modern discovery. These guidelines have changed the rules for collectors who intended to make gifts or bequests to a museum but are now deterred from donating. They have also had the predictable effect of creating an estimated million-plus “orphaned” objects that can never have the benefit of museum ownership, exhibition, publication or conservation. The AAMD guidelines are based on an assumption that a pre-1970 acquisition will be granted repose that has proven false: no source country has given any indication that it would limit its claims against museums to objects imported into the U.S. after 1970.

The White Paper offers five specific proposals to rectify the profoundly confusing situation that currently exists. Four involve changes to law or Federal agency practice; the last envisions the creation of a privately-held object database. The database can be set up now, but should have the benefit of law to ensure that its terms are binding on all participants, including foreign countries and U.S. and state governments. Taken together, these five proposals would establish a unified, integrated, and internally consistent policy governing the importation and ownership of ancient artworks and other cultural materials by Americans and U.S. museums.

Amend Criminal Law.

Liability under criminal law should be limited to actual theft of provenanced or site-specific objects as envisioned by Congress under the 1983 Cultural Property Implementation Act. U.S. criminal laws should no longer be triggered by the “blank-check” rule of the National Stolen Property Act. S. 605 of 1985 should be revived and passed. This would restore the original intent of U.S. policy makers and conform criminal law to Congressional intent.

Ensure that Customs Practice Conforms with U.S. Law.

Current practice of U.S. Customs and Border Patrol (CBP) and the U.S. Attorney is to exploit the doctrine of civil forfeiture to seize, detain and repatriate objects claimed by a foreign country without proof of any of the elements needed to demonstrate theft under the McClain and Schultz cases. These elements are whether the foreign law includes a clear and unambiguous declaration of national ownership, or is domestically enforced, or was in effect on the date of export, or whether the importer knew or consciously avoided knowledge of the applicable law at the date of export. The doctrine of civil forfeiture should be reformed to comply with the basic requirements of the McClain and Schultz decisions.

Ensure that the Legal Requirements of the Cultural Property Implementation Act are followed.

The U.S. State Department has executed Memoranda of Understanding with foreign State Parties that impose sweeping import restrictions on broad categories of archaeological and ethnological materials. A number of these MOUs fail to satisfy the basic legal requirements of the CPIA. They cannot be reconciled with the plain language of the CPIA, the accompanying Senate Report, or the statements of the panelists who guided U.S. accession to the UNESCO Convention of 1970. Binding interpretive guidelines are needed to restore the checks and balances of the CPIA, and to ensure neutral interpretation of the CPIA and fair administration of

the Cultural Property Advisory Committee (CPAC). Moving the stewardship of the CPIA to the Department of Commerce should be considered.

Harmonize ARPA.

In several matters, the U.S. Justice Department has used the Archaeological Resources Protection Act of 1979 as a basis for seizure of foreign-sourced archaeological objects. Nothing in ARPA or its legislative history indicates that it was meant to address anything other than materials found on land owned or administered by the U.S. Government or Indian tribes. Although none of these matters were adjudicated, they are outliers. ARPA should be amended to limit its reach accordingly.

Create an Electronic Database of Objects to Encourage Transparency, Restore Liquidity and Provide Repose.

A universally accessible database of objects should be created that would encourage transparency among market participants, motivate claimants to come forward, and restore legitimacy and value to non-1970 compliant objects. A database of privately-owned objects is feasible today, but passage into law is preferable to remove any doubt as to whether its terms and conditions would be binding on foreign and domestic governments and agencies.

Conclusion

Public interest demands the restoration of common sense and fairness in U.S. policy affecting art and artifacts. Government actions far exceeding the boundaries set by Congress have usurped the role of museums to decide what they will collect, preserve, research, and exhibit in the public benefit.

No policy will satisfy everyone. But without a consistent policy and guaranteed repose for art that has been in the U.S. for decades, museums, philanthropists, art collectors, and the public – not looters and other criminals – will suffer. *A Proposal to Reform U.S. Law and Policy Relating to the International Exchange of Cultural Property*, by William G. Pearlstein lays the groundwork for a fruitful discussion that will serve the public interest and bring security to museums and their collections.