

**RESOLVING THE DISJUNCTION BETWEEN
CULTURAL PROPERTY POLICY AND LAW:**

A CALL FOR REFORM

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ABSTRACT

Cultural property policy in the United States has become increasingly lawless, for lack of a better term. In recent years, the executive branch has aggressively restricted the movement of cultural property into the United States, but it has repeatedly done so without regard for constraining legal authority. The result is a troubling disjunction between the executive branch's (the "Executive") current cultural property policies and the existing legal framework established by Congress and the Judiciary. We document that disjunction in this Article.

We explain, for example, how the executive branch has recently repatriated an Egyptian sarcophagus and an antique French automobile to their respective countries of origin, but it disregarded well-established judicial authority in the process. We explain how the executive branch has similarly sought to repatriate cultural objects to Italy, Peru, and Southeast Asia by relying on statutory authority that Congress plainly never designed for such a purpose. And we explain how the executive branch has imposed comprehensive import restrictions on cultural property from around the world without satisfying all of the statutory requirements mandated by Congress.

In addition to documenting this disjunction between policy and law, we situate it in its broader context. We submit that the disjunction reflects an outdated legal framework. That framework is the product of the 1970s, when the cultural property field was still forming, and it has not incorporated the dramatic political and

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normative developments of the last three decades. We further explain how the executive branch's willingness to disregard statutory constraints raises serious and unresolved separation of powers concerns. This precarious constitutional dynamic undermines the democratic process and invites arbitrary policymaking. We therefore argue that statutory reform is necessary to resolve the disjunction, modernize the legal framework, and restore the rule of law. We conclude by offering suggestions for reform.

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INTRODUCTION

In recent years, the executive branch (“the Executive”) has repeatedly restricted the movement of cultural property into the United States without regard for constraining legal authority. In this Article, we document this troubling, yet previously overlooked, disjunction between policy and law. We propose that statutory reform is necessary to accommodate the Executive’s current policy preferences and restore the rule of law. Moreover, given the substantial normative developments in the field over the last three decades, which largely coincide with current policy, we argue that such reform is not only ripe but practicable.

The current legal framework governing the movement of cultural property into the United States is a relic of the late 1970s and early 1980s, and it derives primarily from two federal statutes: the National Stolen Property Act (“NSPA”)¹ and the Convention on Cultural Property Implementation Act (“CCPIA”).²

Although it now acts as the federal government’s general theft

1. 18 U.S.C. §§ 2314-15 (2006).

2. 19 U.S.C. §§ 2601-13 (2006).

statute, the NSPA originally stems from Congress' desire to facilitate the prosecution of automobile thieves who crossed state lines.³ Despite the fact that the NSPA was never intended to address the unique issues surrounding cultural property, the Fifth Circuit's seminal *McClain* decisions in the late 1970s⁴ ("*McClain*") effectively transformed the statute into the Executive's principal legal instrument for restricting the movement of cultural property into the United States. Discussed in greater detail below, the Fifth Circuit in *McClain* broadly interpreted the term "stolen" for purposes of the NSPA to include antiquities illegally exported from foreign nations that had declared ownership over them.⁵ Recognizing the potential significance of *McClain*, archaeologists praised it as an advance in efforts to stem the illegal export of cultural property, thereby deterring unauthorized excavation and destruction of cultural sites.⁶ Art collectors and dealers, on the other hand, denounced *McClain* as a wholesale reversal of long-standing U.S. policy promoting the free movement of cultural property.⁷

Although *McClain* thrust the NSPA into the forefront of the cultural property field, the underlying debate between the interested stakeholders had been underway since before the start of that decade. Indeed, in the late 1960s the United States had played a critical role in drafting 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"),⁸ the central international legal instrument on the subject.⁹ The

3. See Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. L. REV. 123, 133-34 (2010) (discussing the origins of the NSPA).

4. *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977); *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979).

5. See *infra* Part I.A.

6. See, e.g., Ellen Herscher, *The Antiquities Market*, 12 J. FIELD ARCHAEOLOGY 469 (1985) (reviewing testimony presented by the Archaeological Institute of America to the Senate Judiciary Subcommittee on Criminal Law praising *McClain*).

7. See, e.g., James R. McAlee, *From the Boston Raphael to Peruvian Pots: Limitations on the Importation of Art into the United States*, 85 DICK. L. REV. 565, 580-81 (1981) (discussing the negative reaction of the Council of the American Association of Museums and the American Association of Dealers in Ancient, Oriental, and Primitive Art).

8. United Nations Educational, Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].

9. Andrew Adler, Book Review, 15 ART ANTIQUITY & L. 281, 281 (2010) (reviewing PATRICK J. O'KEEFE, COMMENTARY ON THE 1970 UNESCO CONVENTION (2d ed. 2007)). The other international legal instrument on the subject is the 1995 UNIDROIT Convention, which generally sought to establish uniform legal rules governing restitution claims for stolen cultural objects and return claims for illicitly exported

United States quickly ratified the Convention in 1972,¹⁰ but because the Convention was not self-executing,¹¹ a long and fierce debate ensued among the various stakeholders regarding how the United States should implement it.¹² Archaeologists sought a broad and robust implementation regime that would restrict the importation of cultural property, particularly antiquities, and require the United States to return cultural property illegally exported from foreign nations.¹³ Collectors and dealers, on the other hand, sought a more limited and selective implementation that would permit a regulated trade in cultural property.¹⁴ It was not until 1983 that Congress was finally able to broker a compromise and enact the CCPIA.¹⁵ Discussed in greater detail below, the CCPIA authorizes the Executive to remedy situations of cultural pillage abroad by imposing import restrictions on objects illegally exported from foreign nations; critically, however, such restrictions are authorized only if exacting statutory requirements are satisfied.¹⁶

Despite this delicate balance that Congress achieved in the CCPIA, in recent years the Executive has increasingly taken a one-sided approach and aggressively restricted the movement of cultural property into the United States. We do not address the wisdom of that policy but rather object to the cavalier method by which the Executive has sought to achieve it. In pursuing this objective, the Executive has disregarded the Judiciary's interpretation of the NSPA, the compromises democratically embedded in the CCPIA, and the long-standing prohibition against enforcing foreign export laws. In this Article, we identify several examples illustrating this disjunction between the Executive's cultural property policies and the existing legal framework.

In Part I, we discuss the Justice Department's misapplication of the NSPA, as that statute has been interpreted by the Judiciary.

cultural objects. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330.

10. 118 CONG. REC. S27,925 (daily ed. Aug. 11, 1972).

11. The United States ratified the 1970 UNESCO Convention with the understanding that it would not be self-executing. *Id.*

12. See Asif Efrat, *Protecting Against Plunder: The United States and the International Efforts Against Looting of Antiquities* 41-75 (Cornell Law Faculty Working Papers, Paper No. 47, 2009), available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1049&context=clsops_papers (summarizing the positions adopted by the various stakeholders during the legislative debate).

13. See *id.* at 43-49.

14. See *id.* at 49-60.

15. See Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT'L L.J. 690, 692 (2008) ("[T]he passage of the [CCPIA] in 1983 represented a rare compromise in what has been more usually a vitriolic debate among the various parties involved.").

16. See *infra* Part III.A.

Specifically, we explain that in two recent civil forfeiture complaints premised on *McClain*, federal prosecutors have failed, as a matter of law, to allege an underlying violation of the NSPA. Nonetheless, the Executive succeeded in having both cultural objects returned to their countries of origin.

In Part II, we discuss the Justice Department's international application of the Archaeological Resources Protection Act ("ARPA").¹⁷ We identify three instances in which federal prosecutors have successfully used ARPA, rather than the NSPA, to seek the return of archaeological resources to the countries from which they were allegedly stolen. Although there is no case law on point, we contend that the international application of ARPA impermissibly exceeds the scope of the statute, which Congress intended to apply only to archaeological resources discovered within the United States.

In Part III, we discuss the State Department's imposition of import restrictions under the CCPIA without regard for all of that statute's requirements. We first summarize how primary source documents revealed that, in 1997, the Executive had failed to comply with the statutory criteria when imposing comprehensive import restrictions on cultural property from Canada and Peru.¹⁸ Instead of correcting the problem, we explain how the State Department responded by perversely restricting public access to the information necessary to monitor its statutory compliance.¹⁹ We then submit that, despite this lack of transparency, the information that has been released strongly suggests that the Executive continues to impose broad import restrictions without regard for all of the statute's requirements.²⁰

While the cause of the Executive's willingness to disregard the legal framework is not entirely clear, we suspect that it is due in no small part to the fact that the legal framework is outdated. Indeed, the framework was established at a time when the cultural property field was nascent, there was no regulatory experience from which to draw, the issues had not yet ripened, and the stakeholders' arguments had not yet been fully refined.²¹ Over the last three decades, however, the normative landscape has changed substantially, as the stakeholders—particularly museums and collectors—have increasingly taken more nuanced and pragmatic approaches towards cultural property policy.

17. 16 U.S.C. §§ 470aa-mm (2006).

18. *See infra* Part III.B.

19. *See infra* Part III.C.

20. *See infra* Parts III.D-E.

21. The first law school text appeared in 1979, and the first art law treatise appeared a few years earlier. *See* JOHN HENRY MERRYMAN & ALBERT E. ELSÉN, *LAW, ETHICS, AND THE VISUAL ARTS: CASES AND MATERIALS* (1979); LEONARD D. DUBOFF, *THE DESKBOOK OF ART LAW* (1977).

Several examples from the past decade illustrate this normative shift. The American museum community has broadly adopted guidelines making it a breach of professional ethics to acquire an object without a clear provenance.²² Self-regulating guidelines of this sort would have been unthinkable to museum directors in the 1970s. Moreover, several American museums, confronted with clear evidence that objects in their collections had been recently looted, have agreed to return those objects to their countries of origin.²³ Similar evidence published in the late 1960s resulted in no such action.²⁴ The museum community's behavior has also affected private collectors, as some have similarly agreed to return looted objects in their collections to their countries of origin.²⁵ Moreover, in recent years the number of antiquities sold at public auction in the United States has decreased,²⁶ and the antiquities that have recently come to auction with secure provenance have fetched premiums.²⁷ That trend in the marketplace reflects a general, albeit not universal, acceptance that objects likely to have been recently looted should be shunned. Additionally, in the past decade several important market nations have ratified or accepted the 1970 UNESCO Convention, including the United Kingdom (2002), Japan (2002), Denmark (2003), Switzerland (2003), Germany (2007), and the Netherlands (2009).²⁸

22. See Jennifer Anglim Kreder, *The Revolution in U.S. Museums Concerning the Ethics of Acquiring Antiquities*, 64 U. MIAMI L. REV. 997, 1013-22 (2009) (discussing these ethical guidelines); see also Urice, *supra* note 3, at 125 ("Provenance refers to the history of an object and includes such information as when and by whom the object was made, who owned it, and its record of publication, public exhibition, and restoration or conservation. A related term, provenience, refers to an antiquity's archaeological context or find spot; thus, an antiquity's provenience forms a part of its provenance.") (footnote omitted).

23. See Kreder, *supra* note 22, at 1008-12 (discussing how several American museums have recently returned cultural objects to source nations).

24. See Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J., 94, 94 (1969) (documenting that, during the 1960s, "there ha[d] been an incalculable increase in the number of monuments systematically stolen, mutilated and illicitly exported from Guatemala and Mexico in order to feed the international art market") (alteration in original).

25. For example, in 2008, Shelby White, a New York philanthropist and antiquities collector, agreed to return ten Italian antiquities that Italy asserted had been recently looted. Elisabetta Povoledo, *Collector Returns Art Italy Says Was Looted*, N.Y. TIMES, Jan. 18, 2008, at B1.

26. See, e.g., David Gill, *Antiquities at Auction in New York*, LOOTING MATTERS (Jan. 5, 2010, 6:45 PM), <http://lootingmatters.blogspot.com/2010/01/antiquities-at-auction-in-new-york.html> ("The antiquities market in New York seems to be in serious decline. The overall sale of antiquities at Sotheby's and Christie's was down by over \$8.5 million [in 2009 as compared to 2008].").

27. See, e.g., Souren Melikian, *The New Quest: Antiquities Beyond Reproach*, INT'L HERALD TRIB., Dec. 18, 2010, at 17 (discussing the significant increase in prices fetched for antiquities with pre-1970 provenance at recent public auctions).

28. *Convention on the Means of Prohibiting and Preventing the Illicit Import,*

A broader dialogue has also emerged within the archaeological community. The powerful voice of that community, led by the Archaeological Institute of America (“AIA”), began to splinter in 2006 when a group of prominent archaeologists publicly criticized the AIA’s policy prohibiting the initial publication of unprovenanced antiquities in its journals.²⁹ This criticism demonstrates that even the archaeological community has become more diverse in its thinking.

Finally, a promising new dialogue has begun among the stakeholders, as representatives from AIA and the Association of Art Museum Directors met for the first time in 2010 to discuss how they might cooperatively address the illicit trade.³⁰ Such a conversation could not have occurred back when the legal framework was first established.

These developments in the normative landscape alone provide a compelling reason for statutory reform. The legal framework is the product of an era that has long since passed, and we believe it should be modernized to reflect the more sophisticated dialogue taking place today. Even more important, however, is that recent normative developments largely coincide with the Executive’s current policy preferences. This convergence between the normative and political landscape creates an optimal environment for statutory reform.

In addition to accounting for the normative and political developments of the last three decades, statutory reform is also necessary to restore the rule of law. The Executive’s willingness to disregard the legal framework raises serious separation of powers concerns. In the famous words of Justice Jackson, by acting contrary to the will of Congress, the Executive has been operating at the “lowest ebb” of its constitutional authority.³¹ In recent years, this

Export and Transfer of Ownership of Cultural Property, UNESCO, <http://portal.unesco.org/la/convention.asp?KO=13039&language=E> (last visited Dec. 7, 2011).

29. Hugh Eakin, *Must Looted Relics Be Ignored?*, N.Y. TIMES, May 2, 2006, at E1.

30. Professor Urice attended this two-day meeting in Salem, Massachusetts, on January 30-31, 2010.

31. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Justice Jackson’s concurring opinion established a tripartite framework for analyzing separation of powers disputes between the Executive and Congress. Under the first category, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Id.* at 635. Under the second category,

[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.

“lowest ebb” problem has become particularly acute in the national security context, where the President has asserted with increasing vigor that, as the Commander in Chief, he may disregard war-related statutory constraints imposed by Congress.³² That assertion has led to great disagreement about when, if ever, the Executive may constitutionally exceed statutory constraints mandated by Congress.³³

The disjunction we identify here precariously injects the “lowest ebb” conundrum into the cultural property context. Rather than pitting the Commander in Chief power³⁴ against Congress’ war powers,³⁵ the Executive’s willingness to disregard the cultural property legal framework pits the Executive’s power to conduct foreign affairs³⁶ against Congress’ power to regulate commerce.³⁷ There can be no doubt that the NSPA and the CCPIA are valid exercises of Congress’ constitutional power to regulate interstate and foreign commerce, respectively. And while it is unlikely that the Executive would normally have the constitutional authority to confiscate private property in the United States³⁸—as it has

Id. at 637. Under the third category, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its *lowest ebb*, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” *Id.* (emphasis added).

32. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 712-20 (2008) (describing the structural forces responsible for this shift); see generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) (describing the history behind this shift).

33. See, e.g., Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 334 (2009) (arguing that “[i]n the event of a conflict between a statute or treaty and the exercise of an implied presidential power, the statute or treaty prevails”); Barron & Lederman, *Framing the Problem*, *supra* note 32, at 706-11 (providing several examples in which the administration of President George W. Bush actively advanced the position that the President’s Commander in Chief power could not be impinged by Congress); see also Mark D. Rosen, *Revisiting Youngstown: Against the View that Jackson’s Concurrence Resolves the Relation Between Congress and the Commander-in-Chief*, 54 UCLA L. REV. 1703, 1705-06 (2007) (arguing that “wherever congressional power overlaps with antecedent presidential powers, congressional action categorically trumps”).

34. U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States . . .”).

35. See *id.* art. I, § 8, cls. 1, 11-16 (granting Congress various war powers).

36. *Id.* art. II, § 2, cl. 2 (granting the Executive the power, subject to the Senate’s advice and consent, to “make Treaties” and “appoint Ambassadors, other public Ministers and Consuls”); *id.* art. II, § 3, cl. 3 (granting the executive branch the power to “receive Ambassadors and other public Ministers”).

37. *Id.* art. I, § 8, cl. 3 (granting Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

38. See *id.* amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without

effectively done in the examples described in Parts I and II— or to restrict the importation of private property³⁹—as it has effectively done in the examples described in Part III— it is at least arguable, though we remain skeptical, that the Executive may have such authority where the property at issue is culturally affiliated with foreign nations. In such cases, foreign policy considerations may be implicated, thus triggering the Executive’s constitutional power to conduct foreign affairs. In short, just as in the national security context, it remains unclear whether (and to what extent) the Executive may constitutionally disregard statutory constraints in the cultural property context.

We identify, rather than explore, this separation of powers problem here because its very presence bolsters our call for statutory reform. Indeed, we believe that, regardless of how the constitutional issues are resolved, it is untenable for the Executive to continue to make policy in disregard of the laws established by Congress. It will create tension and instability between the branches; it will remove Congress from the equation and thereby undermine the democratic process; it will invite arbitrary and unconstrained policymaking by the Executive; and it will create uncertainty among the stakeholders. Thus, not only will statutory reform realign the legal framework with the current normative and political landscape, but it will also avoid this thorny constitutional issue and help restore legal order.

I. THE NATIONAL STOLEN PROPERTY ACT

In this Part, we discuss the Justice Department’s recent application of the NSPA to cultural property in the United States that was allegedly stolen from foreign nations. Specifically, we highlight two civil forfeiture actions, referred to below as the French Automobile case and the Egyptian Sarcophagus case, respectively. We focus on these two actions in particular because, as a matter of law, the federal prosecutors did not allege the underlying NSPA violation upon which the forfeiture claim was predicated. Nonetheless, because they encountered no opposition from the claimants, both cultural objects were ultimately returned to their country of origin.⁴⁰ In order to explain why the forfeiture allegations

just compensation.”).

39. See, e.g., Hans Aufricht, *Presidential Power to Regulate Commerce and Lend-Lease Transactions*, 6 J. POL. 57, 60 (1944) (“Apparently, the only embargo proclamation which has ever been issued without statutory authorization is Jefferson’s proclamation of July 2, 1807. But even in this case, the proclamation was submitted to Congress for subsequent approval.”).

40. In the French Automobile case, the government voluntarily dismissed the forfeiture action after the claimant agreed to return the automobile to France. Government’s Motion to Dismiss Civil Case, Attached Stipulation for Settlement of Civil Forfeiture Action at ¶¶ 6-10, *United States v. 1 (One) French 1919 Vehicle* (W.D. Wash. Feb. 10, 2009) (No. 08-01825); see also Paul Shukovsky, *Seattle Classic-Car Buff*

were legally insufficient, we first set out the relevant legal parameters.

A. *The Legal Parameters*

The NSPA is a federal criminal statute prohibiting, inter alia, the transportation, transmission, or transfer of any goods worth \$5,000 or more in interstate or foreign commerce, “knowing the same to have been stolen.”⁴¹ The statute also prohibits the receipt, possession, concealment, storage, barter, sale, or disposition of such goods if they have crossed a state or U.S. boundary, “knowing the same to have been stolen.”⁴² Significantly, an underlying violation of the NSPA permits the government to bring an in rem civil forfeiture action against the stolen property.⁴³

Although the NSPA is a general theft statute, distinct legal issues have arisen when the government has applied it to cultural property. The primary recurring issue in this context has been whether a foreign nation’s declaration of ownership over undiscovered archaeological objects or antiquities—in the form of a so-called patrimony law or vesting statute—renders such goods “stolen” for purposes of the NSPA. To date, only three federal appellate decisions have touched on the issue.⁴⁴

Losing Prize to France, SEATTLE POST-INTELLIGENCER, Dec. 31, 2008, at A1 (providing background of the dispute).

In the Egyptian Sarcophagus case, the government obtained a default judgment after the claimant failed to file a responsive pleading. Default Judgment of Forfeiture, United States v. One Ancient Egyptian, Yellow Background, Wooden Sarcophagus (S.D. Fla. Dec. 30, 2009) (No. 09-23030); *see also* Press Release, U.S. Customs and Border Prot., U.S. Returns Ancient Sarcophagus to Egypt at Nat’l Geographic Soc’y (Mar. 10, 2010), *available at* http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2010_news_releases/march_2010/03102010_7.xml (reporting the sarcophagus’s return to Egypt).

41. 18 U.S.C. § 2314 (2006).

42. *Id.* § 2315.

43. Civil forfeiture actions for stolen property are authorized under various statutes. *See* 18 U.S.C. § 545 (2006) (authorizing civil forfeiture of merchandise brought into the country “contrary to law”); 18 U.S.C. § 981(a)(1)(C) (2006) (authorizing civil forfeiture of personal property that constitutes or is derived from proceeds traceable to a violation of, inter alia, a “specified unlawful activity,” which includes violations of the NSPA); 19 U.S.C. § 1595a(c) (2006) (authorizing civil forfeiture of stolen merchandise brought into the country); 19 U.S.C. §§ 2607, 2609(a) (2006) (authorizing civil forfeiture of cultural property that is stolen from “a museum or religious or secular public monument or similar institution” in any country that has ratified the 1970 UNESCO Convention).

44. Two federal district courts have also addressed the issue in the civil forfeiture context. *See* United States v. An Antique Platter of Gold, 991 F. Supp. 222, 231-32 (S.D.N.Y. 1997) (holding, in the alternative, that an Italian patrimony law sufficiently vested ownership for purposes of rendering an object “stolen” under the NSPA), *aff’d on other grounds*, 184 F.3d 131 (2d Cir. 1999); United States v. Pre-Columbian Artifacts, 845 F. Supp. 544, 547 (N.D. Ill. 1993) (same, with respect to Guatemalan

The first is the Ninth Circuit's 1974 decision in *United States v. Hollinshead*.⁴⁵ In that case, the federal government obtained a criminal conviction under the NSPA against two men for transporting a well-documented, pre-Columbian Mayan stele into the United States.⁴⁶ The prosecution's theory of the case apparently was that the stele was owned by, and thus stolen from, Guatemala by virtue of a Guatemalan patrimony law.⁴⁷

Significantly, however, the defendants did not challenge the prosecution's theory on appeal,⁴⁸ effectively conceding that Guatemala's patrimony law vested the nation with a form of ownership sufficient to trigger the NSPA.⁴⁹ A close reading of *Hollinshead* thus reveals that, because the issue was not presented on appeal, the Ninth Circuit did not *hold* that a foreign nation's patrimony law could support a NSPA violation; instead, the court did no more than tacitly assume—without deciding—that the prosecution's legal theory in this regard was valid.

In the seminal case of *United States v. McClain*, the government obtained criminal convictions under the NSPA against several defendants for transporting and receiving pre-Columbian artifacts originating in Mexico.⁵⁰ The government proceeded under the same legal theory used in *Hollinshead*, but this time the defendants directly challenged the theory's validity on appeal.⁵¹

In a thorough opinion, the Fifth Circuit in 1977 held that a national declaration of ownership, coupled with the fact of illegal exportation, rendered an object stolen for purposes of the NSPA.⁵²

law).

45. *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

46. *Id.* at 1155.

47. *See id.*; *see also* Appellee's Brief at 8-10, 40, *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974) (No. 73-2525) (reviewing the testimony presented at trial, including testimony elicited by the government that Guatemala had declared ownership over the stele and that it was unlawfully exported from the country).

48. Instead, the defendants unsuccessfully raised nine claims of error not relevant here. *See Hollinshead*, 495 F.2d at 1155-56.

49. It is a well-established rule of federal appellate procedure that arguments not raised by an appellant on appeal are deemed abandoned. *See, e.g.*, *United States v. Williamson*, 439 F.3d 1125, 1138 (9th Cir. 2006) ("With no argument presented, we decline to address the claim. Federal Rule of Appellate Procedure 28(a)(9)(A) requires that the argument in an appellant's brief contain the appellant's contentions and the reasons for them. . . . We will not manufacture arguments for an appellant . . . , especially where a host of other issues are presented for review.") (internal citations omitted) (internal quotation marks omitted).

50. *United States v. McClain*, 545 F.2d 988, 991-92 (5th Cir. 1977).

51. *Id.* at 993-94.

52. *Id.* at 1000-01 ("We hold that a declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered 'stolen', within the meaning of the National Stolen Property Act. Such a declaration combined with a restriction on exportation without consent of the owner

The court summarized its rationale as follows:

This conclusion is a result of our attempt to reconcile the doctrine of strict construction of criminal statutes with the broad significance attached to the word “stolen” in the NSPA. Were the word to be so narrowly construed as to exclude coverage, for example, with respect to pre-Columbian artifacts illegally exported from Mexico after the effective date of the 1972 [patrimony] law, the Mexican government would be denied protection of the Act after it had done all it reasonably could do—vested itself with ownership—to protect its interest in the artifacts. This would violate the apparent objective of Congress: the protection of owners of stolen property. If, on the other hand, an object were considered “stolen” merely because it was illegally exported, the meaning of the term “stolen” would be stretched beyond its conventional meaning.⁵³

Significantly, the court repeatedly emphasized the distinction between a national declaration of ownership and a mere restriction on illegal export.⁵⁴ This critical distinction was rooted in the court’s acceptance of the rule that the United States does not enforce the export laws of other countries absent a treaty or statute providing otherwise.⁵⁵

The Court then applied this distinction by carefully parsing a series of Mexican patrimony laws in search for a clear declaration of ownership.⁵⁶ It ultimately concluded that, contrary to the district court’s jury instruction, Mexico’s 1897 patrimony law was an export restriction, not a declaration of ownership, and that Mexico did not clearly declare ownership over the artifacts in question until 1972.⁵⁷ Thus, the court vacated the convictions because the artifacts could be considered stolen only if they were illegally exported *after* Mexico’s declaration of ownership became effective, and the jury had not been

(Mexico) is sufficient to bring the NSPA into play.”) (footnotes omitted).

53. *Id.* at 1001-02 (footnotes omitted).

54. *See id.* at 996-97; *id.* at 1002 (“We distinguish, therefore, between varying types of governmental control over property within the borders of a state. . . . [R]estrictions on exportation are just like any other police power restrictions. They do not create ‘ownership’ in the state.”).

55. *Id.* at 996 (“The general rule today in the United States, and I think in almost all other art-importing countries, is that it is not a violation of law to import simply because an item has been illegally exported from another country. This is a fundamental general rule today with respect to art importation. . . . This means that a person who imports a work of art which has been illegally exported is not for that reason alone actionable, and the possession of that work cannot for that reason alone be disturbed in the United States.”) (quoting Paul M. Bator, *International Trade in National Art Treasures: Regulation and Deregulation*, in *ART LAW, DOMESTIC AND INTERNATIONAL* 295, 300 (Leonard D. DuBoff ed., 1975)) (alteration in original).

56. *McClain*, 545 F.2d at 997-1001.

57. *Id.* at 1000.

instructed to determine when the artifacts had been exported.⁵⁸

More than twenty years later, the third (and, to date, last) federal appellate court addressed the issue. In *United States v. Schultz*, the government proceeded under the legal theory validated in *McClain* and obtained a criminal conviction against a defendant under the NSPA for conspiring to receive Egyptian antiquities.⁵⁹ The defendant challenged the legitimacy of the government's theory on appeal,⁶⁰ but the Second Circuit, relying heavily on *McClain*, "conclude[d] that the NSPA applies to property that is stolen from a foreign government, where that government asserts actual ownership of the property pursuant to a valid patrimony law."⁶¹

Significantly, the court followed the Fifth Circuit's example by analyzing whether the 1983 Egyptian patrimony law relied upon constituted a declaration of ownership or merely restricted illegal export.⁶² Emphasizing the unequivocal language of the patrimony law, as well as Egypt's active enforcement of the law,⁶³ the court concluded that the patrimony law was a true ownership law, not an export restriction.⁶⁴ The Second Circuit thus made clear, as the Fifth Circuit had in *McClain*, that the distinction between a declaration of ownership and a mere export restriction was central to its holding.⁶⁵

58. *Id.* at 1003-04. Four of the five defendants were re-tried and convicted, and they again appealed to the Fifth Circuit. *United States v. McClain*, 593 F.2d 658, 659-60 & n.2 (5th Cir. 1979). In that appeal, the court concluded it was bound under the law of the case doctrine by the prior panel's holding that Mexico's patrimony law, coupled with illegal export, triggered liability under the NSPA. *Id.* at 664-66. While the court ultimately affirmed the defendants' convictions for conspiracy to violate the NSPA, it vacated their substantive NSPA convictions on grounds not relevant here. *See id.* at 665-72.

59. *United States v. Schultz*, 333 F.3d 393, 395-96 (2d Cir. 2003).

60. *Id.* at 398-99, 402.

61. *Id.* at 416. In addition to relying on the unambiguous language of the statute and the broad construction traditionally afforded to the word "stolen," the court explicitly "agree[d] that the Fifth Circuit reached the proper balance [among the] competing concerns in *McClain*." *Id.* at 399, 402-04, 409-10.

62. *Id.* at 403-04.

63. Although most of the literature assumes that *Schultz* adopted *McClain* wholesale, we believe that *Schultz's* reliance on Egypt's active, domestic enforcement of its patrimony law meaningfully distinguishes the case from *McClain*, where such enforcement was absent. Urice, *supra* note 3, at 145-47.

64. *Schultz*, 333 F.3d at 399-402, 404-08; *see id.* at 407-08 ("Schultz contends that it is United States policy not to enforce the export restrictions of foreign nations. Schultz offers no evidence in support of this assertion, but even if his assessment of United States policy is accurate, the outcome of this case is unaffected. We have already concluded, based on the plain language of [the patrimony law] and the evidence in the record, that [the patrimony law] is an ownership law, not an export-restriction law. . . . [The patrimony law] is more than an export regulation—it is a true ownership law.").

65. Indeed, in its conclusion, the court expressed confidence that lower courts would be "capable of evaluating foreign patrimony laws to determine whether their

B. The French Automobile Case

In December 2008, federal prosecutors brought an *in rem* civil forfeiture action in the Western District of Washington against an antique French automobile.⁶⁶ The government sought forfeiture on two alternative grounds. First, the government asserted that the automobile was subject to forfeiture because the importer made materially false statements on customs forms.⁶⁷ Second, the government asserted that the automobile was subject to forfeiture under 19 U.S.C. § 1595a(c)(1)(A) because it constituted stolen property under the NSPA.⁶⁸ While we take no issue with the government's first forfeiture claim,⁶⁹ it appears that the government's second claim is without legal basis.

The government alleged the following facts.⁷⁰ The automobile was manufactured in 1919 at the request of the Duc de Montpensier, a descendant of the Orleans branch of the Bourbon Dynasty and owner of the French castle of Randan.⁷¹ Upon his death in 1924, title to the automobile passed to his wife; she subsequently married Alberto de Huarte, who inherited the automobile upon her death in

language and enforcement indicate that they are intended to assert true ownership of certain property, or merely to restrict the export of that property." *Id.* at 410.

66. Verified Complaint for Forfeiture *in Rem*, United States v. 1 (One) French 1919 Vehicle (W.D. Wash. Dec. 23, 2008) (No. 08-01825).

67. *Id.* at Attachment "A," Aff. of Special Agent Thomas W. Penn ¶¶ 4-5, 24-26 [hereinafter Penn Aff.]. The government brought this forfeiture claim pursuant to 18 U.S.C. § 545—authorizing civil forfeiture of any merchandise introduced into the country "contrary to law"—based on an underlying violation of 18 U.S.C. § 542, prohibiting making materially false statements on customs forms. According to the sworn affidavit attached to the complaint, the importer erroneously stated that the value of the automobile was \$420,000, when in fact it was closer to twice that value, and that the automobile's country of origin was the Netherlands, when in fact it was France. *Id.* ¶¶ 4-5, 14, 16-19, 26 & n.4.

68. *Id.* ¶¶ 27-28; see 19 U.S.C. § 1595a(c)(1)(A) (2006) (authorizing the civil forfeiture of "stolen" merchandise introduced into the United States).

69. Under the law in the Ninth Circuit, where the action was brought, the importer's false statements regarding the automobile's value and country of origin would be considered material for purposes of § 542 if the truth would have actually prevented the automobile's entry into the country. *United States v. Teraoka*, 669 F.2d 577, 579 (9th Cir. 1982). This "but for" standard is more favorable to the importer than the "natural tendency" standard adopted by other circuits. See, e.g., *United States v. An Antique Platter of Gold*, 184 F.3d 131, 136 (2d Cir. 1999) (holding that a false statement is material if a "reasonable customs official would consider the statement[] to be significant to the exercise of his or her official duties").

70. The government's verified complaint essentially incorporated, without elaboration, an attached affidavit prepared by an Immigration and Customs Enforcement ("ICE") special agent containing both the facts of the investigation and the legal basis of forfeiture claims; we therefore cite to that affidavit. Verified Complaint, *supra* note 66, at 3.

71. Penn Aff., *supra* note 67, ¶ 6. For an image of this "completely unique" automobile, see Shukovsky, *supra* note 40.

1958.⁷² In 1991, the French government classified the Randan estate and all of the goods conserved there, including the automobile, as historical monuments.⁷³ The effect of this classification was to prohibit the permanent export of the automobile from France under the French Heritage Code.⁷⁴ In 1997, de Huarte sold the automobile in France to Antoine Raffaelli, who sold it in 2003 to Bruno Vendiesse, a seller of classic cars based in France.⁷⁵ Despite the restriction on permanent export, Vendiesse sent the automobile in 2004 from France to J. Braam Ruben in the Netherlands, who brokered a sale of the automobile to Charles Morse, a resident of Seattle, Washington.⁷⁶ The automobile arrived in Seattle from the Netherlands the following year.⁷⁷

After reciting these factual allegations, the government set out its “legal basis”⁷⁸ of forfeiture by asserting that the automobile was “stolen” from France “[b]y virtue of its being taken from France in violation of the French Heritage Code.”⁷⁹ For support, the government provided the following citation: “*See United States v. Hollinshead*, 495 F.2d 1154, 1156 (9th Cir. 1974); *United States v. Schultz*, 333 F.3d 393, 404 (2nd [sic] Cir. 2003) (“The Ninth Circuit’s discussion indicates its acceptance of the prosecution’s theory in *Hollinshead*: that an object is ‘stolen’ within the meaning of the NSPA if it is taken in violation of a patrimony law.”).”⁸⁰

The government’s purported legal basis of this forfeiture claim is deficient. Even assuming that *Hollinshead* could be interpreted as implicitly adopting *McClain*’s definition of stolen, the government’s forfeiture claim would still amount to the enforcement of France’s export restrictions. Despite citing *Schultz*, the government overlooks the critical distinction between laws declaring ownership and export restrictions. The provision in the French Heritage Code upon which the government relied is an export restriction on its face;⁸¹ and the government referred to it as such, seemingly unaware that this fact would render its forfeiture claim contrary to the very case law upon

72. Penn Aff., *supra* note 67, ¶ 7.

73. *Id.* ¶ 8 & n.2.

74. *Id.* ¶ 9 & n.2. The English translation of the applicable provision in the French Heritage Code provided: “The export out of France of items classified as Historical Monuments is forbidden, without detriment to the provisions regarding . . . temporary export” *Id.* ¶ 9 n.3.

75. *Id.* ¶¶ 10-12.

76. *Id.* ¶¶ 13-14.

77. *Id.* ¶ 15.

78. *Id.* ¶¶ 23-25.

79. *Id.* ¶ 28.

80. *Id.*

81. Penn Aff., *supra* note 67, at 3 n.3.

which it relied.⁸² Because it is undisputed that France never declared itself the owner of the automobile, its illegal export, standing alone, could not have rendered it legally stolen for purposes of the NSPA. In this respect, not only did the government fail to allege that France owned the automobile, but it also failed to allege any theft whatsoever. To the contrary, the government set out a clear chain of title to the automobile from the original owner to the U.S. importer.⁸³

C. *The Egyptian Sarcophagus Case*

In October 2009, federal prosecutors brought an *in rem* civil forfeiture action in the Southern District of Florida against an ancient Egyptian sarcophagus.⁸⁴ The government brought this action again pursuant to 19 U.S.C. § 1595a(c)(1)(A), authorizing the civil forfeiture of “stolen” merchandise introduced into the United States.⁸⁵ Although the government did not cite the NSPA, the verified complaint reveals that the government proceeded under the legal theory validated in *McClain* and *Schultz*.⁸⁶ Although *McClain* is binding precedent in the Southern District of Florida,⁸⁷ the government’s complaint does not allege a violation of the NSPA as interpreted by the Fifth Circuit.

The government’s complaint alleged the following:⁸⁸ In September 2008, Joseph A. Lewis II imported an Egyptian sarcophagus constructed between 1070 and 946 B.C. into the United States from Barcelona, Spain.⁸⁹ Lewis purchased the sarcophagus from Felix Cervera Correa, the owner of a Spanish gallery.⁹⁰ In his entry documentation, Lewis stated that the provenance of the

82. *See id.* ¶¶ 9, 13, 22, 28. The government notably referred to a letter sent to ICE by the Deputy French Director of Historical Monuments and Protected Areas detailing the specific *export* violations that occurred in connection with the automobile. *Id.* ¶ 22.

83. *See id.* ¶¶ 6-17.

84. Verified Complaint for Forfeiture *in Rem*, United States v. One Ancient Egyptian, Yellow Background, Wooden Sarcophagus (S.D. Fla. Oct. 8, 2009) (No. 09-23030).

85. *Id.* ¶¶ 2, 52-54.

86. *See id.* ¶¶ 38-44, 47, 51-52.

87. The Southern District of Florida is part of the Eleventh Circuit, which has adopted as binding precedent all decisions issued by the Fifth Circuit before October 1, 1981, the date that Congress divided the former Fifth Circuit into the current Fifth Circuit and the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

88. A special agent with ICE swore to these facts under the penalty of perjury. Verified Complaint, *supra* note 84, at 8.

89. *Id.* ¶¶ 5, 11, 12-16.

90. *Id.* ¶¶ 9-12. The entry documentation filed by Lewis revealed a sale price of 15,000 euro and a (roughly equivalent) market value of approximately \$21,894. *Id.* ¶¶ 17-18.

sarcophagus was the Buendia Collection.⁹¹ Although he did not have an art collection, Miguel Angel Buendia “stated [that] he ‘found’ the [sarcophagus] during a series of trips he did around Europe and Egypt in the 1970s. . . . Buendia [did] not produce[] any documentation regarding when he obtained the [sarcophagus] and from whom he obtained [it].”⁹² He sold the sarcophagus to Cervera’s father some time in the early 1970s.⁹³ Cervera admitted that he lacked an Egyptian export license and that such a license “probably never ha[d] been done.”⁹⁴ Cervera also obtained a report from the Art Loss Register providing that the sarcophagus had not been reported missing or stolen.⁹⁵ U.S. Immigration and Customs Enforcement contacted Zahi Hawass, the Secretary General of the Egyptian Supreme Council of Antiquities, who surmised that, because Egypt was unable to locate any information regarding the approval of the sarcophagus’s export, it was “likely the product of an illegal excavation.”⁹⁶

After reciting these factual allegations, the government’s complaint quoted from a series of Egyptian antiquities laws. Specifically, it quoted from the following: an 1835 ordinance banning the exportation of antiquities; an 1874 regulation asserting that “[a]ny undiscovered antique piece (lying under the ground) in any location, belongs to the Government;” an 1883 order asserting that all antiques located in Egyptian museums were “the state’s public property;” an 1891 decree asserting that “[a]ll of the objects found in excavations belong by right to the State;” a 1912 law declaring that “every antiquity found on, or in the ground, shall belong to the Public Domain of the State;” a 1951 law declaring that, subject to certain exceptions, “[a]ll antique edifices, furnishings and land . . . shall be part of the public domain;” and a 1983 law (the same one analyzed in *Schultz*) declaring that “[a]ll antiquities are considered public property except” those held in a prescribed form of charitable trust.⁹⁷

91. *Id.* ¶ 19.

92. *Id.* ¶¶ 20-22.

93. *Id.* ¶¶ 23-24. Buendia stated that he sold the sarcophagus to Cervera’s father, co-owner of the Spanish gallery, in 1972; Cervera’s father stated that he acquired it from Buendia in December 1970. *Id.* ¶¶ 9-10, 23-24.

94. *Id.* ¶¶ 26-27.

95. *Id.* ¶ 28.

96. *Id.* ¶¶ 29-32; *see also id.* ¶ 46 (stating that documentation of the sarcophagus’s export still had not been found as of the filing of the complaint on October 8, 2009).

97. *Id.* ¶¶ 38-45. There are several peculiarities worth noting here. First, it is unclear why the government quoted the 1835 Ordinance, since it is nothing more than an export restriction on its face. Second, it is unclear why the government quoted the 1883 Order, which appears to pertain only to documented artifacts located in a museum. Third, it is unclear why the government quoted the 1951 Law, which would not apply to the sarcophagus. Finally, the government offered no explanation as to how the various laws related to each other.

The government then set out its “Claim for Forfeiture”⁹⁸ as follows: “[s]ince at least 1874, Egypt has had in place, patrimony laws, which . . . indicate that any antique piece belongs to the government of Egypt[.]”⁹⁹ the sarcophagus was exported from Egypt without the government’s permission;¹⁰⁰ the sarcophagus was “removed from Egypt in violation of Egyptian law[.]”¹⁰¹ and the sarcophagus was therefore “stolen,”¹⁰² rendering it subject to forfeiture.¹⁰³

However, the government’s claim for forfeiture is legally deficient because it does not allege *when* the sarcophagus left Egypt.¹⁰⁴ This omission is critical because in order for the

98. *Id.* at 6.

99. *Id.* ¶ 48. This reliance on the 1874 provision again raises the question why the government quoted the earlier 1835 Ordinance restricting export. *See id.* ¶ 38.

100. *Id.* ¶ 50.

101. *Id.* ¶ 51. The government did not identify the Egyptian law or laws to which it was referring.

102. *Id.* ¶ 52. This critical paragraph of the complaint stated in its entirety as follows: “The [sarcophagus] was stolen from Egypt.” *Id.*

103. *Id.* ¶¶ 53-54.

104. Although news reports covering the case provide conflicting accounts on when the sarcophagus first left Egypt, that fact does not appear in the complaint. *Compare Egypt to Receive Stolen Sarcophagus from US*, ASSOCIATED PRESS, Feb. 22, 2010, available at http://www.boston.com/news/world/middleeast/articles/2010/02/22/egypt_to_receive_stolen_sarcophagus_from_us/ (reporting that “U.S. authorities determined the sarcophagus had left Egypt some time after 1970”), with Hadeel Al-Shalchi, *Stolen sarcophagus returns to Egypt from U.S.*, ASSOCIATED PRESS, Mar. 13, 2010, available at http://seattletimes.nwsource.com/html/nationworld/2011334676_apmlegypstolensarcophagus.html (“An investigation found the coffin had been stolen from Egypt 126 years ago . . .”), and Steven McElroy, *Egypt Requests Coffin’s Return*, N.Y. TIMES, Mar. 23, 2009, at C2 (reporting that Egypt “sent documents to authorities in Miami proving that the coffin was taken out of Egypt illegally in 1884”); *see also Pre-1970 Provenance No Safe Harbor for Egyptian Antiquities?*, CULTURAL PROPERTY OBSERVER (Mar. 14, 2010, 8:04 AM), <http://culturalpropertyobserver.blogspot.com/2010/03/pre-1970-provenance-no-safe-harbor-for.html> (comment by Sofi on Mar. 15, 2010, 9:04 PM) (“I have not seen a single article on this coffin with the correct facts so far. . . . Hawass’ only claim to this item . . . was the lack of an export permit from Egypt[.] in fact he stated that the Egyptian government had no idea whatsoever when

sarcophagus to be considered stolen under *McClain*, it must have been unlawfully taken from Egypt *after* Egypt clearly vested itself with ownership. Indeed, the Fifth Circuit vacated the defendants' convictions in *McClain* precisely because the jury did not find that the artifacts left Mexico after the effective date of the patrimony law.¹⁰⁵ Thus, even if the government were correct that Egypt clearly vested itself with ownership over all antiquities since 1874,¹⁰⁶ that assertion, by itself, is legally incomplete; only if the sarcophagus was illegally exported after that patrimony law became effective could it be stolen. Moreover, by failing to allege this critical fact, the government's complaint effectively sought to enforce Egypt's export restrictions,¹⁰⁷ which, as discussed above, squarely conflicts with the holding in *McClain*.

II. THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT

In this Part, we discuss the Justice Department's unexplained decision to apply the Archaeological Resources Protection Act (ARPA),¹⁰⁸ instead of the NSPA, to cultural property allegedly stolen from abroad. We explain that, although Congress expressly intended ARPA to apply only to archaeological resources originating within the United States, federal prosecutors have nonetheless applied it to foreign archaeological resources in the United States. Although there is no case law on point, in our view, the government's international application of ARPA exceeds the scope of the statute and flouts legislative intent.¹⁰⁹ It is also unnecessary.

this coffin left Egypt as they had no record of this item – period.”). Indeed, the government openly acknowledged in the complaint that Buendia provided no documentation regarding when or where he obtained the sarcophagus. Verified Complaint, *supra* note 84, ¶ 22. Moreover, the government's allegation that Buendia stated that he “found” the sarcophagus “during a series of trips he did around Europe and Egypt in the 1970s” does not go to when the sarcophagus first left Egypt. *See id.* ¶ 21.

105. *United States v. McClain*, 545 F.2d 988, 1003 (5th Cir. 1977); *see also* *Peru v. Johnson*, 720 F. Supp. 810, 812-15 (C.D. Cal. 1989) (holding that, in the context of a civil replevin action, Peru did not meet its burden of proof in part because it could not establish that it was the “legal owner [over the artifacts in question] at the time of their removal from that country”), *aff'd sub. nom.* *Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991) (No. 90-55521, 1991 Term).

106. It is noteworthy that the government was able to rely exclusively on Egypt's 1983 patrimony law in *Schultz*, because the illegal export in that case occurred after 1983. *See United States v. Schultz*, 333 F.3d 393, 396-98 (2d Cir. 2003).

107. By failing to allege when the sarcophagus left Egypt, the government also arguably failed to allege illegal export. Although the government sufficiently alleged that Egypt had not authorized the export of the sarcophagus, there is nothing to indicate that such authorization was legally required (since there is nothing to indicate when the export occurred).

108. 16 U.S.C. §§ 470aa-mm (2006).

109. In advancing this argument, we rely upon and summarize a prior article. Andrew Adler, *An Unintended and Absurd Expansion: The Application of the*

Congress enacted ARPA in 1979¹¹⁰ to combat the rise of unauthorized archaeological excavation on public (i.e., federal) and Indian lands¹¹¹ within the United States.¹¹² The preamble¹¹³ and savings clause¹¹⁴ of the statute, its legislative history,¹¹⁵ and the fact that it largely superseded the Antiquities Act of 1906 (which was limited to lands controlled by the federal government),¹¹⁶ all confirm this unambiguous legislative intent.¹¹⁷

Nevertheless, federal prosecutors have applied ARPA to archaeological resources originating outside the United States on at least three occasions. First, in December 1996, prosecutors brought “an in rem civil forfeiture [action] pursuant to ARPA” in the Southern District of New York against Etruscan artifacts;¹¹⁸ because no claimant filed a responsive pleading, the government obtained a default judgment.¹¹⁹ Second, in 2003, a Virginia man pled guilty to a criminal violation of ARPA for attempting to sell a number of Peruvian artifacts.¹²⁰ Third, in January 2008, prosecutors obtained search warrants against California museums by alleging violations of ARPA in connection with the museums’ possession of various Asian and Native American antiquities.¹²¹ Due to the procedural posture of

Archaeological Resources Protection Act to Foreign Lands, 38 N.M. L. REV. 133 (2008).

110. Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721.

111. For the statutory definition of public and Indian lands, see 16 U.S.C. §§ 470bb(3)-(4) (2006).

112. Adler, *supra* note 109, at 140 (citing H.R. REP. NO. 96-311, at 15-16 (1979), reprinted in 1979 U.S.C.C.A.N. 1709, 1718-19).

113. 16 U.S.C. § 470aa(b) (2006) (“The purpose of this chapter is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands . . .”).

114. *Id.* § 470kk(c) (“Nothing in this chapter shall be construed to affect any land other than public land or Indian land . . .”).

115. See, e.g., H.R. REP. NO. 96-311, at 13 (1979), reprinted in 1979 U.S.C.C.A.N. 1709, 1716 (“The lands involved in the legislation are entirely Federally owned or Indian lands . . .”).

116. 16 U.S.C. §§ 431-33 (2006); see *United States v. Gerber*, 999 F.2d 1112, 1115 (7th Cir. 1993) (recognizing that ARPA “superseded the Antiquities Act of 1906, which had been expressly limited to federal lands”) (internal citation omitted). Congress found it necessary to supersede the Antiquities Act because the Ninth Circuit had concluded that the term “object[s] of antiquity” was unconstitutionally vague, and because the statute prescribed meager penalties. Adler, *supra* note 109, at 140-41.

117. Adler, *supra* note 109, at 140-41, 145-47.

118. *Id.* at 143 (citing Verified Complaint ¶ 1, *United States v. An Archaic Etruscan Pottery Ceremonial Vase*, No. 96 CIV. 9437 (S.D.N.Y. Dec. 12, 1996)).

119. Adler, *supra* note 109, at 143 (citing Default Judgment, *United States v. An Archaic Etruscan Pottery Ceremonial Vase*, No. 96 CIV. 9437 (S.D.N.Y. Mar. 24, 1997)).

120. Adler, *supra* note 109, at 143-44 (citing Maria Glod, *Arlington Man Pleads Guilty to Selling Protected Artifacts*, WASH. POST, Sept. 25, 2003, at B3).

121. Adler, *supra* note 109, at 144 (citing Search Warrant on Written Affidavit ¶¶ 4,

these three cases, no court had the occasion to rule on this application of ARPA to cultural property originating in foreign nations.¹²²

In all three examples, the government relied on 16 U.S.C. § 470ee(c), a provision in ARPA prohibiting the sale, purchase, exchange, transport, or receipt of “any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.”¹²³ Prosecutors purported to satisfy § 470ee(c) by coupling state theft laws with foreign patrimony laws. Under their theory, the illegal export of archaeological resources from a nation with a patrimony law rendered those objects stolen; it was a violation of state theft laws to receive stolen property; and it was therefore a violation of § 470ee(c) to sell, purchase, exchange, transport, or receive such objects, regardless of their country of origin.¹²⁴

Viewed in isolation, the plain language of § 470ee(c) might be capable of accommodating the government’s unwieldy theory.¹²⁵ However, in our view this theory is irreconcilable with legislative intent in two major respects. First, Congress designed § 470ee(c) to reinforce state—not foreign—laws protecting archaeological sites.¹²⁶

10, *United States v. The Premises Known As: Charles W. Bowers Museum Corp.*, No. 08-0093M (C.D. Cal. Jan. 19, 2008); *Search Warrant on Written Affidavit ¶¶ 3(a), 6, United States v. The Premises Known As: Los Angeles County Museum of Art*, No. 08-0100M (C.D. Cal. Jan. 19, 2008); and *Search Warrant on Written Affidavit ¶¶ 4, 8, United States v. The Premises Known as: Pacific Asia Museum*, No. 08-0118M (C.D. Cal. Jan. 22, 2008)).

122. Adler, *supra* note 109, at 143.

123. 16 U.S.C. § 470ee(c) (2006). Section 470ee(c) is the third type of prohibited act under ARPA; the first two prohibit the unauthorized excavation and trafficking of archaeological resources on federal and Indian lands. *Id.* §§ 470ee(a)-(b). Not only does a violation of these prohibitions give rise to criminal liability, *id.* § 470ee(d), but it permits the government to bring a civil forfeiture action against the object(s). *Id.* § 470gg(b).

124. Adler, *supra* note 109, at 144-45.

125. So far as we are aware, the only scholarly authority advocating the international application of ARPA is conclusory and fails to explain the legality or utility behind such application. See Patty Gerstenblith, *Increasing Effectiveness of the Legal Regime for the Protection of the International Archaeological Heritage*, in *CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE* 305, 306 (James A.R. Nafziger & Ann M. Nicgorski, eds., 2009) (simply stating that “ARPA . . . is primarily concerned with sites and artifacts found on federally owned or controlled land” and “prohibits trafficking in inter-state or foreign commerce”).

126. See *United States v. Gerber*, 999 F.2d 1112, 1115 (7th Cir. 1993) (explaining that § 470ee(c) was “designed to back up state and local laws protecting archaeological sites and objects,” thus “resembl[ing] . . . a host of other federal statutes that affix federal criminal penalties to state crimes that, when committed in interstate commerce, are difficult for individual states to punish or prevent because coordinating

Congress has proven itself capable of expressly authorizing the enforcement of foreign law when it so desires,¹²⁷ and it provided no such authority in § 470ee(c). Second, the government's international application of § 470ee(c) produces an absurd result because Congress' overriding, unambiguous objective in enacting ARPA was to protect archaeological resources originating in the United States.¹²⁸ Thus, the government's interpretation runs contrary to the purpose of both § 470ee(c) and the statute as a whole.

We remain puzzled as to why the Justice Department has advanced this application of ARPA, especially given that the NSPA provides broad statutory authority to address the same problem.¹²⁹ Regardless of motivation, we acknowledge that the Executive is generally free to advance novel interpretations of the statutes it enforces, at least where, as here, there is no judicial authority foreclosing such interpretations. Nonetheless, the absence of such judicial authority in no way detracts from our view that the international application of ARPA is statutorily improper. Consequently, a necessary component of the statutory reform we propose would clarify that ARPA applies only to archaeological resources discovered within the United States.

III. THE CONVENTION ON CULTURAL PROPERTY IMPLEMENTATION ACT

In this Part, we discuss import restrictions imposed pursuant to the CCPIA. In doing so, we focus on several instances in which it appears that the Executive has imposed import restrictions without regard for all of that statute's requirements. We begin with the relevant legal parameters.

A. *The Legal Parameters*

As mentioned at the outset, the CCPIA represents the United States' domestic implementation of the 1970 UNESCO Convention. Although the United States quickly ratified the Convention in 1972,¹³⁰ it took Congress more than ten years to enact the CCPIA due to the conflicting positions adopted by the various stakeholders (e.g., archaeologists, dealers, collectors, museums, and governmental institutions).¹³¹

the law enforcement efforts of different states is difficult").

127. See, e.g., 16 U.S.C. §§ 3372(a)(2)-(3) (prohibiting various acts involving fish and wildlife that are taken "in violation of any law or regulation of any State or in violation of any foreign law").

128. Adler, *supra* note 109, at 149-50 & n.118, 152-53.

129. *But see id.* at 156 & nn.143-44 (speculating that ARPA's mens rea requirement would be less strict than the NSPA's scienter requirement).

130. 118 CONG. REC. S27,925 (daily ed. Aug. 11, 1972).

131. See Efrat, *supra* note 12, at 41-75 (summarizing the positions adopted by the various stakeholders during the legislative debate).

The duration and intensity of the legislative debate resulted in a statute characterized by two important attributes. First, the CCPIA emerged as the most comprehensive and definitive statement of cultural property policy in the United States.¹³² Second, the statute “reflect[ed] an elaborate compromise designed to balance the competing interests of US museums, the art market, the US public, archaeologists, and source nations.”¹³³ This balance that Congress struck is reflected in the structure of the statute and its effectuating mechanisms.

The CCPIA primarily implements Article 9 of the 1970 UNESCO Convention¹³⁴ by authorizing the President¹³⁵ to impose import restrictions on specific categories of archaeological and ethnological materials that have been unlawfully exported—so long as specific criteria are satisfied.¹³⁶ This general statutory approach itself reflects an important compromise: on the one hand, the statute authorizes the United States to enforce the export restrictions of

132. See Douglas Ewing, *What is “Stolen”?: The McClain Case Revisited*, in *THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY?* 177, 182 (Phyllis Mauch Messenger ed., 2d ed. 1999) (“Throughout the decade-long series of debates and discussion and extraordinary congressional mark-up sessions, it was acknowledged by all parties, private and public, that what we were in fact doing was formulating a national cultural property policy.”).

133. William Pearlstein, *Cultural Property, Congress, the Courts, and Customs: The Decline and Fall of the Antiquities Market?*, in *WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW* 9, 10 (Kate Fitz Gibbon ed., 2005) [hereinafter *WHO OWNS THE PAST?*]; see also Bauer, *supra* note 15, at 692 (“[T]he passage of [CCPIA] in 1983 represented a rare compromise in what has been more usually a vitriolic debate among the various parties involved.”).

134. See 1970 UNESCO Convention, *supra* note 8, art. 9 (“Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.”).

135. In 1986, President Reagan delegated his functions under the CCPIA primarily to the United States Information Agency (“USIA”) and delegated the remaining functions to the Departments of State, Treasury, and Interior. Exec. Order No. 12,555, 51 Fed. Reg. 8,475 (1986). In 1998, Congress abolished the USIA and transferred its functions to the State Department. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, tit. XIII, §§ 1311-12, 112 Stat. 2681, 2681-776 (1998) (codified at 22 U.S.C. §§ 6531-32 (2006)). In 2003, President George W. Bush transferred the previous delegation of authority to the Department of the Treasury to the Department of Homeland Security. Exec. Order No. 13,286, 3 C.F.R. 166, 166 (2004). Thus, today the Executive’s primary authority under the CCPIA is delegated to the State Department, with the remaining authority delegated to the Departments of Homeland Security and Interior.

136. 19 U.S.C. § 2602(a)(1)-(2) (2006).

foreign nations, thus modifying the default rule against such enforcement;¹³⁷ on the other hand, because Congress considered such import restrictions to be “drastic” measures,¹³⁸ especially for a country committed to open borders and free trade,¹³⁹ Congress ensured that they could be imposed only if exacting criteria were satisfied.

Aside from a provision governing “emergency” situations of pillage,¹⁴⁰ four substantive statutory criteria must be met before the Executive—“President” in the statute—may impose import restrictions. First, and following directly from Article 9, the Executive must determine “that the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party.”¹⁴¹ Second, the Executive must determine “that the [requesting] State Party has taken measures consistent with the [1970 UNESCO] Convention to protect its cultural patrimony.”¹⁴² The third statutory criterion has two components: First, the Executive must determine that U.S. import restrictions, “if applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by those nations (whether or not State Parties) individually having a significant import trade in such material, would be of substantial benefit in deterring a serious situation of pillage[:]”¹⁴³

137. See *supra* note 55 and accompanying text.

138. See § 2602(a)(1)(C)(ii) (referring to import restrictions as a “drastic” remedy).

139. See, e.g., Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 343 (1982) (explaining that the United States has historically allowed for the “[u]nrestricted and free trade in the arts”).

140. In order to implement the “irremediable injury” component of Article 9, the statute authorizes the Executive to impose import restrictions in response to “emergency” situations of pillage. 19 U.S.C. § 2603(b) (2006). If the Executive determines that an “emergency” situation exists, see *id.* § 2603(a) (defining three such situations), it may impose import restrictions for five years, which may be renewed for an additional three years. *Id.* § 2603(b), (c)(3). The Executive has imposed seven sets of emergency import restrictions under the CCPIA, the most recent occurring in 1999 (Cambodia and Cyprus). See *Import Restrictions List & Chart*, US DEP’T OF STATE, <http://exchanges.state.gov/heritage/culprop/listactions.html> (last visited Nov. 16, 2011). While § 2603 constitutes an important grant of authority, we only briefly mention it because there are currently no emergency restrictions in place, and it does not impact our analysis below.

141. 19 U.S.C. § 2602(a)(1)(A) (2006).

142. *Id.* § 2602(a)(1)(B).

143. *Id.* § 2602(a)(1)(C)(i). There is a limited exception to this statutory criterion. See *id.* § 2602(c)(2) (authorizing the President to impose import restrictions even where “a nation individually having a significant import trade in such material is not implementing, or is not likely to implement, similar restrictions,” so long as the President determines that “such restrictions are not essential to deter a serious situation of pillage, and . . . the application of [U.S.] import restrictions . . . in concert with similar restrictions implemented, or to be implemented, by other nations (whether or not State Parties) individually having a significant import trade in such

and second, the Executive must determine that “remedies less drastic than the application of the restrictions set forth in such section are not available.”¹⁴⁴ Fourth, the Executive must determine “that the application of the import restrictions . . . in the particular circumstances is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.”¹⁴⁵

In addition to these four statutory criteria, there is an essential structural feature of the statute further limiting the imposition of import restrictions. In accordance with Article 9 of the Convention, the CCPIA authorizes the Executive to impose import restrictions only if there is a request for assistance from a foreign nation.¹⁴⁶ By conditioning the Executive’s authority upon the receipt of such a request,¹⁴⁷ the statute limits discretion and ensures that import restrictions will be imposed only on a reactive, rather than a proactive, basis.

If the statutory criteria are satisfied, the statute authorizes the Executive to enter into a bilateral agreement—sometimes referred to as a Memorandum of Understanding (“MOU”)—with the requesting country and impose import restrictions pursuant thereto.¹⁴⁸ These bilateral agreements expire after five years, but the Executive may renew them for additional five-year periods if it determines that the statutory criteria remain satisfied.¹⁴⁹ At present, the United States has bilateral agreements with twelve nations.¹⁵⁰

material would be of substantial benefit in deterring a serious situation of pillage”).

The statute also notably requires the President to suspend import restrictions if he determines that “a number of parties to the agreement (other than parties described in subsection (c)(2) . . .) having significant import trade in the archaeological and ethnological material covered by the agreement . . . have not implemented within a reasonable period of time import restrictions that are similar to [U.S. import restrictions]” or “are not implementing such restrictions satisfactorily with the result that no substantial benefit in deterring a serious situation of pillage in the State Party concerned is being obtained.” *Id.* § 2602(d).

144. *Id.* § 2602(a)(1)(C)(ii).

145. *Id.* § 2602(a)(1)(D).

146. *Id.* §§ 2602(a)(1), 2602(a)(3), 2603(c)(1).

147. There need not be an additional request to extend import restrictions already imposed. *See id.* §§ 2602(e), 2603(c)(3).

148. *Id.* § 2602(a)(2)(A). The statute also authorizes the President to enter into multilateral agreements, but no such agreements have been entered in to thus far. *See id.* § 2602(a)(2)(B).

149. *Id.* § 2602(e).

150. *Import Restrictions List & Chart*, US DEP’T OF STATE, <http://exchanges.state.gov/heritage/culprop/listactions.html> (last visited Dec. 30, 2011). The Executive has also imposed import restrictions on Iraqi archaeological and ethnological materials, pursuant to the Emergency Protection for Iraqi Cultural Antiquities Act of 2004, Pub. L. No. 108-429, 118 Stat. 2434, 2599-2600, tit. III, §§ 3001-03. *See* Import Restrictions Imposed on Archaeological and Ethnological

In order to ensure that the Executive was provided with the expertise necessary to evaluate the statutory criteria, Congress established the Cultural Property Advisory Committee (“CPAC”).¹⁵¹ The primary responsibility of CPAC is to review requests for, and renewals of, import restrictions and to prepare reports advising the Executive of the appropriate action to take in light of the statutory criteria.¹⁵² As an advisory committee, CPAC is generally subject to the Federal Advisory Committee Act (“FACA”),¹⁵³ including its requirement that advisory committees be “fairly balanced in terms of the points of view represented.”¹⁵⁴ Consistent with this requirement, as well as the balanced nature of the CCPIA itself, Congress carefully prescribed CPAC’s membership in order to ensure “fair representation of the various interests of the public sectors and the private sectors.”¹⁵⁵ To achieve such representation, Congress mandated that the eleven-member committee be constituted as follows: two members must represent the “interests of museums[.]” three members must have expertise in archaeology, anthropology, or ethnology; three members must have expertise in the “international sale” of cultural property; and three members must “represent the interests of the general public.”¹⁵⁶ Although originally housed in the United States Information Agency (“USIA”), CPAC migrated to the State Department in 1999.¹⁵⁷ As a result, CPAC’s Executive Director

Material of Iraq, 73 Fed. Reg. 23,334 (Apr. 30, 2008) (to be codified at 19 C.F.R. pt. 12).

151. 19 U.S.C. § 2605 (2006); *see also* S. REP. NO. 97-564, at 25 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4078, 4102 (“The Cultural Property Advisory Committee . . . will render the expert advice necessary to understand these terms in the context of particular cases.”).

152. *See* 19 U.S.C. §§ 2602(f)(3), 2603(c)(2), 2605(f) (2006). The Committee is also charged with conducting an ongoing review of import restrictions previously imposed under the statute. *Id.* § 2605(g)(1).

153. 5 U.S.C. app. §§ 1-16 (2006).

154. *Id.* § 5(b)(2). The CCPIA exempts CPAC from certain FACA provisions “relating to open meetings, public notice, public participation, and public availability of documents.” 19 U.S.C. § 2605(h). The CCPIA also contains a related provision on confidential information. *Id.* § 2605(i).

155. 19 U.S.C. § 2605(b)(2)(A).

156. *Id.* § 2605(b)(1). Members are private citizens “appointed for terms of three years and may be reappointed for one or more terms.” *Id.* § 2605(b)(3)(A).

157. *See* Reorganization Plan and Report Submitted by President Clinton to the Congress on December 30, 1998, Pursuant to Section 1601 of the Foreign Affairs Reform and Restructuring Act of 1998, as Contained in Pub. L. No. 105-277, § 2(d) (Oct. 21, 1998); *The Who, What, Why and How of the Cultural Property Advisory Committee (CPAC): An IFAR Evening, April 17, 2008*, 10 IFAR J. Nos. 3 & 4, at 24, 48 n.4 (2008-09) [hereinafter *IFAR Evening*]. Specifically, CPAC is subsumed under the International Cultural Property Protection Program, which is part of the Cultural Heritage Center, which is part of the State Department’s Bureau of Educational and Cultural Affairs. *See Cultural Property Advisory Committee*, U.S. DEPT OF STATE, <http://exchanges.state.gov/heritage/culprop/committee.html> (last visited Dec. 30, 2011). On the delegation of the President’s functions under the CCPIA, *see supra* note 135.

and supporting staff are permanent State Department employees.¹⁵⁸

B. The Cases of Canada and Peru

Not long after the Executive began using the CCPIA in the late 1980s, it was revealed that import restrictions were not actually being imposed in accordance with the statute.¹⁵⁹ In 1998, James Fitzpatrick, a private attorney who represented antiquities' dealers, published an article referred to here as *Stealth UNIDROIT*.¹⁶⁰ Armed with primary source materials—namely, original country requests for import restrictions and CPAC's resulting reports—Fitzpatrick explained how in 1997 the Executive had failed to satisfy the CCPIA's criteria when imposing comprehensive import restrictions on Canadian and Peruvian archaeological and ethnological materials.¹⁶¹

In the Canadian case, the Executive had imposed import restrictions of a “breathtaking” scope, covering “virtually all Native American archaeological and ethnological works in Canada, dating from . . . 10,000 B.C. to the very recent past.”¹⁶² Fitzpatrick revealed that the first statutory criterion had not been satisfied because there had been no showing that Canadian Native American archaeological

158. See 19 U.S.C. § 2605(e)(1) (granting CPAC “administrative and technical support services and assistance”).

159. This was not the first controversy involving the Executive's disregard for the CCPIA. During the brief three-month interval between the Senate's final legislative report and the statute's enactment, the U.S. Customs Service, relying on *McClain*, promulgated a directive that sought to enforce foreign ownership laws and impose a comprehensive embargo on Pre-Columbian artifacts. See U.S. CUSTOMS SERVICE, SEIZURE AND DETENTION OF PRE-COLUMBIAN ARTIFACTS, POLICIES & PROCEDURES MANUAL SUPP. NO. 3280-01 (Oct. 5, 1982). As others have previously explained, this Customs directive was utterly incompatible with the CCPIA, for it contradicted “virtually every key conclusion of Congress.” James F. Fitzpatrick, *A Wayward Course: The Lawless Customs Policy Toward Cultural Properties*, 15 N.Y.U. J. INT'L L. & POL. 857, 864-85 (1983); see James R. McAlee, *The McClain Case, Customs, and Congress*, 15 N.Y.U. J. INT'L L. & POL. 813, 829-34, 36-37 (1983) (discussing Customs' reliance on *McClain* and asserting that the directive was incompatible with the CCPIA).

160. James F. Fitzpatrick, *Stealth UNIDROIT: Is USIA the Villain?*, 31 N.Y.U. J. INT'L L. & POL. 47 (1998) [hereinafter Fitzpatrick, *Stealth UNIDROIT*].

161. By imposing such comprehensive import restrictions, Fitzpatrick believed that the USIA was effectively enforcing foreign nations' export restrictions, a policy that had been rejected by the United States when it declined to join the 1995 UNIDROIT Convention; hence the article's title. *Id.* at 77 (“The Canadian and Peruvian agreements reflect that the [C]CPIA has become an instrument to enforce foreign export control laws. Of course, that was the goal of UNIDROIT[,] which was so overwhelmingly and vigorously rejected by the entire U.S. museum, dealer, and collector community such that the Government has apparently abandoned its efforts to seek the Treaty's Congressional ratification.”).

162. *Id.* at 55; see also Archaeological and Ethnological Material from Canada, 62 Fed. Reg. 19,488 (Apr. 22, 1997) (to be codified at 19 C.F.R. pt. 12).

or ethnological materials were *currently* in jeopardy of pillage.¹⁶³ Instead, the import restrictions were predicated on historical incidents of looting and the existence of a market in the United States for such materials.¹⁶⁴ Fitzpatrick explained (correctly in our view) that those two purported justifications were legally irrelevant, since the first criterion requires a finding of *contemporary* pillage—a conclusion compelled both by the present-tense language of the statute and its unmistakable purpose to deter ongoing looting abroad.¹⁶⁵

Fitzpatrick also revealed that there was “no proof in the administrative record” demonstrating compliance with the third statutory criterion¹⁶⁶—requiring that U.S. import restrictions be “applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by . . . nations . . . having a significant import trade in such material.”¹⁶⁷ Fitzpatrick explained that, although USIA¹⁶⁸ and CPAC concluded simply that the United States was the only nation with a significant import trade in Canadian Native American items, a survey contained in CPAC’s own report indicated that approximately one quarter of the trade

163. Fitzpatrick, *Stealth UNIDROIT*, *supra* note 160, at 56-67. With respect to restricted objects pertaining to “four out of the six” tribal groups, “there was no specific contemporary evidence of pillage” at all. *Id.* at 56. With respect to objects pertaining to the remaining two tribal groups, only one specific example of contemporary pillage was cited in each case, which was hardly sufficient to support the respective bans covering objects produced over 8,000- and 12,000-year periods. *Id.* at 63-65; *see also infra* notes 171-72 and accompanying text (explaining that the CCPIA requires evidence of contemporary pillage affecting the specific categories of items subject to import restrictions).

164. Fitzpatrick, *Stealth UNIDROIT*, *supra* note 160, at 56-59, 61-63, 65.

165. *Id.* at 50-52, 50 n.12, 59, 61, 63-65, 67; *see also* 19 U.S.C. § 2602(a)(1)(A) (2006) (requiring the Executive to determine “that the cultural patrimony of the State Party *is in jeopardy* from the pillage of archaeological or ethnological materials of the State Party”) (emphasis added); S. REP. NO. 97-564, at 21 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4078, 4098 (explaining that the statute would authorize import restrictions on “archaeological or ethnological materials specifically identified as comprising a part of a state’s cultural patrimony that *is in danger* of being pillaged”) (emphasis added); Fitzpatrick, *Stealth UNIDROIT*, *supra* note 160, at 72 (“From the beginning, Congress has targeted situations of *contemporary* pillage because restricting the market for those goods would have a direct and immediate impact on pillage. One simply cannot refer to [historical] pillage . . . as statutory evidence of contemporary looting and include those particular goods on an embargo list because any action on behalf of the United States today would not affect such historical ‘pillage.’”) (emphasis in original); *cf.* *Bonnichsen v. United States*, 367 F.3d 864, 875 & n.15 (9th Cir. 2004) (concluding, consistent with Supreme Court precedent, that “Congress’ use of the present tense [was] significant” in construing the Native American Graves Protection and Repatriation Act).

166. Fitzpatrick, *Stealth UNIDROIT*, *supra* note 160, at 67.

167. 19 U.S.C. § 2602(a)(1)(C)(i) (2006).

168. *See supra* text accompanying note 157.

passed through London auction houses.¹⁶⁹ Thus, Fitzpatrick concluded (again, correctly in our view) that this quantity constituted a “significant” import trade; and because the record did not indicate that the United Kingdom had enacted or planned to enact “similar restrictions,” the third criterion had not been satisfied.¹⁷⁰

Only a few months later, the Executive imposed similar comprehensive import restrictions on virtually the “entire cultural heritage” of Peru, encompassing archaeological and ethnological materials dating from 12,000 B.C. to 1821 A.D.¹⁷¹ In evaluating the legality of these import restrictions—again by referring to Peru’s request and CPAC’s report—Fitzpatrick identified the same two statutory deficiencies.

With respect to the first statutory criterion, he concluded that “[a] review of the Committee Report reflect[ed] the dramatic failure to support the wholesale import restrictions with evidence of actual pillage,” since “[t]here [was] no doubt that the proof of pillage in Peru does not extend to the full range, 13,000 years, of embargoed goods.”¹⁷² Fitzpatrick based this conclusion on the requirement that there must be evidence of *contemporary* pillage affecting the specific category of items to be restricted.¹⁷³ This requirement is compelled both by the plain language of the statute and its legislative history.¹⁷⁴ Thus, although the record contained limited examples of contemporary pillage,¹⁷⁵ these examples justified only “rifle-shot”

169. Fitzpatrick, *Stealth UNIDROIT*, *supra* note 160, at 68.

170. *Id.* We discuss this aspect of the third criterion in further depth below. See *infra* notes 198-204 and accompanying text.

171. Fitzpatrick, *Stealth UNIDROIT*, *supra* note 160, at 68-70; Archaeological and Ethnological Material from Peru, 62 Fed. Reg. 31,712, 31,713 (June 11, 1997) (to be codified at 19 C.F.R. pt. 12).

172. Fitzpatrick, *Stealth UNIDROIT*, *supra* note 160, at 69-70.

173. *Id.* at 70.

174. See 19 U.S.C. § 2602(a)(2)(A) (2006) (authorizing the Executive to apply import restrictions only “to the archaeological or ethnological material of the State Party the pillage of which is creating the jeopardy to the cultural patrimony of the State Party”); S. REP. NO. 97-564, at 21 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4078, 4098 (explaining that the statute authorized the Executive to “apply specific import or other controls (upon the request of a State Party) to archaeological or ethnological materials specifically identified as comprising a part of a state’s cultural patrimony that is in danger of being pillaged”) (emphasis added). We assume here that the contemporary pillage of archaeological or ethnological materials would necessarily jeopardize the cultural patrimony of the requesting nation.

175. Specifically, the CPAC report emphasized “fifty-one thefts of ethnographic materials . . . taken largely from provincial churches[.]” Fitzpatrick, *Stealth UNIDROIT*, *supra* note 160, at 70-71, and the Peruvian request highlighted eleven incidents of looting or vandalism at eight archaeological sites. *Id.* at 72-73. Peru also identified looting at two additional sites, but it did not seek protection for materials from those sites. *Id.* at 73-74. Fitzpatrick also acknowledged that the Sipan Region of Peru was subject to contemporary pillage, but he correctly pointed out that the United States already had imposed emergency import restrictions on materials from there.

restrictions, not a “comprehensive embargo” on Peru’s “entire cultural heritage.”¹⁷⁶ As in the Canadian case, “[t]he Peruvian request [was] essentially premised on numerous references to the long history of looting[,]” which, as explained above, would not satisfy the first statutory criterion.¹⁷⁷

Fitzpatrick also concluded that “[t]here [was] a clear failure of proof” with respect to the third statutory criterion, because there was “no showing that *any* major market abroad [was] following the United States’s total ban.”¹⁷⁸ Although the Peruvian request identified markets in Peruvian goods in several countries abroad, CPAC relied only on the fact that some of these countries had ratified, or signaled their intent to ratify, the 1970 UNESCO Convention or the 1995 UNIDROIT Convention.¹⁷⁹ However, Fitzpatrick explained (again, correctly in our view) that merely ratifying one of these treaties, by itself, “is a far cry from having ‘similar restrictions’ in place.”¹⁸⁰ Fitzpatrick further revealed that, with the “possible exception of Canada,” there was no evidence in the record that any of these nations were “in fact barring [or intending to bar] any Peruvian goods, let alone imposing the comprehensive ban that the [United States] approved.”¹⁸¹

C. *The Onset of Secrecy*

Rather than ameliorating Fitzpatrick’s findings, which to this day have never been challenged in print, the State Department perversely responded by eliminating transparency with respect to its implementation of the CCPIA. So far as we are aware, the State Department has not released any original country requests since the publication of *Stealth UNIDROIT*, and we have been able to obtain

Id. at 70, 73 (“At best, the experience with . . . Sipan suggests only that this agreement should be continued, not that a far broader embargo be instituted under the law.”); *see* Import Restrictions Imposed on Significant Archaeological Artifacts from Peru, 55 Fed. Reg. 19,029 (May 7, 1990) (to be codified at 19 C.F.R. pt. 12).

176. Fitzpatrick, *Stealth UNIDROIT*, *supra* note 160, at 70, 73-74.

177. *Id.* at 72.

178. *Id.* at 74-75.

179. *Id.* Specifically, there were markets in Brazil, Denmark, England, France, Germany, Italy, Japan, the Netherlands, Sweden, and Switzerland; and the Executive pointed to the fact that Brazil, Canada, France, and Italy had ratified the 1970 UNESCO Convention, and that France, Switzerland, and the Netherlands had signed the 1995 UNIDROIT Convention. *Id.* at 74-75. In this respect, and although not discussed by Fitzpatrick, it is noteworthy that the Executive might have, but did not appear to, invoke the limited statutory exception to the requirement that *all* nations with a significant import trade enact “similar restrictions.” 19 U.S.C. § 2602(c)(2) (2006); *see* S. REP. NO. 97-564, at 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4078, 4105 (referring to this exception as a “limited” one).

180. Fitzpatrick, *Stealth UNIDROIT*, *supra* note 160, at 75; *see infra* notes 198-204 and accompanying text.

181. Fitzpatrick, *Stealth UNIDROIT*, *supra* note 160, at 75.

only one, nonredacted CPAC report (the 2000 report on the Italian request).¹⁸² This lack of transparency itself borders on lawlessness; for example, the State Department recently denied a congressman's written request for two CPAC reports,¹⁸³ even though the CCPIA requires the submission of those very reports to Congress.¹⁸⁴

This lack of transparency has not always been the case. In 1987, the United States for the first time imposed import restrictions pursuant to the CCPIA, in response to an emergency situation of pillage in El Salvador.¹⁸⁵ Two years later, then-Executive Director of CPAC, Ann Guthrie Hingston, published an article detailing and quoting from both El Salvador's request for import restrictions and CPAC's resulting report.¹⁸⁶ And in 1993, CPAC voluntarily

182. Letter from Francis Terry McNamara, Co-Chairman, Appeals Review Panel, to Peter K. Tompa, Counsel for the Int'l Ass'n of Prof'l Numismatists (Mar. 22, 2004) (on file with the authors) (releasing REPORT OF THE CULTURAL PROPERTY ADVISORY COMMITTEE ON THE REQUEST FROM THE GOVERNMENT OF THE REPUBLIC OF ITALY RECOMMENDING U.S. IMPORT RESTRICTIONS ON CERTAIN CATEGORIES OF ARCHAEOLOGICAL MATERIAL (2000) [hereinafter CPAC REPORT ON ITALIAN REQUEST] (on file with the authors)).

We have obtained five additional CPAC reports, but those copies are all heavily (and, in some instances, completely) redacted with respect to the statutory criteria. See *infra* Part III.D. Thus, we refer only to the nonredacted 2000 report on the Italian request in our discussion of the statutory criteria. See REPORT OF THE CULTURAL PROPERTY ADVISORY COMMITTEE ON THE PROPOSAL TO EXTEND THE MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA & THE GOVERNMENT OF THE REPUBLIC OF CYPRUS CONCERNING THE IMPOSITION OF IMPORT RESTRICTIONS ON PRE-CLASSICAL AND CLASSICAL ARCHAEOLOGICAL MATERIAL AND BYZANTINE PERIOD ECCLESIASTICAL AND RITUAL ETHNOLOGICAL MATERIALS (2007) [hereinafter 2007 CPAC REPORT ON CYPRIOT EXTENSION] (on file with the authors); THE REPORT OF THE CULTURAL PROPERTY ADVISORY COMMITTEE ON THE PROPOSAL TO EXTEND THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA & THE GOVERNMENT OF THE REPUBLIC OF ITALY CONCERNING THE IMPOSITION OF IMPORT RESTRICTIONS ON CATEGORIES OF ARCHAEOLOGICAL MATERIAL REPRESENTING THE PRE-CLASSICAL, CLASSICAL, & IMPERIAL ROMAN PERIODS OF ITALY (2005) (on file with the authors); CULTURAL PROPERTY ADVISORY COMMITTEE REPORT ON THE PROPOSAL TO EXTEND THE 1999 EMERGENCY ACTION ON BYZANTINE ECCLESIASTICAL AND RITUAL ETHNOLOGICAL MATERIAL FROM CYPRUS (2003) (on file with the authors); REPORT OF THE CULTURAL PROPERTY ADVISORY COMMITTEE ON THE REQUEST FROM THE GOVERNMENT OF THE REPUBLIC OF CYPRUS RECOMMENDING U.S. IMPORT RESTRICTIONS IN CERTAIN CATEGORIES OF ARCHAEOLOGICAL MATERIAL (1999) (on file with the authors); REPORT OF THE CULTURAL PROPERTY ADVISORY COMMITTEE RECOMMENDING EMERGENCY ACTION ON THE REQUEST FROM THE GOVERNMENT OF THE REPUBLIC OF CYPRUS (1998) (on file with the authors).

183. Letter from Richard R. Verma, Assistant Sec'y, Legislative Affairs, U.S. Dep't of State, to Hon. John Culberson, Member of the House of Representatives (June 18, 2009) (on file with the authors) (declining to release CPAC's recent reports on the Chinese and Cypriot requests).

184. 19 U.S.C. § 2605(f)(6) (2006).

185. 1987 Import Restrictions on Archaeological Material from El Salvador, 52 Fed. Reg. 34,614 (Sept. 11, 1987).

186. Ann Guthrie Hingston, *U.S. Implementation of the UNESCO Cultural Property*

submitted a ten-year report to the President and Congress regarding its implementation of the CCPIA.¹⁸⁷ Although there has never been any suggestion that these publications resulted in harm, transparency of this sort is now a relic of the past.

We do not know why the State Department has chosen to cut off information to the public about the Executive's implementation of the CCPIA. Supporters of the secrecy have suggested that it is necessary to protect diplomatic relations with source nations, as well as the location of endangered cultural sites.¹⁸⁸ Critics counter that this secrecy is designed to conceal the State Department's statutorily-unmoored pursuit of import restrictions,¹⁸⁹ which it views as bargaining chips for use in unrelated political and diplomatic missions.¹⁹⁰

Although we do not purport to resolve that dispute here, we find the lack of transparency regrettable given the openness that previously existed, *Stealth UNIDROIT's* troubling (and unchallenged) findings, and the increasingly broad scope of the

Convention, in THE ETHICS OF COLLECTING CULTURAL PROPERTY, *supra* note 132, at xi, 129, 134-43.

187. CULTURAL PROPERTY ADVISORY COMMITTEE, LOOTING, THEFT AND SMUGGLING: A REPORT TO THE PRESIDENT AND THE CONGRESS 1983-1993 (1993).

188. See *IFAR Evening, supra* note 157, at 42-43 (statements of Nancy C. Wilkie and Patty Gerstenblith); Steven Vincent, *Stealth Fighter: The Secret War of Maria Kouroupas*, ART & AUCTION, Mar. 2002, at 63, 67; Steven Vincent, *Dealers v. USIA*, ART & AUCTION, Nov. 1997, at 44-46; Jeremy Kahn, *Is the U.S. Protecting Foreign Artifacts? Don't Ask*, N.Y. TIMES, Apr. 8, 2007, at 26.

189. See *IFAR Evening, supra* note 157, at 39-49; *id.* at 33 (Jack A. Josephson's talk, *A Historical Perspective*); *id.* at 34-36 (Kate Fitz Gibbon's talk, *A Critique of CPAC*); *id.* at 37-39 (Jay I. Kislak's talk, *The Chairman's View*); Kahn, *Is the U.S. Protecting Foreign Artifacts?*, *supra* note 188; Jeremy Kahn, *U.S. Delays Rule on Limits to Chinese Art Imports*, N.Y. TIMES, Oct. 18, 2006, at E2 [hereinafter Kahn, *U.S. Delays Rule*]; Nina Teicholz, *You Can't Bring Those Antiquities Here!*, WASH. POST, Dec. 24, 2000, at B05; Steven Vincent, *Stealth Fighter, supra* note 188, at 65; Vincent, *Dealers v. USIA, supra* note 188, at 44-46; Letter from Peter K. Tompa, Counsel for the Int'l Ass'n of Prof. Numismatists and the Prof. Numismatists Guild, to Howard J. Krongard, Inspector General, U.S. Dep't of State (Mar. 29, 2007) (on file with the authors).

190. See Maria P. Kouroupas, *Preservation of Cultural Heritage: A Tool of International Public Diplomacy, in* CULTURAL HERITAGE ISSUES, *supra* note 125, at 325 ("In recent years, the rising tide of interest in cultural preservation has made it a palpable element of public diplomacy, particularly with respect to movable cultural property . . ."); WHO OWNS THE PAST?, *supra* note 133, at 12-13 (stating that "US enforcement agencies," including the State Department, "have no incentive to tolerate, much less promote, the importation of cultural property if the result would be to antagonize foreign governments that might, in consequence, withhold cooperation on matters of greater concern to the US government (such as terrorism, drug smuggling, illegal immigration, money laundering, military bases, trade preferences, and so on)"); Fitzpatrick, *Stealth UNIDROIT, supra* note 160, at 76 ("[T]here is an unmistakable indication that the State Department is wielding its authority to force embargoes on political, rather than cultural property, grounds.").

import restrictions imposed in recent years. The lack of transparency precludes any thorough and comprehensive evaluation of the State Department's compliance with the CCPIA. Nonetheless, the information that is publicly available suggests that the Executive is failing to comply with all of the CCPIA's statutory requirements.

D. The Statutory Criteria

As explained above, the first statutory criterion requires not only that there be evidence of contemporary pillage, but that there also be evidence of contemporary pillage affecting the specific category of items to be restricted.¹⁹¹ Although *Stealth UNIDROIT* emphasized this point, the Executive continues to ignore Congress' intent by imposing import restrictions of broad scope. Perhaps the best examples are the import restrictions recently imposed on Chinese archaeological materials, encompassing virtually every kind of object ranging in date from 75,000 BC to 907 AD.¹⁹² Although lack of access to documentary evidence prevents us from assessing whether China demonstrated a situation of contemporary pillage, as required by the first statutory criterion, the mere scope of these restrictions raises serious doubts regarding the Executive's compliance with that requirement. Under the CCPIA, China was required to demonstrate that each specific category of material within this comprehensive embargo was currently in jeopardy of pillage. That China actually provided such evidence requires a significant suspension of disbelief.¹⁹³

Our concerns are exacerbated by the analysis employed by CPAC in its 2000 report on the Italian request—the most recent, nonredacted report that has been released¹⁹⁴—which resulted in broad import restrictions on several categories of archaeological materials, ranging in date from the 9th Century BC to the 4th Century AD.¹⁹⁵ Rather than documenting the evidence of

191. See *supra* notes 171-72 and accompanying text.

192. Also included in the embargo are “monumental sculptures and wall art at least 250 years old.” 2009 Import Restrictions Imposed on Certain Archaeological Material from China, 74 Fed. Reg. 2838-39 (Jan. 16, 2009) (to be codified at 19 C.F.R. pt. 12).

193. See James F. Fitzpatrick, *Falling Short: Profound Failures in the Administration of the 1983 Cultural Property Law*, 2 A.B.A. SEC. OF INT'L L. ART & CULTURAL HERITAGE L. NEWSL. 24, 26 (Summer 2010) [hereinafter Fitzpatrick, *Falling Short*] (“[T]he China MOU embargoed *all* archeological objects from prehistoric times to the end of the Tang Dynasty. It is impossible to believe that China presented evidence of pillage of all such objects.”).

194. See *supra* note 180 and accompanying text.

195. Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 66 Fed. Reg. 7,399 (Jan. 23, 2001) (to be codified at 19 C.F.R. pt. 12); see James Cuno, *Museums, Antiquities, Cultural Property, and the US Legal Framework for Making Acquisitions*, in WHO OWNS THE PAST?, *supra* note 133, at 143, 153 (explaining that

contemporary pillage affecting each specific category of restricted material, the CPAC report briefly outlined (in less than two pages) general looting problems facing Italy, both past (which are statutorily irrelevant) and present.¹⁹⁶ Notably, two CPAC members dissented with regard to the first statutory criterion, with one of them specifically objecting to the “procedure of making general findings for the entire country rather than proceeding with findings on a regional or site-by-site basis.”¹⁹⁷ This generalized analysis employed by CPAC, coupled with the increasingly broad scope of import restrictions being imposed, suggests that the Executive is not adhering to the first statutory criterion.

There are similar concerns pertaining to the third statutory criterion, requiring, *inter alia*, that U.S. import restrictions be “applied in concert with similar restrictions implemented, or to be implemented,” by other nations having a significant import trade in the restricted materials.¹⁹⁸ In *Stealth UNIDROIT*, Fitzpatrick revealed that this requirement was disregarded in the Peruvian case because CPAC had focused solely on whether other market nations had ratified the 1970 UNESCO Convention or 1995 UNIDROIT Convention—without regard to the concrete restrictions actually yielded by such ratification.¹⁹⁹ In our view, the necessity of identifying such concrete restrictions is best illustrated by the simple fact that market nations have varied significantly in their implementation of the 1970 UNESCO Convention.²⁰⁰ Moreover, only after specific restrictions are identified can there be a determination, in accordance with the CCPIA, whether they are sufficiently “similar” to the import restrictions adopted by the United States.²⁰¹ This approach is compelled by the plain language of the statute and is in accordance with the third criterion’s purpose of preventing U.S.

these import restrictions covered “virtually every kind of art object produced in or imported to the land we now call Italy over twelve hundred years of recorded human history”).

196. See CPAC REPORT ON ITALIAN REQUEST, *supra* note 182, at 10-12.

197. *Id.* at 22.

198. 19 U.S.C. § 2602(a)(1)(C)(i) (2006).

199. See *supra* notes 176-79 and accompanying text.

200. For example, Australia and Canada have broadly implemented the Convention by prohibiting the import of any cultural object unlawfully exported from its country of origin; on the other hand, Japan’s implementation regime does not even account for “[o]bjects from clandestine excavations,” thus “ignor[ing] the reality of the unlawful trade in cultural property.” PATRICK J. O’KEEFE, COMMENTARY ON THE 1970 UNESCO CONVENTION 41-42, 102-03, 126 (2d ed. 2007).

201. Focusing on the concrete restrictions adopted, rather than the mere act of ratification, is also consistent with the fact that the CCPIA deems it irrelevant whether the market nation is a “State Party” to the 1970 UNESCO Convention. See 19 U.S.C. § 2602(a)(1)(C)(i) (2006).

import restrictions from merely diverting illicit traffic elsewhere.²⁰²

Nonetheless, a review of CPAC's 2000 report on the Italian request again suggests that CPAC did not alter its approach. Only with respect to one market nation (France) did CPAC attempt to identify concrete restrictions affecting the movement of Italian archaeological materials.²⁰³ By failing to apply this statutorily-mandated approach to each pertinent market nation, CPAC did not satisfy the third criterion. In this respect, CPAC failed to address the truly difficult question here—namely, just what sort of “restrictions” are “similar” to the import restrictions adopted by the United States?²⁰⁴

202. See Fitzpatrick, *Stealth UNIDROIT*, *supra* note 160, at 52 (“It was recognized that there would be no deterrent [to looting] if the United States closed its market to certain items, but then those same cultural products simply found their way to markets in London, Paris, Zurich, the Near East, or Tokyo. In the words of the chief architect of the final draft of the statute, Senator Patrick Moynihan of New York, the United States should not engage in a self-denying ordinance which merely shifts a market from one country to another.”) (internal quotation marks omitted); Vincent, *Stealth Fighter*, *supra* note 188, at 64 (explaining that “if the U.S. is the only nation applying a ban, the trade will simply shift elsewhere”).

203. CPAC REPORT ON ITALIAN REQUEST, *supra* note 182, at 20 (“French customs officials would demand an export certificate prior to allowing any archaeological object to be imported into France. On being asked specifically whether export certificates are required to import Italian antiquities into France, he indicated that they are required.”). Instead, CPAC again relied on whether market nations had ratified the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, as well as whether they were subject to the European Union’s regulatory regime on unlawfully exported cultural property. See *id.* at 15, 19-20, 23-24. On the latter point, one member of CPAC notably dissented on the ground that “how and whether” the EU regulations were actually implemented was “unknown.” *Id.* at 23; see also Fitzpatrick, *Falling Short*, *supra* note 193, at 25 (“[A]nalyzes and reports on the administration of these [EU regulations] confirm that they fall far short of any comprehensive, enforced import ban as [the United States] impose[s].”).

204. We believe that the correct approach to this inquiry requires comparing the concrete measures adopted by each pertinent market nation with the proposed U.S. import restrictions—bearing in mind that the CCPA describes the import restrictions it authorizes as a “drastic” remedy. See 19 U.S.C. § 2602(a)(1)(C)(ii) (2006). We note that former CPAC member, Patty Gerstenblith, has submitted letters to CPAC arguing that, regardless of form, any measure adopted by a market nation that is aimed at stemming the illicit trade—including its mere ratification of a cultural property treaty—is sufficiently “similar” to U.S. import restrictions. Letter from Patty Gerstenblith, President, Lawyers’ Comm. for Cultural Heritage Pres., to the Cultural Prop. Advisory Comm. 3 (Feb. 25, 2008), available at http://www.culturalheritagelaw.org/Resources/Documents/Letter-Cambodia_Extension.doc (“The use of the word ‘similar’ (rather than the word ‘same’) in the statutory language to describe the actions of other nations to be considered indicates that the [C]CPA only requires that other nations need to take similar actions that serve the underlying purpose of restricting the trade in looted artifacts.”); Letter from Patty Gerstenblith, President, Lawyers’ Comm. for Cultural Heritage Pres., to Jay Kislak, Chairman, Cultural Prop. Advisory Comm. (Sept. 24, 2005), available at www.culturalheritagelaw.org/Resources/Documents/Letter-Italy_Extension.doc (“[A]lthough the United Kingdom has chosen a different method of implementing the UNESCO Convention [i.e. the creation of a new

The third statutory criterion also requires that the Executive determine that concerted action “would be of substantial benefit in deterring a serious situation of pillage” before imposing import restrictions.²⁰⁵ However, upon renewing import restrictions, the Executive does not always update the designated list of restricted items.²⁰⁶ Its failure to do so raises the following concern regarding adherence to the statutory criteria for renewals: if the original import restrictions had the anticipated effect of substantially deterring a situation of pillage, how could the Executive find (as is statutorily required) a contemporary situation of pillage affecting the very same items five years later?²⁰⁷ If, on the other hand, the original import restrictions did not have the anticipated effect of deterring a situation of pillage, on what basis could the Executive find (as is statutorily required) that concerted action five years later would substantially deter such pillage?²⁰⁸

The El Salvadoran case illustrates this concern. Following the emergency import restrictions imposed in 1987, the United States entered a bilateral agreement with El Salvador in 1995 and restricted the importation of pre-Hispanic artifacts.²⁰⁹ Although that

criminal offense], this legislation is aimed at controlling the same problem of illegal excavation.”). While we agree that the measures adopted by a market nation need not be identical to U.S. import restrictions, we disagree that any measure attempting to regulate the illicit trade will satisfy the statute. Indeed, such an interpretation would render the word “similar” superfluous. *See* United States *ex rel.* Eisenstein v. City of New York, 129 S. Ct. 2230, 2234 (2009) (relying on “well-established principles of statutory interpretation that require statutes to be construed in a manner that gives effect to all of their provisions”). In this respect, we further highlight that the statute explicitly contemplates that those measures adopted by market nations will take the form of “import restrictions.” *See* 19 U.S.C. § 2602(d)(1) (2006) (requiring the President to suspend import restrictions where market nations “have not implemented within a reasonable period of time *import restrictions* that are similar to those” imposed by the United States) (emphasis added).

205. 19 U.S.C. § 2602(a)(1)(C)(i) (2006).

206. The United States has renewed bilateral agreements with the following countries (in some cases more than once) without updating the designated list of restricted items: Bolivia, El Salvador, Guatemala, Honduras, Nicaragua, and Peru. By contrast, the United States has updated the list of restricted items when renewing its bilateral agreement with Cambodia, Cyprus, Italy, and Mali. *Import Restrictions List & Chart*, US DEP’T OF STATE, <http://exchanges.state.gov/heritage/culprop/listactions.html> (last visited Nov. 16, 2011).

207. *See* 19 U.S.C. §§ 2602(a)(1)(A), 2602(e)(1) (2006) (prohibiting the extension of import restrictions unless the statutory criteria remain satisfied, including the requirement that there be evidence of contemporary pillage affecting the items to be restricted).

208. *See id.* §§ 2602(a)(1)(C)(i), 2602(e)(1) (prohibiting the extension of import restrictions unless the statutory criteria remain satisfied, including the requirement that international concerted action “would be of substantial benefit in deterring a serious situation of pillage”).

209. Prehispanic Artifacts from El Salvador, 60 Fed. Reg. 13,352 (Mar. 10, 1995) (to be codified at 19 C.F.R. pt. 12).

bilateral agreement has been renewed and amended every five years since then, the designated list of restricted items has not changed.²¹⁰ Thus, in recently renewing the import restrictions in 2010, the Executive would have had to determine under the law that: 1) despite having import restrictions in place since 1995, a contemporary situation of pillage continued to affect the same categories of El Salvadoran items; and 2) despite the fifteen-year history of failure to alleviate this pillage, U.S. import restrictions, coupled with concerted international action, would substantially deter that situation of pillage this time around.

While these examples illustrate the type and severity of the ongoing concerns pertaining to the Executive's adherence to the law, there are other unresolved issues. For example, the second statutory criterion requires that the requesting nation take "measures consistent with the [1970 UNESCO] Convention to protect its cultural patrimony."²¹¹ It remains unclear the extent to which a requesting nation must perform the enumerated, protective functions listed in Article 5 of the Convention, let alone how such performance should be assessed and whether the Executive has ever even made such an assessment.²¹² Moreover it remains unclear whether a requesting country can satisfy this criterion if it has a thriving domestic market in the proposed category of items to be restricted from importation into the United States.²¹³

To take another example, the third statutory criterion, in addition to requiring concerted international action, requires that "remedies less drastic" than import restrictions be unavailable.²¹⁴

210. *El Salvador*, US DEP'T OF STATE, <http://exchanges.state.gov/heritage/culprop/esfact.html> (last visited Dec. 30, 2011).

211. 19 U.S.C. § 2602(a)(1)(B) (2006).

212. Article 5 of the Convention requires that States Parties "ensure the protection of their cultural property" by establishing "one or more national services" to undertake the following seven enumerated, protective functions: (1) drafting laws and regulations; (2) establishing a national inventory of protected property; (3) developing or establishing institutions ensuring the protection of cultural property; (4) organizing supervised, archaeological excavations; (5) establishing ethical rules and principles regarding the acquisition and transfer of cultural property; (6) educating members of the public about the importance of cultural heritage and spreading knowledge about the Convention's provisions; and (7) publicizing the disappearance of cultural property. 1970 UNESCO Convention, *supra* note 8, at art. 5.

213. *See, e.g.*, Letter from William G. Pearlstein, Counsel to Golenblock, Eiseman, Assor, Bell & Peskoe LLP, to the Cultural Prop. Advisory Comm., at 4-5 (Feb. 17, 2005), *available at* <http://www.golenbock.com/attorney.cfm?ID=44> (follow link on left of page) (arguing that China's request failed to satisfy the second statutory criterion because China encouraged a "booming domestic market" in the same materials that it requested the United States to restrict); Fitzpatrick, *Falling Short*, *supra* note 193, at 28 (same).

214. 19 U.S.C. § 2602(a)(1)(C)(ii) (2006).

This standard imposes an onerous burden on the Executive.²¹⁵ It remains unclear whether the standard requires only that the proposed import restrictions be as narrow as possible,²¹⁶ or whether it requires that remedies less drastic than import restrictions be unavailable.²¹⁷ CPAC failed to address this statutory criterion in its 2000 report on the Italian request.²¹⁸

As a final example, former CPAC Chairman Jay Kislak has commented that, not only did CPAC vote on each of the four statutory criteria, but it took a fifth, “overall” vote on whether to grant a request.²¹⁹ This is a baffling procedure because if any one of the statutory criteria is not satisfied, then the inquiry should immediately come to an end, as the statute requires that *each* of its criteria be satisfied. Thus, taking such an “overall” vote is wholly inconsistent with the statutory framework.²²⁰

E. The Ancient Coin Collectors Case

In addition to the statutory criteria, there are serious concerns that the State Department is disregarding other important structural features of the CCPIA as well. These concerns are illustrated by an ongoing lawsuit brought by the Ancient Coin Collectors Guild (“ACCG”), a self-described “non-profit organization committed to promoting the free and independent collecting of coins from antiquity.”²²¹

In July 2007, the United States extended its bilateral agreement with Cyprus and, for the first time in the CCPIA’s history, restricted

215. Indeed, it is reminiscent of the “least restrictive alternative” test accompanying the strict scrutiny standard that so often dooms the constitutionality of statutes. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 813 (2006) (concluding that application of the strict scrutiny standard results in the challenged law being upheld less than one-third of the time).

216. See Kimberly DeGraaf, *Should the U.S. Restrict Imports of Chinese Archaeological Materials?: An Analysis Under the Convention on Cultural Property Implementation Act*, 2 ART & MUSEUM L.J. 31, 46 (2007) (“A less drastic remedy is available in the form of a narrower range of objects included in a request for an import ban . . .”).

217. See *id.* at 48-54 (suggesting that less drastic remedies would include strengthening laws protecting cultural property at its source, increasing the licit market, and instituting public education programs).

218. See CPAC REPORT ON ITALIAN REQUEST, *supra* note 182, at 24 (concluding, without explanation, that less drastic remedies were not available).

219. *IFAR Evening*, *supra* note 157, at 45 (statement of Jay I. Kislak).

220. In this respect, we note that a former CPAC member has commented that “there were a lot of contortionist moves on CPAC that were made necessary because the requests were inadequate in some way or another.” *Id.* at 47 (statement of Kate Fitz Gibbon).

221. ANCIENT COIN COLLECTORS GUILD, <http://www.accg.us/> (last visited Dec. 30, 2011).

the importation of coins.²²² Then, in January 2009, after much delay and controversy,²²³ the United States granted China's 2004 request for import restrictions and again included coins on the list of restricted items.²²⁴ Disappointed with the inclusion of coins, and frustrated with the lack of transparency in the process,²²⁵ ACCG sought to test the legality of these import restrictions. To gain standing, it legally purchased and imported from abroad common Cypriot and Chinese coins valued at \$275, correctly anticipating that U.S. Customs and Border Patrol would detain and seize them.²²⁶ The

222. Extension of Import Restrictions Imposed on Pre-Classical and Classical Archaeological Objects and Byzantine Period Ecclesiastical and Ritual Ethnological Material from Cyprus, 72 Fed. Reg. 38,470 (July 13, 2007) (to be codified at 12 C.F.R. pt. 12); Jeremy Kahn, *U.S. Imposes Restrictions on Importing Cypriot Coins*, N.Y. TIMES, July 18, 2007, at E3. Although CPAC apparently considered restricting the importation of Cypriot and Italian coins in 1999, such restrictions were ultimately not imposed. See Import Restrictions Imposed on Pre-Classical and Classical Archaeological Material Originating in Cyprus, 67 Fed. Reg. 47,447 (July 19, 2002) (to be codified at 19 C.F.R. pt. 12); Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 66 Fed. Reg. 7,399 (Jan. 23, 2001) (to be codified at 19 C.F.R. pt. 12); Peter K. Tompa & Ann M. Brose, *A Modern Challenge to an Age-Old Pursuit: Can Cultural Patrimony Claims and Coin Collecting Coexist?*, in WHO OWNS THE PAST?, *supra* note 133, at 214; First Amended Complaint ¶¶ 37-40, Ancient Coin Collectors Guild v. U.S. Customs and Border Prot., No. CCB-10-322, 2011 WL 3444343 (D. Md. July 15, 2010).

223. *E.g.*, Kahn, *U.S. Delays Rule*, *supra* note 188.

224. Import Restrictions Imposed on Certain Archaeological Material from China, 74 Fed. Reg. 2,838 (Jan. 16, 2009) (to be codified at 19 C.F.R. pt. 12); see Autumn L. Marton, *On Rabbits, Rats and Low-Hanging Fruit: Rethinking the Impact of International Agreements on China's Domestic Cultural Property Protection*, 23 COLUM. J. ASIAN L. 217, 228-38 (2009) (discussing and analyzing the U.S.-China bilateral agreement).

Most recently, the United States has extended its MOU with Italy and restricted the importation of certain categories of Italian coins. See Extension of Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 76 Fed. Reg. 3,012 (Jan. 19, 2011) (to be codified at 19 C.F.R. pt. 12).

225. The ACCG was involved in FOIA litigation at the administrative level on these issues from 2004 to 2007, during which time the State Department notably refused to disclose country requests and CPAC reports. See Ancient Coin Collectors Guild v. U.S. Dep't of State, 673 F. Supp. 2d 1, 2 & n.1 (D.D.C. 2009). After the United States restricted the importation of Cypriot coins, ACCG filed a lawsuit in federal court contesting the State Department's refusal to disclose certain documents under FOIA. *Id.* at 2-3. In November 2009, the district court granted the State Department's motion for summary judgment. *Id.* at 3-7. Rather than wait for the resolution of the appeal, which is currently pending, ACCG decided to use the information that it did obtain from the FOIA process to file a separate lawsuit; that is, the lawsuit discussed in the text.

226. First Amended Complaint, *supra* note 222, ¶¶ 3, 8, 91, 94-96; Press Release, Ancient Coin Collectors Guild, Ancient Coin Collectors Seek Judicial Review of Controversial Decisions to Bar Coin Imports (Feb. 16, 2010), *available at* http://www.accg.us/news/item/Ancient_Coin_Collectors_Seek_Judicial_Review_of_Cont

lawsuit subsequently filed by ACCG (which remains ongoing at the time of this writing)²²⁷ is the first to challenge the Executive's compliance with the CCPIA.²²⁸ We focus here on only two of the many allegations in that lawsuit.

First, ACCG alleged that the embargo on Cypriot and Chinese coins exceeded the scope of the CCPIA.²²⁹ This allegation appears to be well supported. Under the CCPIA, import restrictions may be applied only to "archaeological or ethnological materials," which, by definition, are limited to certain objects that are "*first discovered within*, and [are] subject to export control by, the [requesting] State Party."²³⁰ Thus, the statute prohibits the Executive from imposing import restrictions on objects discovered outside the requesting nation, even if they are culturally affiliated with that requesting nation. While the rationale of this statutory prohibition is not altogether clear—and, in this respect, it may be an appropriate topic for statutory reform—it nonetheless appears that the Executive has disregarded it by imposing the coin embargos.

Unlike other archaeological materials, it is generally "impossible" to determine the "find spot" of ancient coins.²³¹ As one commentator explained:

Coinage seems to lack good provenance because of three factors. First, unlike modern currency, ancient coins moved more freely across sovereign borders in antiquity because their value was tied to the metal's intrinsic value. This led to a far wider geographic dispersal of coins in comparison to contemporary money, which is generally limited to specific countries or economic zones. Therefore, a Cypriot coin might be found in Egypt, England, or Rome. Second, coins have been collected for centuries, indeed, since antiquity, and some coins have traded hands innumerable times. This has

roversial_Decisions_to_Bar_Coin_Imports.aspx.

227. Shortly before this Article was published, the U.S. District Court of the District of Maryland issued a memorandum opinion dismissing the case. *Ancient Coin Collectors Guild v. U.S. Customs and Border Prot.*, No. CCB-10-322, 2011 WL 3444343 (D. Md. Aug. 8, 2011). There is much in that decision with which we disagree, such as the disturbing holding that "actions taken pursuant to delegated presidential authority under the CPIA will not be held subject to review under the [Administrative Procedure Act]." *Id.* at *15 (alterations in original). While the authors intend to address that holding (and others) elsewhere, our response here is limited, given the late stage in the publication process when the decision was issued. The case is currently on appeal to the U.S. Court of Appeals for the Fourth Circuit.

228. Press Release, Ancient Coin Collectors Guild, *supra* note 226.

229. See First Amended Complaint, *supra* note 222, ¶¶ 14-17, 29(a), 68, 92, 135(g) 141, 143.

230. 19 U.S.C. § 2601(2) (2006) (alteration in original) (emphasis added).

231. First Amended Complaint, *supra* note 222, ¶¶ 14, 16; see also *id.* ¶ 68 (alleging that the Director of the Cypriot Department of Antiquities "admitted in a private communication" to the State Department that, with respect to ancient coins, "any attempt to locate their exact find spot [is] extremely difficult") (alterations in original).

resulted in the loss of provenance. Third, the very nature of coinage as a standardized means of exchange requires that sovereigns repeatedly reproduce near exact copies. This means that for many coins there are several duplicates, which can make attributing a coin to a particular find spot exceedingly difficult.²³²

The import restrictions imposed on Cypriot and Chinese coins do not account for these factors distinguishing coins from other kinds of archaeological materials. Instead, the restrictions simply prohibit the importation of coins that are of Cypriot and Chinese origin.²³³ But merely identifying coins by their country of origin fails to satisfy the CCPIA; if this were all that were required, Congress would have emphasized the place of “production”²³⁴ rather than the place of “discovery.”²³⁵ In sum, because it is at best “exceedingly difficult” to determine where coins were “first discovered,” there is a strong

232. Derek R. Kelly, Note, *Illegal Tender: Antiquities Protection and U.S. Import Restrictions on Cypriot Coinage*, 34 BROOK. J. INT'L L. 491, 503 (2009) (footnotes omitted).

233. See Import Restrictions Imposed on Certain Archaeological Material from China, 74 Fed. Reg. 2,838, 2,842 (Jan. 16, 2009) (to be codified at 19 C.F.R. pt. 12); Extension of Import Restrictions Imposed on Pre-Classical and Classical Archaeological Objects and Byzantine Period Ecclesiastical and Ritual Ethnological Material from Cyprus, 72 Fed. Reg. 38,470, 38,473 (July 13, 2007) (to be codified at 19 C.F.R. pt. 12).

234. Or construction, creation, manufacture, origin, etc.

235. The district court rejected this statutory argument for three reasons, none of which we find persuasive. First, the court observed that “for objects without documentation of where and when they were discovered, the CPIA [in § 2606(b)-(c)] expressly places the burden on importers to prove that they are importable.” *Ancient Coin Collectors Guild v. U.S. Customs and Border Prot.*, No. CCB-10-322, 2011 WL 3444343, at *18 (D. Md. Aug. 8, 2011). But although the burden is on the importer to demonstrate that their object is not subject to import restrictions, those import restrictions must comply with the CCPIA in the first instance; and the statute provides that only “archaeological or ethnological materials”—statutorily defined as materials that are “first discovered within, and . . . subject to export control by,” the requesting nation—may be restricted from importation. *Id.* (internal quotation omitted). Second, the court emphasized that “the CPIA anticipates that some categories of materials will be designated ‘by type or other appropriate classification.’” *Id.* (quoting 19 U.S.C. § 2604). But that statutory language is qualified by the requirement that “each listing made under this section shall be sufficiently specific and precise to insure that . . . the import restrictions . . . are applied only to the *archeological and ethnological material* covered by the agreement.” 19 U.S.C. § 2604(1) (emphasis added). Third, the court argued that “interpreting the ‘first discovered in’ requirement to preclude the State Department from barring the importation of archaeological objects with unknown find spots would undermine the core purpose of the CPIA, namely to deter looting of cultural property,” because “[l]ooted objects are, presumably, extremely unlikely to carry documentation . . . of when and where they were discovered and when they were exported from the country in which they were discovered.” *Ancient Coin Collectors Guild*, 2011 WL 3444343, at *19. While this policy argument may render the “first discovered within” language a good candidate for statutory reform, it does not permit the Executive to simply disregard the plain language of the statute.

argument that the coin embargos exceed the scope of the statute.²³⁶

Second, ACCG alleged that “China never formally requested import restrictions on coins”²³⁷ and that the State Department instead “created the purported request . . . in house.”²³⁸ If true, this action would contravene the reactive structure of the CCPIA, which authorizes the Executive to impose import restrictions only in response to a request from a foreign nation.²³⁹ Significantly, the statute not only requires that there be such a request but also requires that the request “be accompanied by a written statement of the facts known to the State Party that relate” to the pertinent statutory criteria.²⁴⁰ Implicit in this requirement is that any import restriction will correspond to the situation of pillage identified by the requesting country. Indeed, the foreign nation’s request would become a mere formality if the Executive could simply enlarge the categories of restricted items *sua sponte*.²⁴¹

To support this allegation, ACCG relied on several pieces of inconclusive, circumstantial evidence.²⁴² But because the State

236. Without access to the CPAC report on the Chinese request, we are unable to determine whether CPAC considered that the coin embargo might exceed the scope of the statute on this basis. With respect to the embargo of Cypriot coins, we have obtained a heavily redacted version of the pertinent CPAC report. 2007 CPAC REPORT ON CYPRIOT EXTENSION, *supra* note 182. While this report contains a brief discussion of Cypriot coins, nowhere in the nonredacted text does the report address the “first discovered within” requirement of the CCPIA. See *id.* at 21-24. We also note that former CPAC member Patty Gerstenblith submitted a letter to CPAC arguing that Cypriot coins constituted “archaeological materials,” but the letter did not address the “first discovered within” requirement of the statute. See Letter from Patty Gerstenblith, President, Lawyers’ Comm. for Cultural Heritage Prot., to the Cultural Prop. Advisory Comm. (Jan. 29, 2007), available at <http://www.savingantiquities.org/pdf/LCCHPCyprusCoinsRenewal.pdf>.

237. First Amended Complaint, *supra* note 222, ¶¶ 43, 135(a).

238. Letter from Peter K. Tompa, *supra* note 189, at 6 (internal quotation omitted).

239. 19 U.S.C. §§ 2602(a)(1), 2603(c)(1).

240. *Id.* §§ 2602(a)(3), 2603(c)(1).

241. The district court rejected this argument on the ground that “the CPIA does not require that a state party’s initial request include a detailed accounting of every item eventually covered by an Article 9 agreement.” Ancient Coin Collectors Guild v. U.S. Customs and Border Prot., No. CCB-10-322, 2011 WL 3444343, at *19 (D. Md. Aug. 8, 2011). But the allegation here is not that China failed to include such a detailed accounting, but rather that the executive branch unilaterally imposed import restrictions on a broad and distinct category of items (coins) that China did not identify as being in jeopardy of pillage.

242. First, ACCG pointed out that, in the original Federal Register notice summarizing China’s request, there was no mention of coins; it was not until a few months later that the State Department’s online, public summary of China’s request (which is no longer posted) mentioned coins. First Amended Complaint, *supra* note 222, ¶¶ 41-42; see Notice of Receipt of Cultural Property Request from the Government of the People’s Republic of China, 69 Fed. Reg. 53,970 (Sept. 3, 2004). Second, ACCG alleged that the State Department’s response to a FOIA request indicated that China never requested to restrict the importation of coins. First Amended Complaint, *supra*

Department could easily refute this allegation—by disclosing just the relevant portion of the Chinese request—its failure to do so raises unnecessary suspicions that China did not include coins in its request.²⁴³ Significantly, the Executive has reportedly circumvented the “request” requirement in the past by soliciting foreign nations to make a request.²⁴⁴ In our view, such solicitation goes even beyond enlarging the scope of a legitimate request because it effectively eliminates the “request” requirement and reverses the reactive nature of the statute.²⁴⁵ Thus, while a lack of transparency prevents us from discovering whether China in fact requested the United States to restrict the importation of coins, the government’s failure to refute that allegation, coupled with its previous circumvention of the “request” requirement, creates an inference of statutory noncompliance.

CONCLUSION

In this Article, we have documented a disturbing disjunction between the Executive’s cultural property policies and the existing legal framework established by Congress and the Judiciary. To resolve this disjunction, we believe that statutory reform is necessary for at least two reasons.

First, the current legal framework is antiquated: it is the product of the 1970s, when the cultural property field had not yet emerged

note 222, ¶ 43. We have independently reviewed that FOIA correspondence and find it inconclusive on this point. Third, and although not contained in the complaint itself, an attorney for ACCG has asserted elsewhere, without further elaboration, that “a reliable source close to the Chinese Embassy indicated that the Chinese had never specifically asked for import restrictions on coins in the first place.” Letter from Peter K. Tompa, *supra* note 189, at 6.

243. In its motion to dismiss, the government asserted that the State Department “received a diplomatic note from the Minister of Fine Arts of China requesting an agreement by which the United States would impose import restrictions on archaeological and ethnological material originating in China. The request included information regarding coins.” Defendants’ Memorandum of Law in Support of Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment, *Ancient Coin Collectors Guild v. U.S. Customs and Border Prot.*, No. CCB-10-322, 2011 WL 3444343, at 16 (D. Md. June 25, 2010). Again, however, this assertion could be easily verified by disclosing the relevant portion of the Chinese request.

244. See Fitzpatrick, *Stealth UNIDROIT*, *supra* note 160, at 76 & n.88 (“It is . . . well documented . . . that the Canadian request was prompted by the USIA approaching Canadian officials and urging them to request U.S. action in closing U.S. borders to Canadian cultural objects.”); Teicholz, *supra* note 189 (reporting that Greek government officials informed her that CPAC staff and other American officials “had pressured them” to request import restrictions, though apparently without success).

245. We do not mean to suggest here that a requesting nation is prohibited from seeking or accepting assistance in preparing its request, provided that such assistance comes after the requesting nation decides to submit a request on its own, without any pressure by the United States. Indeed, such assistance could serve to ensure that the resulting request satisfies the statutory criteria.

from its embryonic state. Since then, there have been substantial normative developments²⁴⁶ that have not been incorporated into the legal framework. Instead, the statutory framework has ossified, and judicial involvement has been sparse. These normative developments, which largely coincide with the Executive's current policies, favor the proactive and aggressive use of import restrictions. While we express no view about the wisdom or efficacy of those policies, we note that the convergence of the normative and political landscapes creates an opportunity in which statutory reform is practicable.

Second, statutory reform would mitigate a constitutional dilemma. As mentioned at the outset, the disjunction between policy and law injects the "lowest ebb" separation of powers problem into the cultural property field.²⁴⁷ That, in turn, raises questions about the scope of the Executive's constitutional authority to conduct foreign affairs in the cultural property context, and the relationship between any such authority and Congress' power to regulate commerce.²⁴⁸ Statutory reform would prompt discussion of these important and novel constitutional issues.

While we have identified specific statutory issues in need of reform, we do not attempt to describe a comprehensive strategy for reform. We note, however, a variety of approaches Congress could take. For example, Congress could work with the existing statutory framework and harmonize the ways in which the NSPA and CCPIA conflict.²⁴⁹ A more ambitious approach would be to remove the NSPA from the equation altogether by substituting in its place legislation specifically addressing stolen *cultural* property. Unlike the CCPIA, the NSPA was never designed to address the unique concerns of cultural property,²⁵⁰ and its application to cultural property has created practical and analytical difficulties.²⁵¹ At the same time,

246. See *supra* notes 22-30 and accompanying text.

247. See *supra* notes 31-33 and accompanying text.

248. See *supra* notes 34-39 and accompanying text.

249. The CCPIA was drafted with the understanding that subsequent legislation would overturn *McClain*, and therefore no attempt was made to harmonize the CCPIA with the NSPA. Fitzpatrick, *Stealth UNIDROIT*, *supra* note 160, at 862-64. But because such legislation never passed, WHO OWNS THE PAST?, *supra* note 133, at 19-21, there remain several areas in which the CCPIA and NSPA conflict. See, e.g., Katherine D. Vitale, Note, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 NOTRE DAME L. REV. 1835, 1858-62 (2009) (summarizing the conflicts).

250. See *supra* note 3 and accompanying text.

251. See, e.g., Urice, *supra* note 3 (arguing that application of the NSPA to cultural property can create unintended consequences—either broadening the illicit market in unprovenanced antiquities or criminalizing American museums' continued possession of antiquities); Adam Goldberg, Comment, *Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, 53 UCLA L. REV. 1031,

Congress could revise the CCPIA to afford the Executive the greater flexibility it apparently now exercises. For example, Congress could clarify the metric by which to measure the efficacy of import restrictions. While the CCPIA was originally designed to assist other nations with cultural pillage, import restrictions now appear to be imposed for more self-serving purposes, such as securing long-term loans²⁵² and unrelated diplomatic concessions.²⁵³ The motivating force behind these restrictions is therefore no longer apparent.

Alternatively, given the normative developments of the last three decades, Congress could wipe the slate clean and start anew. As a part of any such wholesale reform, Congress could address fundamental issues. For example, Congress could examine the origin

1046-59 (2006) (summarizing common criticisms of *McClain*); *see also supra* Part I.C (discussing how federal prosecutors failed, as a matter of law, to allege that the Egyptian sarcophagus was “stolen” under the NSPA because they failed to allege that it left Egypt after Egypt vested itself with ownership).

252. The Executive has sought to satisfy the fourth statutory criterion by securing agreements from the requesting nation to provide loans of cultural objects to American museums. *See, e.g.*, Memorandum of Understanding Between the Government of the United States of America and the Government of the People’s Republic of China Concerning the Imposition of Import Restrictions on Categories of Archeological Material from the Paleolithic Period Through the Tang Dynasty and Monumental Sculpture and Wall Art at Least 250 Years Old, U.S.-China, Jan. 14, 2009, art. II, § 7(1), *available at* <http://exchanges.state.gov/heritage/culprop/chfact/pdfs/ch2009mou.pdf>; Revised Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Peru Concerning the Imposition of Import Restrictions on Archaeological Material from the Prehispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru, U.S.-Peru, June 9, 2007, art. II.E, *available at* <http://exchanges.state.gov/heritage/culprop/pefact/pdfs/pe2007mouext.pdf>.

However, there is controversy about the effectiveness of such agreements. *See, e.g.*, Katherine Jane Hurst, *The Empty(ing) Museum: Why a 2001 Agreement Between the United States and Italy is Ineffective in Balancing the Interests of the Source Nation with the Benefits of Museum Display*, 11 ART ANTIQUITY AND L. 55, 74-83 (2006) (discussing the limitations with the loans prompted by the 2001 U.S.-Italy bilateral agreement and suggesting changes to same); Kaywin Feldman, Director and President of the Minneapolis Institute of Arts, Statement to the Cultural Property Advisory Committee Regarding the Interim Review of the Italian Memorandum of Understanding, at 3 (Nov. 13, 2009), *available at* <http://aamd.org/advocacy/documents/TestimonytoCPAC110909.pdf> (“We have found almost no evidence of long-term loans to large [American] museums, except for the institutions that have individual agreements resulting from the transfer of works. The Italian loans made as a result of American Museums transferring objects to Italy are not truly long-term loans since these loans are not made to satisfy Article II of the MOU, but instead to satisfy an agreement with an individual museum.”); Comments of William G. Pearlstein, Counsel to Golenbock, Eiseman, Assor, Bell & Peskoe LLP, to the Cultural Prop. Advisory Comm. 6 (Sept. 8, 2005), *available at* http://www.golenbock.com/docs/outlineCPACPresentation-Italyrenewal_v2.pdf (noting that there were “[r]eports that Italy has threatened to withhold loans unless U.S. museums agree to Italy’s restitution claims”).

253. *See supra* note 188.

and rationale of the default rule against enforcing foreign export laws and determine whether it should apply to cultural property. Although this rule has been of seminal importance to the current regulatory regime, we have been unable to locate scholarly authority exploring its rationale in the cultural property context.²⁵⁴

Moreover, Congress could address the general allocation of cultural property responsibility within the Executive. Currently, the Departments of Justice and State exercise primary policymaking responsibility,²⁵⁵ but it is not apparent why the Department of Commerce, for example, is not an active participant.²⁵⁶ It is also unclear how (indeed, if) departments coordinate their cultural property policies. Unlike other nations, the United States does not have a Ministry of Culture providing for centralized coordination in this field.²⁵⁷ Congress could supplement statutory reform by creating an interagency committee to facilitate policy discussion, planning, and coordination.

Our primary aim here is not to provide an exhaustive list of possibilities for reform. Instead, it is to describe the disjunction between the Executive's current cultural property policies and the existing legal framework. In documenting this overlooked disjunction, our hope is that stakeholders and policymakers will

254. This rule can be traced back to Paul Bator's seminal article in the *Stanford Law Review*, but there is little subsequent scholarship exploring the rule's theoretical underpinnings. Bator, *supra* note 139, at 287 & n.30. We nonetheless suspect that the rule is an extension of the common law prohibition against the enforcement of foreign revenue, penal, and other public laws. See Lawrence Collins, *Professor Lowenfeld and the Enforcement of Foreign Public Law*, 42 N.Y.U. J. INT'L L. & POL. 125, 129-33, 141-46 (2009) (discussing the application of this rule to cultural heritage by two non-American courts).

255. The Departments of Justice and State are prominent for the issues considered here. The Department of the Interior carries primary responsibility for domestic cultural property policy. See US DEP'T OF THE INTERIOR, <http://www.doi.gov> (last visited Dec. 30, 2011) ("The U.S. Department of the Interior protects America's natural resources and heritage, honors our cultures and tribal communities, and supplies the energy to power our future.").

256. Cf. Vincent, *Stealth Fighter*, *supra* note 188, at 69 (hypothesizing that, if CPAC had been located in the "Commerce Department—where issues of markets and free trade are paramount—and not the State Department, the administration of the CPAC might well be more favorable to the trade").

257. See John Henry Merryman, *Art Systems and Cultural Policy*, 15 ART ANTIQUITY & L. 99, 101 n.9 (2010) (quoting Michael Kammen, *Culture and the State in America*, 83 J. AM. HIST. 791, 807 (1996) ("Most industrialized nations and many of the so-called developing ones have cabinet-level ministries of culture. Poland, Denmark, Argentina, Haiti, and France are among the highly diverse examples. . . . The European Economic Community has a Commissioner of Cultural Affairs; and the European ministers of culture meet regularly on a monthly or bi-monthly basis to discuss their differences and possible modes of comparison.")).

recognize that the time for statutory reform is overdue and that the opportunity to address these complex issues in open discussion and debate is ripe.