RECORD NO. 11-2012

In The
United States Court of Appeals
For The Fourth Circuit

ANCIENT COIN COLLECTORS GUILD,

Plaintiff – Appellant,

v.

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

Defendants – Appellees.

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

BRIEF OF APPELLANT

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Fourth Cir. Rule 26.1, Plaintiff-Appellant, The Ancient Coin Collectors Guild ("the Guild") submits its corporate disclosure statement.

(a) The Guild is organized as a non-profit corporation and is not a publicly-held corporation or a publicly-held entity.

(b) The Guild has no parent company and no publicly-held company has a 10% or greater ownership in the Guild.

(c) No publicly-held company has a direct financial interest in the outcome of this litigation.

(d) No other publicly-held legal entity has a direct financial interest in the outcome of this litigation.

(e) The Guild is not a Trade Association and no publicly-held member's stock or equity value will be affected by the outcome of this proceeding.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this timely appeal from a final judgment in the United States District Court for the District of Maryland on August 8, 2011, under 28 U.S.C. § 1291. The District Court's jurisdiction was based upon 28 U.S.C. § 1356. Pursuant to Fed. R. App. P. 4(a)(1)(B), the Notice of Appeal was filed on September 20, 2011.

STATEMENT OF ISSUES

This appeal presents the following four issues for review:

1. Did the District Court improperly preclude *ultra vires* review under the Cultural Property Implementation Act ("CPIA") where the District Court acknowledged that the President's delagee at the U.S. Department of State ("State") lacked unbridled discretion under that statute?

2. Did the District Court improperly preclude review under the Administrative Procedure Act ("APA") of regulations imposing import restrictions on certain categories of Chinese and Cypriot coins where the District Court acknowledged that the final agency action was that of U.S. Customs and Border Protection ("CBP") and not the President's designee at State?

3. Did the District Court improperly conclude under *ultra vires* review that the Defendants could restrict the import of coins from China where there is no evidence in the record that China requested import restrictions on coins?

4. Did the District Court improperly conclude after *ultra vires* and constitutional review that CBP could seize and forfeit the Guild's property without a showing that the coins were "first discovered" in either Cyprus or China as required by the CPIA's plain meaning?

STATEMENT OF THE CASE

This action arises out of the seizure of twenty-three (23) ancient Cypriot and Chinese coins that the Guild purchased from a coin dealer in London and imported into the United States. (Memorandum Opinion ("Op.") at 1, Joint Appendix ("JA") 427.) After the Government failed to file a forfeiture action that would have allowed the Guild to contest the seizure, the Guild sued CBP, the Commissioner of Customs, State, and the Assistant Secretary of State, Bureau of Educational and Cultural Affairs ("Assistant Secretary, ECA") to test the legality of import restrictions imposed on ancient Cypriot and Chinese coins. In its Amended Complaint, the Guild alleged violations of the APA, the First and Fifth Amendments to the U.S. Constitution and related statutes, and also alleged that the Government acted "*ultra vires*." (Amended Complaint at ¶¶ 105-86, JA 161-79.) This is a case of first impression related to the construction and application of the CPIA, 19 U.S.C. §§ 2601 *et seq.* (JA 57-73), a copy of which is also appended as an addendum to this brief. The District Court granted the Government's Motion to Dismiss, holding that the matter was not justiciable under the APA, and that the

Guild's "*ultra vires*," constitutional and related statutory claims lacked merit. (Op. at 21-52, JA 447-78.) The Guild filed a timely notice of appeal.

STATEMENT OF FACTS

In 1983, Congress passed the CPIA to enact the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("the 1970 UNSECO Convention") into U.S. law. *See* 19 U.S.C. §§ 2601 *et seq.*; 823 U.N.T.S. 231 (1972) (JA 114-21). Broadly speaking, the 1970 UNESCO Convention contemplates that governments will enter into agreements known as "memorandums of understanding" ("MOUs") to help enforce each other's export controls on archaeological and ethnological artifacts. However, the U.S. Senate only ratified the 1970 UNESCO Convention in 1972 subject to reservations intended to preserve the "independent judgment" of the United States regarding "the need and scope of import controls." (*See* S. REP. NO. 97-564 (1992) (hereinafter "Senate Report"), JA 125, 127.)

To help maintain this "independent judgment," Congress has limited the President's delegated authority to enter into such MOUs. Of particular relevance here, the CPIA makes the President's authority to enter into MOUs contingent upon: (1) a request from a State Party to the 1970 UNESCO Convention that "must be accompanied by a written statement of facts known to the State Party" (CPIA, 19 U.S.C. § 2602(a)(3)); (2) specific findings that: (a) any restricted archaeological

artifacts were "first discovered within" and are "subject to export control" by the State Party seeking restrictions (*Id.* § 2601(2)(C)); (b) any restricted archaeological artifacts are of "cultural significance" (*Id.* § 2601(2)(C)(i)(I)); (c) less drastic remedies than import restrictions are unavailable (*Id.* § 2602(a)(1)(C)(ii)); and (d) any restrictions are part of a "concerted international response" of other State Parties to the 1970 UNESCO Convention (*Id.* § 2602(a)(1)(C)(i)); and (3) compliance with reporting requirements to Congress.[1] *Id.* § 2602(g)(2).

Moreover, the CPIA set up a panel of experts, the Cultural Property Advisory Committee ("CPAC"), to assist the President in his decision-making. *See id.* §§ 2605 *et seq.* CPAC is comprised of eleven (11) members appointed to renewable three-year terms, with the following profiles: two (2) members to represent the interests of museums; three (3) members expert in archaeology,

[1] Congress has accordingly limited the President's power to impose import restrictions on cultural goods through a "contingency format delegation." As a scholar has explained,

> These statutes, stemming from the early days of the Republic, grant the President power conditioned on his determination that certain events have transpired. . . .While these contingency format delegations are no longer the standard form of delegations to agencies, Congress still regularly employs them when it delegates power directly to the President. To determine whether the President's exercise of power under such a contingency delegation is valid requires review of the satisfaction of the condition or contingency. Simply, if the stated condition or contingency is not satisfied, there is no justification for the exercise of statutory power.

Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 Vand. L. Rev. 1171, 1174-75 (2009).

anthropology, ethnology, or related fields; three (3) members expert in the international sale of cultural property; and three (3) members to represent the interests of the general public. *Id.* § 2605(b).

As part of its statutory duties, CPAC reports to the President: (a) the results of its investigation and review; (b) its findings as to the nations individually having a significant trade in the relevant material subject to potential restriction; and (c) its recommendation as to whether a MOU should be entered into, together with its reasoning. *Id.* § 2605(f)(1). In addition, when import restrictions are recommended, the CPAC report must include: (a) any terms and conditions CPAC recommends for such MOU's; and (b) a listing of archaeological or ethnological material, specified by type or such other classification as CPAC deems appropriate, which should be covered by any such MOU. *Id.* § 2605(f)(4).

The CPIA also contemplates that the President will not treat CPAC's recommendations lightly. Under the CPIA, 19 U.S.C. § 2602(g)(2), if the President enters into or extends a MOU, he is required to report to Congress. That report must: (a) describe the actions taken; (b) indicate whether there were any differences between those actions and CPAC's recommendations; and (c) state, if so, the reasons for those differences. *Id.*

The CPIA also contains limitations on CBP's authority. In particular, if import restrictions are recommended, CBP must by regulation designate the

material restricted, by type or classification, but shall ensure that the list is sufficiently specific and precise to ensure that the restrictions are *only applied* to the material covered by any agreement to impose import restrictions. *Id.* § 2604(1) (emphasis added). Congress also contemplated that CPAC would guide CBP in preparing such "designated lists" of material subject to import restrictions. As the Senate Report indicates,

> The Secretary [of the Treasury] [now CBP] will consult with the Director of the United States Information Agency [now Assistant Secretary, ECA] before promulgating such a lists, as the latter is responsible for servicing the work of the Advisory Committee that is expected to contribute heavily to the composition of the list.

(Senate Report, JA 129.)

All these provisions were added to the CPIA as a legislative compromise to assuage the concerns of museums, collectors and dealers in cultural goods. As Stephen K. Urice and Andrew Adler have explained,

> The duration and intensity of the legislative debate resulted in a statute characterized by two important attributes. First, the [CPIA] emerged as the most comprehensive and definitive statement of cultural property policy in the United States. 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." This balance that Congress struck is reflected in the structure of the statute and its effectuating mechanisms. . . .
>
> On the one hand, the statute authorizes the United States to enforce the export restrictions of foreign nations, thus modifying the default rule against such enforcement; on the other hand, because Congress considered such import restrictions to be "drastic" measures, especially for a country

> committed to open borders and free trade, Congress ensured that they could be imposed only if exacting criteria were satisfied.

Stephen K. Urice & Andrew Adler, *Resolving the Disjunction Between Cultural Property Policy and the Law: A Call for Reform*, 18-19 (Miami L. Res., Paper Series, Draft Mar. 17, 2011), *available at* http://ssrn.com/abstract=1792588) (last visited Oct. 14, 2011) (hereinafter "Urice and Adler").[2]

After Congress enacted the CPIA, President Reagan initially delegated his authority to enter into MOUs to the Secretary of State, the Secretary of the Treasury, and the Director of the U.S. Information Agency, but after that Agency was folded into State, the President's authority was ultimately delegated to the Assistant Secretary, ECA. (*See* Op. at 8-9, JA at 434-35.) As part of this reorganization, ECA's Cultural Heritage Center also has been assigned to act as CPAC's secretariat. *See* CPIA, 19 U.S.C. § 2605(e); State, ECA Cultural Heritage Center, *available at* http://exchanges.state.gov/heritage/index.html (last visited Oct. 14, 2011).

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[2] The Guild cited an earlier version of this paper in briefing before the District Court. *See* Stephen K. Urice & Andrew Adler, *Unveiling the Executive Branch's Extralegal Cultural Property Policy*, 17-18 (Miami L. Res. Paper Series, Draft Aug. 12, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1658519&download=yes) (last visited Oct. 14, 2011). A subsequent version is now slated for publication. *See* Andrew L. Adler & Stephen K. Urice, *Resolving the Disjunction between Cultural Property Policy and Law: A Call for Reform*, 64 Rutgers L. Rev. __ (forthcoming November 2011).

During ECA's stewardship of the CPIA, the number and scope of MOUs have increased dramatically. Initially, import restrictions were imposed on behalf of poor, third world countries, and on narrow ranges of artifacts. *See generally* State, ECA Cultural Heritage Center Import Restrictions List and Chart, *available at* http://exchanges.state.gov/heritage/culprop/listactions.html (last visited Oct. 14, 2011). After almost three decades, however, import restrictions are now in place on behalf of wealthy European Union ("EU") members like Italy and Cyprus, superpowers like China, and on ever broader categories of artifacts, most recently including ancient coins. *Id.* As a result of this "culture creep," former CPAC members have criticized State publicly, alleging that ECA and its Cultural Heritage Center have disregarded the CPIA's statutory criteria and cloaked their operations in secrecy to hide an abuse of power. (*See generally* Transcript of Seminar, The Cultural Property Act: Is It Working? (Mar. 21, 2011) (hereinafter "CPRI Seminar") (JA 333-426).)

The recent imposition of import restrictions on ancient coins has been particularly controversial. Ancient coins were designed to circulate and did circulate well beyond where they were made. (*See generally* Amended Complaint ¶¶ 14-16, 68, JA 140-41, 152.) They have been collected avidly for centuries, but due to their modest value and the huge numbers extant, they typically have been traded without any provenance information or documentary history as to where and

when they have been found. (*Id.* ¶ 17, JA 141.) As a result, collectors have always maintained that it is unreasonable to assume that a coin is "stolen," "illegally exported," or "illegally imported" merely because the holder cannot establish a chain of custody beyond receipt from a reputable source. (*Id.* ¶ 18, JA 141.)

Initially, State also recognized that coins should be treated differently than other artifacts. During the negotiations that led to the CPIA's passage, State's Deputy Legal Adviser represented to Congress,

> In most cases, it is impossible to establish the provenance of a particular coin or hoard of coins. Therefore, there would be no reason for the United States, in most cases, to list coins as one of the categories of objects of archaeological or ethnological interest that would be included in the agreement. . . . [T]his legislation and ratification of the convention would not have any immediate effect on coins and *it is hard for me to imagine a case where we would need to deal with coins except in the most unusual circumstances.*

(*See Cultural Property Treaty Legislation, Hearing before the House Subcommittee on Trade of the Committee on Ways and Means*, 96th Cong., 1 at 8 (1979) (statement of Mark B. Feldman, Deputy Legal Adviser, Department of State) (emphasis added) (JA 247-50) (hereinafter "HW&M Hearing").)

In addition, CPAC and State also considered and rejected import restrictions on ancient Cypriot coins (once) and Italian coins (twice) before State and CBP reversed course after behind-the-scenes lobbying by the Cyprus American Archaeological Research Institute and other Cypriot advocacy groups, and first imposed import restrictions on ancient coins of "Cypriot types" on July 13, 2007.

(*See generally* Amended Complaint ¶¶ 37-90, JA at 146-58); *Extension of Import Restrictions Imposed on Pre-Classical and Classical Archaeological Objects and Byzantine Period Ecclesiastical Ethnological Material from Cyprus*, 72 Fed. Reg. 38,470-74 (July 13, 2007) (codified at 19 C.F.R. pt. 12, JA at 105-13). State and CBP subsequently imposed import restrictions on coins "originating in China" on January 16, 2009. *See Import Restrictions Imposed on Certain Archaeological Material from China*, 74 Fed. Reg. 2,838-44 (Jan. 16, 2009) (codified at 19 C.F.R. pt. 12, JA at 78-90). While the Government's Motion to Dismiss was pending before the District Court, State and CBP again reversed course and have imposed new import restrictions on ancient Greek and certain Roman coins "of Italian types."[3] *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. 3,012-14 (Jan. 19, 2011) (codified at 19 C.F.R. pt. 12). Even more recently, State has entered into a new MOU with Greece; however, CBP has yet to announce any import restrictions. *See generally* State, ECA Cultural Heritage Center, What's New, *available at* http://exchanges.state.gov/heritage/whatsnew.html (last visited Oct. 14, 2011).

[3] Robert Korver, a CPAC member expert in the international sale of cultural goods, resigned in protest over this decision. He has suggested at a public forum that the decision to again change existing precedent and impose new import restrictions on coins "of Italian types" was again made without CPAC's consent. (*See* CPRI Seminar at 48:1-5, 49:1-12, 49:21-50:8, 51:4-53:15, 93:12-20, JA 380-85, 425.)

The import restrictions at issue here shift the burden of proof onto collectors and the small businesses of the numismatic trade. In particular, they bar entry of ancient coins that are not accompanied by either an export certificate if imported directly from China (Cyprus does not issue such export certificates) or, for imports from third countries, proof in the form of certifications that the coins left China or Cyprus before the date that import restrictions were imposed. *See* 19 U.S.C. § 2606 (Amended Complaint ¶¶ 32, 35-36, JA 145.) In practice, such certifications are virtually impossible to procure from sellers abroad, particularly for items of modest value like coins which are typically traded without provenance documentation. (*See id.* ¶ 33, JA 145.) As a result, import restrictions discriminate against American collectors and small businesses. They alone must contend with government red tape that effectively bars entry of many collectors' coins openly for sale in legitimate markets abroad. (*Id.* ¶¶ 89-90, JA 158.)

After State and CBP changed existing precedent on Cypriot coins, the Guild filed a FOIA lawsuit to ascertain the basis for the decision to impose import restrictions on coins of Cypriot types. (*See* Op. at 14-15, JA 440-41.) As the result of a review of documents only released after that lawsuit was brought, the Guild uncovered evidence that recent decisions to impose import restrictions on ancient coins are the products of bias and/or prejudgment and/or *ex parte* conduct. (*See generally* Amended Complaint ¶¶ 37-90, 132-137, JA 146-58, 165-68.) Moreover,

in the context of the FOIA litigation, Jay Kislak, CPAC's Chairman at the time the Cypriot import restrictions were imposed, stated under oath that State misled Congress and the public about CPAC's recommendations concerning Cypriot coins. (Declaration of Jay L. Kislak (Apr. 20, 2009) (JA 207-43.))

As a result of these revelations, the Guild imported common Cypriot and Chinese coins typical of the ancient coins widely collected worldwide for purposes of a test case. (*See* Op. at 12-14, JA 438-40.) Upon their entry to the United States, CBP seized the coins that were described on a schedule as having "[n]o recorded provenance," and "[f]ind spot unknown." (*Id.* at 12-13, JA 438-39.) After the Government failed to file a forfeiture action that would have allowed the Guild to contest the seizure, the Guild instituted this case.

In its Amended Complaint, the Guild has alleged serious irregularities in the promulgation of Cypriot and Chinese import restrictions on coins that smack of cronyism. (*See* Amended Complaint ¶¶ 135, 170-77, JA 166-68, 174-76.) The Guild also has alleged equally serious violations of State's reporting requirements to Congress. (*Id.* at ¶¶ 120-31, 170-77, JA 163-65, 174-76.) Finally, the Guild has alleged that State and/or CBP issued regulations that wrongfully restricted coins solely by type rather than by find spot. (*Id.* at ¶¶ 138-45, 170-77, JA 168-70, 174-76.)

The District Court has nonetheless refused to undertake an APA-style judicial review of these irregularities solely because the Assistant Secretary, ECA is the President's designee and the President is not an "agency" under the APA. (Op. at 23-29, 43-44, JA 449-55, 469-70.) As the result of the District Court's ruling, the Government has now been given license to place discriminatory legal burdens on American collectors and the small businesses of the numismatic trade, and to seize and forfeit common ancient coins of the sort widely collected worldwide, all without regard to how State and CBP made their controversial decisions to impose import restrictions on ancient coins in the first place.

SUMMARY OF ARGUMENT

The District Court acknowledged that judicial review is appropriate where the Executive's discretion is limited by statute, but then failed to consider whether the Assistant Secretary, ECA operated outside the law when she imposed import restrictions on ancient coins. Moreover, the District Court's ruling turns the APA's presumption of reviewability on its head. At a bare minimum, the District Court should have considered whether the Assistant Secretary, ECA, complied with the CPIA's requirements or acted *ultra vires*, and also should have conducted a more thorough, APA-style review of the final agency actions to impose import restrictions on Cypriot and Chinese coins. Finally, the District Court's rulings that it was unnecessary for China to ask for import restrictions on coins or for the

Government to comply with the CPIA's "first discovery requirement" are at odds with the plain meaning of the CPIA. Extending import restrictions to all unprovenanced coins also raises constitutional problems that could be avoided if the "first discovery requirement" were given its plain meaning.

STANDARD OF REVIEW

The standard of review for dismissal pursuant to Rule 12(b)(6) is *de novo*, with factual allegations construed in the non-moving party's favor and treated as true. *Robinson v. American Honda Motor Corp., Inc.*, 551 F.3d 218, 222 (4th Cir. 2009).

ARGUMENT

A. *Ultra Vires* Review Is Mandated Where the CPIA Limits the Executive's Discretion.

The District Court acknowledged its power to determine whether the President's designee exceeded her statutory authority to impose import restrictions on cultural goods. (Op. at 29-31, JA at 455-57.) But, the District Court failed to consider whether a number of statutory contingencies had been satisfied before such import restrictions may be legally imposed. Instead, the District Court erroneously dismissed the Guild's Amended Complaint without deciding whether the Assistant Secretary, ECA operated outside the law.

In *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, *reh'g and reh'g en banc denied*, 83 F.3d 439 (D.C. Cir. 1996), the District of Columbia Circuit indicated that courts retain power to consider whether the President or his designee acted beyond the scope of his statutory authority outside of the framework of the APA.[4] The *Chamber of Commerce* court explained that the Supreme Court's decisions precluding judicial review only come into play where the President is given unbridled discretion. *Id.* at 1331-32. These decisions merely "stand[] for the proposition that when a statute entrusts a discrete specific decision to the President and *contains no limitations* on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available." *Id.* at 1331 (emphasis added). As the D.C. Circuit also later observed,

> A somewhat different case is presented . . . when the authorizing statute or another statute places discernable limits on the President's discretion. Judicial review in such instances does not implicate separation of powers concerns to the same degree as where the statute did "not at all limit" the discretion of the President. . . . Courts remain obligated to determine whether statutory restrictions have been violated.

[4] Although *Chamber of Commerce* and its progeny are not binding on this Court, other courts have acknowledged the D.C. Circuit's expertise in administrative law matters. *See, e.g. Verizon California, Inc. v. Peevy*, 413 F.3d 1069, 1084 (9th Cir. 2005). Here, there are additional reasons to defer to the law in the D.C. Circuit. The decision making at issue took place in the District of Columbia. For standing purposes, the Guild imported coins for this "test case" into the District of Maryland as the "port of entry." There is simply no "port of Washington, D.C." for customs purposes.

Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 812 (2003); *compare with Dalton v. Specter*, 511 U.S. 462, 474 (1994) (base closure statute at issue does "not at all limit" the Executive's discretion where he is asked to accept or reject a recommendation; hence, "no question of law is raised" in reviewing his decision).

Here, the Guild alleged that import restrictions on coins violate the CPIA's statutory limitations on the decision-maker's discretion. (*See* Amended Complaint ¶¶ 29, 44, 62, 75, 120-31, 135 (a), (f), (g), (i), (j), (p), 138-45, 170-77, JA 144, 147, 151, 154, 163-65, 166-67, 174-76.) Moreover, the District Court also acknowledged that "[t]he CPIA, unlike the statute in *Dalton*, provides discernable limits on the President's discretion." (Op. at 31, JA 457.) Yet, having acknowledged that *ultra vires* review was available, the District Court failed to undertake it except on two discrete issues. (*Id.* at 31-38, JA 457-64.) Accordingly, this matter should be remanded for consideration of whether the Assistant Secretary, ECA operated outside the law despite these statutory limitations on her discretion to impose import restrictions on coins.

B. The District Court Should Have Applied a Presumption of Reviewability and Conducted an APA Review of the Final Agency Actions to Impose Import Restrictions on Ancient Coins.

As set forth above, the District Court should have undertaken an *ultra vires* review of whether the Assistant Secretary, ECA complied with the CPIA's

dictates. In addition, the District Court's ruling that APA review is not available turns the presumption of reviewability of agency actions on its head. In effect, the District Court has expanded a narrow court-created exemption afforded to the President to immunize not only the President's designee at State, but any and all State and CBP actions related to the imposition of import restrictions on ancient coins. This ruling goes much too far, and should, therefore, be reversed.

Though derived primarily from the Supreme Court's decision in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the District Court's conclusion that State ceases to be an "agency" for APA purposes when the Assistant Secretary, ECA acts according to delegated authority is without precedent. The District Court itself admits that no binding authority exists, and that only four (4) other district courts have addressed remotely similar issues. (*See* Op. at 25-26, JA 451-52.) Moreover, three (3) of those decisions involved delegations of authority derived solely, or at least primarily, from the President's constitutional authority over foreign affairs. The fourth, *Tulare County v. Bush*, 185 F. Supp. 2d 18 (D.D.C. 2001), involved authority under the Antiquities Act, which authorizes the President, "in his discretion," to designate federal land as national monuments. (*See* Op. at 26-27, JA 452-53.)

Here, import restrictions are predicated on a statute rather than on the President's inherent constitutional powers, and the CPIA itself contains a number

of limitations on delegated authority unlike the statute at issue in *Tulare County*. Moreover,

> [T]he law provides a presumption favoring judicial review of administrative action unless some other statute is interpreted to preclude review. . . . The mere absence of a provision granting judicial review is insufficient. . . . Rather, the specific intent of Congress to preclude review must be shown by clear and convincing evidence.

GTE Int'l Corp. v. Hunter, 649 F. Supp. 139, 144 (D. P.R. 1986) (citation omitted). *Accord Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (discussing presumption of reviewability of agency action); *Aerolineas Argentinas S.A. v. United States Dep't of Transp.*, 415 F.3d 1, 5 (D.C. Cir. 2005) ("We should not lightly presume the Congress intended to grant the [Department of Transportation] an unreviewable discretion to engage in otherwise noxious decision making.").

Here, the District Court has replaced the presumption of reviewability with one of non-reviewability based on the bald assertion that "Congress likely concluded that deference to the President was appropriate given the foreign policy considerations inherent in deciding whether to impose import restrictions." (Op. at 28, JA 454.) However, Congress itself treats import restrictions on cultural artifacts as a trade issue within its exclusive "power . . . to regulate commerce with foreign nations." *See* U.S. Const. art. I, § 8. Indeed, the CPIA was passed as part of a miscellaneous trade bill and its oversight falls within the jurisdiction of Congress' Trade Subcommittees. (*See* Amended Complaint ¶¶ 25-26, JA 143.)

Moreover, if Congress had indeed "concluded that deference to the President was appropriate," the CPIA would have granted the President unbridled discretion to impose import restrictions rather than limiting that discretion as extensively as it did.

Even assuming *arguendo* that the decisions of the Assistant Secretary, ECA, may only be subject to *ultra vires* review, the vast majority of the actions complained about are those of others at State and CBP that should be subject to APA review. This particularly applies to any decision to impose restrictions on coins of Cypriot and Chinese types regardless of their find spot. Although the District Court avoided this issue supposedly "because the parties have not analyzed the question," the Guild has always maintained that discovery was necessary before there should be any rulings on the merits. (*Compare* Op. 36 n.28, JA at 462 *with* Transcript of Motions Hearing (Feb. 14, 2011) (hereinafter "Transcript") at 20:18-23, 25:24-26:5, JA 270, 275-276.)

Such discovery is especially warranted on this particular issue. Pre-litigation State itself proclaimed to both Congress and the public that CBP was the lead agency responsible for the decision to impose import restrictions on certain Cypriot coin types. (*See* Amended Complaint ¶¶ 79, 81-82, JA 155-56.) Moreover, the final agency action which triggered the seizure of the Guild's coins was CBP's regulations and not any actions of the Assistant Secretary, ECA or State. Nowhere

do the Cypriot and Chinese MOUs mention restrictions on coins; the first instance coins are mentioned is in the CBP regulations themselves. (*See* JA 74-113.) Under Supreme Court precedent, only the CBP regulations can be considered the "final agency action" because only they have a "direct and immediate" impact on the Guild's ability to import coins. *See Bennet v. Spear*, 520 U.S. 154, 178 (1997); *Franklin*, 505 U.S. at 796-77 (citation omitted). Accordingly, this Court should allow APA review of State and CBP decision making other than that of the Assistant Secretary, ECA, which should itself be subject to *ultra vires*, if not APA, review.

C. The District Court Erred in Ruling that Import Restrictions May Be Imposed on Chinese Coins Without a Chinese Request to Do So.

The District Court's conclusion that "the CPIA does not require that a state party's initial request include a detailed accounting of each item eventually covered by an Article 9 agreement" ignores the requirement that any request "must be accompanied by a written statement of the facts known to the State Party that relates to those matters with respect to which determinations must be made. . . ." (*Compare* Op. at 37, JA at 463, *citing* CPIA, 19 U.S.C. § 2602(a)(1) *with* § 2602(a)(3)). As Urice and Adler have explained,

> ACCG alleged that "China never formally requested import restrictions on coins," and that the State Department instead "created the purported request . . . in house . . . ." If true, this action would contravene the reactive structure of the [CPIA], which authorizes the executive to impose import restrictions only in response to a request from a foreign nation.

> Significantly, not only does the statute require that there be such a request, but it 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. Implicit in this requirement is that any import restrictions 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*.

Urice and Adler, *supra.*, at 34. Under the circumstances, this matter should be remanded for further consideration of the issue after discovery.[5]

D. The District Court Erred in Allowing the Guild's Property to be Seized and Forfeited Without any Showing That the Coins were "First Discovered" in either Cyprus or China.

The Guild imported coins with unknown find spots for purposes of this test case and which are, therefore, representative of collector's coins typically found in legitimate markets both here and abroad. (*See* Op. at 12-13, JA 438-39.) CBP seized these coins based on regulations which apply to "Coins of Cypriot types" or coins "originating in China." (*See* JA 74-113.) In stark contrast, the CPIA itself only authorizes seizure and forfeiture of artifacts "first discovered within, and . . . subject to export control by" the State Party seeking restrictions. *See* CPIA, 19 U.S.C. § 2601(2)(c).

[5] As discussed *infra*, the District Court's failure to give effect to all the provisions of the CPIA violates the "plain meaning rule" and several other canons of statutory construction. In addition, the District Court's assumption that no formal request is necessary is also at odds with prior agency practice. Here, for example, there is no dispute that Cyprus specifically asked for import restrictions on coins before they were imposed. (*See* Amended Complaint ¶ 58, JA 150.)

This threshold consideration is of critical importance. As Urice and Adler have explained,

> [M]erely identifying coins by country of origin fails to satisfy the [CPIA]; if this were all that were required, Congress would have emphasized the place of "production" rather than the place of "discovery."

Urice and Adler, *supra.*, at 33-34.

The Guild argued below that the Government could comply with this critical statutory requirement in either one of two ways: (1) establishing by undisputed scholarly evidence that the coins placed on the designated lists could only have been discovered in Cyprus or China and, hence must be subject to their export controls; or (2) demonstrating by documentary evidence that the coins that CBP seized were in fact first discovered in Cyprus or China and are subject to export control by those countries. (Transcript at 22:4-14, 24:6-11, JA 272, 274.)

However, the District Court avoided considering the issue, and instead held, after conducting what purported to be an *ultra vires* review of State's actions, that

> [I]mport restrictions on Chinese and Cypriot coins, which have the effect of barring the importation of coins with unknown find spots, do not exceed the State Department's authority under the CPIA.

(Op. at 36, JA 462.) This ruling is at odds with the plain meaning of the CPIA and the realities of how ancient coinage circulated, and it is constitutionally suspect. Accordingly, this Court should reverse the District Court's decision, and remand this case for further proceedings.

1. The District Court's Ruling Violated the Canons of Statutory Construction.

Despite the obvious conflict between an admission by the Government that the "first discovery requirement" applies to all CPIA import restrictions and the misstatement or silence about this requirement in the applicable regulations (*see* Op. at 33-34 n.25, JA 459-60; Transcript 52:2-53:8, JA 302-303.), the District Court nonetheless avoided ruling on whether State had satisfied this critical statutory requirement. (Op. at 31-36, JA 457-62.) In so doing, the District Court offered several justifications for its circular reasoning that the "first discovery requirement" was met for purposes of this case solely based on State's say so.

First, the District Court relied on the CPIA's own supposed silence on precisely how the Government is to establish the "first discovery requirement" and other provisions related to how an importer is to establish legal import for items on the designated list to suggest that "the CPIA expressly places the burden on importers to prove that they are legally importable, and prohibits the importation of those objects if they cannot meet that burden." (*Id.* at 35, JA 461.) Second, the District Court stated that because the CPIA allows the Executive to designate items as cultural property by type only, the Government could have designated all Cypriot and Chinese coins as restricted regardless of where they were discovered. (*Id.*, JA 461.) Lastly, the District Court suggested that requiring the Government to prove the coins were discovered in either Cyprus or China would be contrary to

the CPIA's goal of discouraging looting of archaeological sites. (*Id.* at 35-36, JA 461-62.)

As an initial matter, the District Court's tortured effort to read the "first discovery requirement" out of the CPIA violates several bedrock canons of statutory construction. These include the "plain meaning" rule and the related "expressed intent" rule, the dictate that the "whole statute" be considered and the related requirement that each word be given effect. *See* Norman J. Singer and J.D. Shambie Singer, *Statutes and Statutory Construction* §§ 46.1, 46.3, 46.5, 46.6 (West 7th ed. vol. 2A 2007) (hereinafter "Sutherland Statutory Construction"). *Accord Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.").

Judged under these precepts, the District Court's circular reasoning fails to justify its departure from the plain meaning of the "first discovery requirement." First, the District Court wrongly suggests the CPIA is silent on how the Government is to establish "whether a particular object 'was first discovered

within, and is subject to export control by, the State Party.'" (Op. at 35, JA 461.) In fact, the CPIA contemplates that CPAC will provide specific advice as to what artifacts will meet these criteria, among others, before they may be lawfully added to the designated list. *See* 19 U.S.C. § 2605(f)(4). (*Accord* Senate Report, JA 129.) Here, of course, CPAC's past Chairman has stated under oath that CPAC recommended against import restrictions on coins, but this recommendation was overruled by State, which then misled Congress and the public about it. (*See* Amended Complaint ¶¶ 79-80, 85, JA 155, 156-57.)

Moreover, the fact that the CPIA anticipates that certain objects without precisely documented provenance will be barred from entry and subject to seizure (Op. at 35, JA 461), says nothing at all about whether such classes of objects were properly designated for restriction in the first place. Indeed, CBP is enjoined to ensure that "import restrictions . . . are applied only to the archaeological and ethnological material covered by the agreement or emergency action. . . ." 19 U.S.C. § 2604(1). This statutory language again underscores Congressional intent that any regulations must be written to ensure they only apply to artifacts "first discovered within, and [] subject to export control by, the State Party." *Id.* § 2601(2).

Similarly, the fact that the CPIA allows such materials to be "listed by type or other appropriate classification" provides no support for the conclusion that

State and/or CBP did not exceed their statutory authority. (Op. at 35, JA at 461.) The Guild has always conceded that State and/or CBP could list coins by type, *but only if there is scholarly support for the assumption that such coins can only be found in either Cyprus or China, which is necessary to satisfy the "first discovery requirement*. (Transcript at 22:4-14, 24:6-11, JA 272, 274.)

Lastly, the District Court assumes that

> [I]nterpreting the 'first discovered in' requirement 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.

(Op. at 35, JA 461.) This assumption, however, ignores Congress' obvious concern about cultural nationalist tendencies, particularly where restrictions only discriminate against American small businesses and collectors. (*See* Amended Complaint ¶¶ 23-24, 27, 33, 44, 62, JA 142-43, 145, 147, 151.) "[T]he construction of a statute that is unreasonable, illogical, unjust, unworkable or inconsistent with common sense should be avoided." *See* Sutherland Statutory Construction, *supra.*, § 45.12, at 108-9.

If anything, it is the Guild's view that the "first discovery requirement" must be given meaning that is consistent with State's own representations to Congress. In testimony to the House Ways and Means Subcommittee on Trade, State's own Deputy Legal Adviser opined that how the CPIA would operate in practice should

alleviate most concerns of coin collectors. He indicated that the Government must establish a coin's find spot before it can be restricted. Specifically, he stated,

> In most cases, it is impossible to establish the provenance of a particular coin or hoard of coins. Therefore, there would be no reason for the United States, in most cases, to list coins as one of the categories of objects of archaeological or ethnological interest that would be included in the agreement.

(*See* HW&M Hearing, JA 250.); *accord Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 748 n.14 (1989) (It is important to adhere to the language and structure of a statute especially when the language results from a series of carefully considered compromises.). Here, then the District Court has wrongly proposed one legislative purpose for the CPIA, when the plain meaning of the statute as well as its legislative history suggest a far more balanced and nuanced view of what the Congress meant the CPIA to achieve.

2. The District Court's Decision Raises Constitutional Concerns.

Ancient coins bear images of rulers, distinctive civic imagery, and inscriptions that communicate culturally important themes. (*See* Amended Complaint ¶¶ 13, 19, JA 140, 141.) Moreover, even Cypriot authorities (confidentially at least) have conceded that coins were designed to circulate in commerce and in fact are found well beyond the borders of where they were produced. (*See id.* ¶¶ 14-16, 68, JA 140-41, 152.) Finally, the Guild has also alleged that it is unreasonable to assume that a coin is stolen, illegally exported or

illegally imported based on a lack of documentation. (*See id.* ¶¶ 17-18, JA 141.) As a result, import restrictions like those at issue here impinge on collectors' access to informational materials in a fashion that is grossly overbroad, and hence, constitutionally suspect under both the First and Fifth Amendments. (*Compare id.* ¶¶ 146-169, JA 170-74 *with* Op. at 39-42, JA 465-68.)

The District Court has nevertheless reckoned that,

> The Convention and CPIA . . . illustrate that countries are in agreement that restricting the importation of particular types of coins, and thereby decreasing demand for those coins, is necessary to combat the trade in looted coins. Thus, even if the restrictions are in some sense over-inclusive because they prohibit the importation of coins that entered the market permissibly, the restrictions are not greater than is essential to deter pillage.

(Op. at 41, JA 467.)

However, the District Court's bald assertion that restrictions on ancient coins are a matter of international consensus is utterly without foundation in fact. Indeed, as set forth above, the Guild has alleged that *no other country* places import restrictions on ancient coins like those now imposed on American collectors and the small businesses of the numismatic trade. (Amended Complaint ¶¶ 44, 62, 135 (j), JA 147, 151, 167; Transcript at 28:6-11, JA 278 ("If you allow this matter to go forward, Your Honor, we will be able to put on evidence that no other country has similar restrictions as the United States has put on Cypriot coins, none, zero. Therefore, the concerted international response cannot be met.").) Oddly, in reaching its decision, the District Court also found that coin collectors can find

solace for their passion in "descriptions, photographs or other reproductions of those coins." (Op. at 42, JA 468.) However, the Guild has also alleged that the possession and handling of coins themselves is an essential attribute to coin collecting itself. (*See* Amended Complaint ¶ 19, JA 141.)

If anything, the District Court's ruling is at odds with the CPIA's requirement that less drastic remedies be considered before restrictions are imposed. 19 U.S.C. § 2602(a)(1)(C)(ii). And as a related matter, the District Court's analysis also ignores yet another canon that favors any statutory construction that does not raise constitutional concerns. *See* Sutherland Statutory Construction, *supra.*, § 45.11. Here, an overbroad import ban on unprovenanced coins threatens to cut off collector access to the vast majority of ancient coins on the international market. In contrast, restrictions squarely linked to find spots are more narrowly tailored to deterring pillage of archaeological sites. That, of course, is the primary goal of the CPIA; not the furthering of nationalistic impulses that lay claim to any unprovenanced coin as the presumptive state property of a foreign power. (*See* Amended Complaint ¶ 23, JA 142.)

CONCLUSION

The District Court should have at least conducted an *ultra vires* review of whether the Assistant Secretary, ECA, overstepped the CPIA's requirements and a more thorough, APA-style review of the final agency action to impose import

restrictions on Cypriot and Chinese coins. Rulings that it was unnecessary for China to ask for import restrictions on coins or for the Government to comply with the CPIA's "first discovery requirement" violate the plain meaning of the CPIA. Import restrictions on coins without reference to their find spots are also grossly overbroad, and, therefore, raise avoidable constitutional problems. Accordingly, this Court should reverse the decision of the District Court and remand this matter for further proceedings.

Dated: October 31, 2011

Respectfully submitted,

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ADDENDUM

(See also Public Law 97-446)

19 United States Code 2600

CHAPTER 14 -- CONVENTION ON CULTURAL PROPERTY

SECTION 2601. DEFINITIONS

For purposes of this chapter --

(1) The term "agreement" includes any amendment to, or extension of, any agreement under this chapter that enters into force with respect to the United States.

(2) The term "archaeological or ethnological material of the State Party" means --

(A) any object of archaeological interest;

(B) any object of ethnological interest; or

(C) any fragment or part of any object referred to in subparagraph (A) or (B); which was first discovered within, and is subject to export control by, the State Party. For purposes of this paragraph—

(i) no object may be considered to be an object of archaeological interest unless such object --

(I) is of cultural significance;

(II) is at least two hundred and fifty years old; and

(III) was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or underwater; and

(ii) no object may be considered to be an object of ethnological interest unless such object is --

(I) the product of a tribal or nonindustrial society, and

(II) important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people.

(3) The term "Committee" means the Cultural Property Advisory Committee established under section 2605 of this title.

(4) The term "consignee" means a consignee as defined in section 1483 of this title.

(5) The term "Convention" means the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property adopted by the General Conference of the United Nations Educational, Scientific, and Cultural Organization at its sixteenth session.

(6) The term "cultural property" includes articles described in article 1(a) through (k) of the Convention whether or not any such article is specifically designated as such by any State Party for the purposes of such article.

(7) The term "designated archaeological or ethnological material" means any archaeological or ethnological material of the State Party which --

(A) is --

(i) covered by an agreement under this chapter that enters into force with respect to the United States, or

(ii) subject to emergency action under section 2603 of this title, and

(B) is listed by regulation under section 2604 of this title.

(8) The term “Secretary” means the Secretary of the Treasury or his delegate.

(9) The term “State Party” means any nation which has ratified, accepted, or acceded to the Convention.

(10) The term “United States” includes the several States, the District of Columbia, and any territory or area the foreign relations for which the United States is responsible.

(11) The term “United States citizen” means --

(A) any individual who is a citizen or national of the United States;

(B) any corporation, partnership, association, or other legal entity organized or existing under the laws of the United States or any State; or

(C) any department, agency, or entity of the Federal Government or of any government of any State.

(Pub. L. 97-446, title III, Sec. 302, Jan. 12, 1983, 96 Stat. 2351.)

References in Text

Section 1483 of this title, referred to in par. (4), was repealed by Pub. L. 97-446, title II, Sec. 201(c), Jan. 12, 1983, 96 Stat. 2349. Prior to repeal, section 1483 read: "For the purposes of this subtitle-- "(1) All merchandise imported into the United States shall be held to be the property of the person to whom the same is consigned; and the holder of a bill of lading or the holder of an air waybill duly indorsed by the consignee therein named, or, in the case of a bill of lading if consigned to order, by the consignor, shall be deemed the consignee thereof; except that this section shall not limit in any way the rights of the consignor, as prescribed by article 12 of the Warsaw Convention (49 Stat. 3017). The underwriters of abandoned merchandise and the salvors of merchandise saved from a wreck at sea or on or along a coast of the United States may be regarded as the consignees.

"(2) A person making entry of merchandise under the provisions of subdivision (h) or (i) of section 1484 of this title (relating to entry on carrier's certificate and on duplicate bill of lading, respectively) shall be deemed the sole consignee thereof."

Codification

Section 2605 of this title, referred to in par. (3), read in original "section 206" and was translated as section 2605 of this title, which is section 306 of Pub. L. 97-446, as the probable intent of Congress.

Effective Date

Section 315 of title III of Pub. L. 97-446 provided that:

"(a) In General.--This title [enacting this chapter] shall take effect on the ninetieth day after the date of the enactment of this Act [Jan. 12, 1983] or on any date which the President shall prescribe and publish in the Federal Register, if such date is--

"(1) before such ninetieth day and after such date of enactment; and

"(2) after the initial membership of the Committee is appointed.

"(b) Exception.--Notwithstanding subsection (a), the members of the Committee may be appointed in the manner provided for in section 306 [2605 of this title] at any time after the date of the enactment of this Act [Jan. 12, 1983]."

Short Title

Section 301 of title III of Pub. L. 97-446 provided that: "This title [enacting this chapter] may be cited as the 'Convention on Cultural Property Implementation Act'."

SECTION 2602. AGREEMENTS TO IMPLEMENT ARTICLE 9 OF THE CONVENTION

(a) Agreement authority

(1) In general

If the President determines, after request is made to the United States under article 9 of the Convention by any State Party--

(A) that the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party;

(B) that the State Party has taken measures consistent with the Convention to protect its cultural patrimony;

(C) that--

(i) the application of the import restrictions set forth in section 2606 of this title with respect to archaeological or ethnological material of the State Party, 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, and

(ii) remedies less drastic than the application of the restrictions set forth in such section are not available; and

(D) that the application of the import restrictions set forth in section 2606 of this title 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; the President may, subject to the provisions of this chapter, take the actions described in paragraph (2).

(2) Authority of President

For purposes of paragraph (1), the President may enter into --

(A) a bilateral agreement with the State Party to apply the import restrictions set forth in section 2606 of this title 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 found to exist under paragraph (1)(A); or

(B) a multilateral agreement with the State Party and with one or more other nations (whether or not a State Party) under which the United States will apply such restrictions, and the other nations will apply similar restrictions, with respect to such material.

(3) Requests

A request made to the United States under article 9 of the Convention by a State Party must be accompanied by a written statement of the facts known to the State Party that relate to those matters with respect to which determinations must be made under subparagraphs (A) through (D) of paragraph (1).

(4) Implementation

In implementing this subsection, the President should endeavor to obtain the commitment of the State Party concerned to permit the exchange of its archaeological and ethnological materials under circumstances in which such exchange does not jeopardize its cultural patrimony.

(b) Effective period

The President may not enter into any agreement under subsection (a) of this section which has an effective period beyond the close of the five-year period beginning on the date on which such agreement enters into force with respect to the United States.

(c) Restrictions on entering into agreements

(1) In general

The President may not enter into a bilateral or multilateral agreement authorized by subsection (a) of this section unless the application of the import restrictions set forth in section 2606 of this title with respect to archaeological or ethnological material of the State Party making a request to the United States under article 9 of the Convention will be applied in concert with similar restrictions implemented, or to be implemented, by those nations (whether or not State Parties) individually having a significant import trade in such material.

(2) Exception to restrictions

Notwithstanding paragraph (1), the President may enter into an agreement if he determines that a nation individually having a significant import trade in such material is not implementing, or is not likely to implement, similar restrictions, but --

(A) such restrictions are not essential to deter a serious situation of pillage, and

(B) the application of the import restrictions set forth in section 2606 of this title 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 material would be of substantial benefit in deterring a serious situation of pillage.

(d) Suspension of import restrictions under agreements

If, after an agreement enters into force with respect to the United States, the President determines that a number of parties to the agreement (other than parties described in subsection (c)(2) of this section) having significant import trade in the archaeological and ethnological material covered by the agreement --

(1) have not implemented within a reasonable period of time import restrictions that are similar to those set forth in section 2606 of this title, or

(2) 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, the President shall suspend the implementation of the import restrictions under section 2606 of this title until such time as the nations take appropriate corrective action.

(e) Extension of agreements

The President may extend any agreement that enters into force with respect to the United States for additional periods of not more than five years each if the President determines that --

(1) the factors referred to in subsection (a)(1) of this section which justified the entering into of the agreement still pertain, and

(2) no cause for suspension under subsection (d) of this section exists.

(f) Procedures

If any request described in subsection (a) of this section is made by a State Party, or if the President proposes to extend any agreement under subsection (e) of this section, the President shall --

(1) publish notification of the request or proposal in the Federal Register;

(2) submit to the Committee such information regarding the request or proposal (including, if applicable, information from the State Party with respect to the implementation of emergency action under section 2603 of this title) as is appropriate to enable the Committee to carry out its duties under section 2605(f) of this title; and

(3) consider, in taking action on the request or proposal, the views and recommendations contained in any Committee report --

(A) required under section 2605(f)(1) or (2) of this title, and

(B) submitted to the President before the close of the one-hundred-and-fifty-day period beginning on the day on which the President submitted information on the request or proposal to the Committee under paragraph (2).

(g) Information on Presidential action

(1) In general

In any case in which the President --

(A) enters into or extends an agreement pursuant to subsection (a) or (e) of this section, or

(B) applies import restrictions under section 2603 of this title, the President shall, promptly after taking such action, submit a report to the Congress.

(2) Report

The report under paragraph (1) shall contain --

(A) a description of such action (including the text of any agreement entered into),

(B) the differences (if any) between such action and the views and recommendations contained in any Committee report which the President was required to consider, and

(C) the reasons for any such difference.

(3) Information relating to committee recommendations

If any Committee report required to be considered by the President recommends that an agreement be entered into, but no such agreement is entered into, the President shall submit to the Congress a report which contains the reasons why such agreement was not entered into.

(Pub. L. 97-446, title III, Sec. 303, Jan. 12, 1983, 96 Stat. 2352.)

Codification

Section 2603 of this title, referred to in subsec. (g)(1)(B), read in the original "section 204", and was translated as section 2602 of this title, which is section 304 of Pub. L. 97-446, as the probable intent of Congress.

Ex. Ord. No. 12555. Protection of Cultural Property

Ex. Ord. No. 12555, Mar. 10, 1986, 51 F.R. 8475, provided:

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Convention on Cultural Property Implementation Act (Title III of Public Law 97-446; hereinafter referred to as the "Act") [this chapter], and Section 301 of Title 3 of the United States Code, it is hereby ordered as follows:

Section 1. United States Information Agency. The following functions conferred upon the President by the Act are hereby delegated to the Director of the United States Information Agency, acting in consultation with the Secretary of State and the Secretary of the Treasury:

(a) The functions conferred by section 303(a)(1) [19 U.S.C. 2602(a)(1)] concerning determinations to be made prior to initiation of negotiations of bilateral or multilateral agreements.

(b) The functions conferred by section 303(d) with respect to the determinations concerning the failure of other parties to an agreement to take any or satisfactory implementation action on their agreement; provided, however, that the Secretary of State will remain responsible for interpretation of the agreement.

(c) The functions conferred by section 303(e) relating to the determinations to be made prior to the initiation of negotiations for the extension of any agreement.

(d) The functions conferred by section 303(f) relating to the actions to be taken upon receipt of a request made by a State Party to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopted by the Sixteenth General Conference of the United Nations Educational, Scientific and Cultural Organization (hereinafter referred to as the "Convention").

(e) The functions conferred by section 303(g)(1)(B) relating to the notification of Presidential action and the furnishing of reports to the Congress.

(f) The functions conferred by section 304(b) [19 U.S.C. 2603(b)] to the extent that they involve determinations by the President that an emergency condition applies with respect to any archaeological or ethnological material of any State Party to the Convention, subject to the limitations of sections 304(c)(1), 304(c)(2), and 304(c)(3).

(g) The functions conferred by section 304(c)(3) to the extent that they involve determinations to be made and the receipt and consideration of an advisory report from the Cultural Property Advisory Committee by the President prior to extensions of emergency import restrictions.

(h) The functions conferred by sections 306(f)(6) and 306(g) [19 U.S.C. 2605(f)(6), (g)] relating to the receipt of reports prepared by the Cultural Property Advisory Committee.

(i) The functions conferred by section 306(h) relating to the determinations to be made about the disclosure of matters involved in the Cultural Property Advisory Committee's proceedings.

Sec. 2. Department of State. The following functions conferred upon the President by the Act are hereby delegated to the Secretary of State, acting in consultation with and with the participation of the Director of the United States Information Agency and in consultation with the Secretary of the Treasury:

(a) The functions conferred by section 303(a)(2) [19 U.S.C. 2602(a)(2)] relating to the negotiation and conclusion of bilateral or multilateral agreements under the Act, subject to the restrictions of section 303(c).

(b) The functions conferred by section 303(a)(4) relating to obtaining a commitment on the exchange of archaeological and ethnological materials from a party to an agreement.

(c) The functions conferred by section 303(e) relating only to negotiation and conclusion of extensions of agreements under the Act.

(d) Except with respect to subsection 303(g)(1)(B), the functions conferred by section 303(g), relating to the notification of Presidential action and the furnishing of reports to the Congress.

(e) The functions conferred by section 304(c)(4) [19 U.S.C. 2603(c)(4)] to the extent that they involve the negotiation and conclusion of agreements subject to advice and consent to ratification by the Senate.

Sec. 3. Department of the Treasury. The following functions conferred upon the President by the Act are hereby delegated to the Secretary of the Treasury, acting in consultation with the Director of the United States Information Agency and the Secretary of State:

(a) Subject to subsection (b) of Section 1 above, the functions conferred by section 303(d) [19 U.S.C. 2602(d)] to the extent that they involve the suspension of import restrictions. (b) Subject to subsection[s] (f) and (g) of Section 1 above, the functions conferred by section 304 [19 U.S.C. 2603] to the extent that they involve the application of import restrictions set forth in section 307 [19 U.S.C. 2606] and the extension of such import restrictions pursuant to section 304(c)(3).

Sec. 4. Enforcement in Territories and Other Areas. The Secretary of the Interior is designated to carry out the enforcement functions in section 314 [19 U.S.C. 2613].

Ronald Reagan.

SECTION 2603. EMERGENCY IMPLEMENTATION OF IMPORT RESTRICTIONS

(a) "Emergency condition" defined

For purposes of this section, the term "emergency condition" means, with respect to any archaeological or ethnological material of any State Party, that such material is--

(1) a newly discovered type of material which is of importance for the understanding of the history of mankind and is in jeopardy from pillage, dismantling, dispersal, or fragmentation;

(2) identifiable as coming from any site recognized to be of high cultural significance if such site is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; or

(3) a part of the remains of a particular culture or civilization, the record of which is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; and application of the import restrictions set forth in section 2606 of this title on a temporary basis would, in whole or in part, reduce the incentive for such pillage, dismantling, dispersal or fragmentation.

(b) Presidential action

Subject to subsection (c) of this section, if the President determines that an emergency condition applies with respect to any archaeological or ethnological material of any State Party, the President may apply the import restrictions set forth in section 2606 of this title with respect to such material.

(c) Limitations

(1) The President may not implement this section with respect to the archaeological or ethnological materials of any State Party unless the State Party has made a request described in section 2602(a) of this title to the United States and has supplied information which supports a determination that an emergency condition exists.

(2) In taking action under subsection (b) of this section with respect to any State Party, the President shall consider the views and recommendations contained in the Committee report required under section 2605(f)(3) of this title if the report is submitted to the President before the close of the ninety-day period beginning on the day on which the President submitted information to the Committee under section 2602(f)(2) of this title on the request of the State Party under section 2602(a) of this title.

(3) No import restrictions set forth in section 2606 of this title may be applied under this section to the archaeological or ethnological materials of any State Party for more than five years after the date on which the request of a State Party under section 2602(a) of this title is made to the United States. This period may be extended by the President for three more years if the President determines that the emergency condition continues to apply with respect to the archaeological or ethnological material. However, before taking such action, the President shall request and consider, if received within ninety days, a report of the Committee setting forth its recommendations, together with the reasons therefor, as to whether such import restrictions shall be extended.

(4) The import restrictions under this section may continue to apply in whole or in part, if before their expiration under paragraph (3), there has entered into force with respect to the archaeological or ethnological materials an agreement under section 2602 of this title or an agreement with a State Party to which the Senate has given its advice and consent to ratification. Such import restrictions may continue to apply for the duration of the agreement.

(Pub. L. 97-446, title III, Sec. 304, Jan. 12, 1983, 96 Stat. 2354.)

Codification

Section 2602 of this title, referred to in subsec. (c)(4), read in the original "section 203", and was translated as section 2602 of this title, which is section 303 of Pub. L. 97-446, as the probable intent of Congress.

Delegation of Functions

For delegation of certain functions of the President under this section, see Ex. Ord. No. 12555, Mar. 10, 1986, 51 F.R. 8475, set out as a note under section 2602 of this title.

SECTION 2604. DESIGNATION OF MATERIALS COVERED BY AGREEMENTS OR EMERGENCY ACTIONS

After any agreement enters into force under section 2602 of this title, or emergency action is taken under section 2603 of this title, the Secretary, after consultation with the Director of the United States Information Agency, shall by regulation promulgate (and when appropriate shall revise) a list of the archaeological or ethnological material of the State Party covered by the agreement or by such action. The Secretary may list such material by type or other appropriate classification, but each listing made under this section shall be sufficiently specific and precise to insure that

(1) the import restrictions under section 2606 of this title are applied only to the archeological and ethnological material covered by the agreement or emergency action; and

(2) fair notice is given to importers and other persons as to what material is subject to such restrictions.

(Pub. L. 97-446, title III, Sec. 305, Jan. 12, 1983, 96 Stat. 2355.)

SECTION 2605. CULTURAL PROPERTY ADVISORY COMMITTEE

(a) Establishment

There is established the Cultural Property Advisory Committee.

(b) Membership

(1) The Committee shall be composed of eleven members appointed by the President as follows:

(A) Two members representing the interests of museums.

(B) Three members who shall be experts in the fields of archaeology, anthropology, ethnology, or related areas.

(C) Three members who shall be experts in the international sale of archaeological, ethnological, and other cultural property.

(D) Three members who shall represent the interest of the general public.

(2) Appointments made under paragraph (1) shall be made in such a manner so as to insure -

(A) fair representation of the various interests of the public sectors and the private sectors in the international exchange of archaeological and ethnological materials, and

(B) that within such sectors, fair representation is accorded to the interests of regional and local institutions and museums.

(3)

(A) Members of the Committee shall be appointed for terms of three years and may be reappointed for one or more terms. With respect to the initial appointments, the President shall select, on a representative basis to the maximum extent practicable, four members to serve three-year terms, four members to serve two-year terms, and the remaining members to serve a one-year term. Thereafter each appointment shall be for a three-year term.

(B)

(i) A vacancy in the Committee shall be filled in the same manner as the original appointment was made and for the unexpired portion of the term, if the vacancy occurred during a term of office. Any member of the Committee may continue to serve as a member of the Committee after the expiration of his term of office until reappointed or until his successor has been appointed.

(ii) The President shall designate a Chairman of the Committee from the members of the Committee.

(c) Expenses

The members of the Committee shall be reimbursed for actual expenses incurred in the performance of duties for the Committee.

(d) Transaction of business

Six of the members of the Committee shall constitute a quorum. All decisions of the Committee shall be by majority vote of the members present and voting.

(e) Staff and administration

(1) The Director of the United States Information Agency shall make available to the Committee such administrative and technical support services and assistance as it may reasonably require to carry out its activities. Upon the request of the Committee, the head of any other Federal agency may detail to the Committee, on a reimbursable basis, any of the personnel of such agency to assist the Committee in carrying out its functions, and provide such information and assistance as the Committee may reasonably require to carry out its activities.

(2) The Committee shall meet at the call of the Director of the United States Information Agency, or when a majority of its members request a meeting in writing.

(f) Reports by Committee

(1) The Committee shall, with respect to each request of a State Party referred to in section 2602(a) of this title, undertake an investigation and review with respect to matters referred to in section 2602(a)(1) of this title as they relate to the State Party or the request and shall prepare a report setting forth –

(A) the results of such investigation and review;

(B) its findings as to the nations individually having a significant import trade in the relevant material; and

(C) its recommendation, together with the reasons therefor, as to whether an agreement should be entered into under section 2602(a) of this title with respect to the State Party.

(2) The Committee shall, with respect to each agreement proposed to be extended by the President under section 2602(e) of this title, prepare a report setting forth its recommendations together with the reasons therefor, as to whether or not the agreement should be extended.

(3) The Committee shall in each case in which the Committee finds that an emergency condition under section 2603 of this title exists prepare a report setting forth its recommendations, together with the reasons therefor, as to whether emergency action under section 2603 of this title should be implemented. If any State Party indicates in its request under section 2602(a) of this title that an emergency condition exists and the Committee finds that such a condition does not exist, the Committee shall prepare a report setting forth the reasons for such finding.

(4) Any report prepared by the Committee which recommends the entering into or the extension of any agreement under section 2602 of this title or the implementation of emergency action under section 2603 of this title shall set forth --

(A) such terms and conditions which it considers necessary and appropriate to include within such agreement, or apply with respect to such implementation, for purposes of carrying out the intent of the Convention; and

(B) such archaeological or ethnological material of the State Party, specified by type or such other classification as the Committee deems appropriate, which should be covered by such agreement or action.

(5) If any member of the Committee disagrees with respect to any matter in any report prepared under this subsection, such member may prepare a statement setting forth the reasons for such disagreement and such statement shall be appended to, and considered a part of, the report.

(6) The Committee shall submit to the Congress and the President a copy of each report prepared by it under this subsection.

(g) Committee review

(1) In general

The Committee shall undertake a continuing review of the effectiveness of agreements under section 2602 of this title that have entered into force with respect to the United States, and of emergency action implemented under section 2603 of this title.

(2) Action by Committee

If the Committee finds, as a result of such review, that --

(A) cause exists for suspending, under section 2602(d) of this title, the import restrictions imposed under an agreement;

(B) any agreement or emergency action is not achieving the purposes for which entered into or implemented; or

(C) changes are required to this chapter in order to implement fully the obligations of the United States under the Convention; the Committee may submit a report to the Congress and the President setting forth its recommendations for suspending such import restrictions or for improving the effectiveness of any such agreement or emergency action or this chapter.

(h) Federal Advisory Committee Act

The provisions of the Federal Advisory Committee Act (Public Law 92-463; 5 U.S.C. Appendix) shall apply to the Committee except that the requirements of subsections (a) and (b) of section 10 and section 11 of such Act (relating to open meetings, public notice, public participation, and public availability of documents) shall not apply to the Committee, whenever and to the extent it is determined by the President or his designee that the disclosure of matters involved in the Committee's proceedings would compromise the Government's negotiating objectives or bargaining positions on the negotiations of any agreement authorized by this chapter.

(i) Confidential information

(1) In general

Any information (including trade secrets and commercial or financial information which is privileged or confidential) submitted in confidence by the private sector to officers or employees of the United States or to the Committee in connection with the responsibilities of the Committee shall not be disclosed to any person other than to--

(A) officers and employees of the United States designated by the Director of the United States Information Agency;

(B) members of the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate who are designated by the chairman of either such Committee and members of the staff of either such Committee designated by the chairman for use in connection with negotiation of agreements or other activities authorized by this chapter; and

(C) the Committee established under this chapter.

(2) Governmental information

Information submitted in confidence by officers or employees of the United States to the Committee shall not be disclosed other than in accordance with rules issued by the Director of the United States Information Agency, after consultation with the Committee. Such rules shall define the categories of information which require restricted or confidential handling by such Committee considering the extent to which public disclosure of such information can reasonably be expected to prejudice the interests of the United States. Such rules shall, to the maximum extent feasible, permit meaningful consultations by Committee members with persons affected by proposed agreements authorized by this chapter.

(j) No authority to negotiate

Nothing contained in this section shall be construed to authorize or to permit any individual (not otherwise authorized or permitted) to participate directly in any negotiation of any agreement authorized by this chapter.

(Pub. L. 97-446, title III, Sec. 306, Jan. 12, 1983, 96 Stat. 2356; Pub. L. 100-204, title III, Sec. 307(a), (b), Dec. 22, 1987, 101 Stat. 1380.)

References in Text

The Federal Advisory Committee Act, referred to in subsec. (h), is Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

Amendments

1987--Subsec. (b)(3)(A). Pub. L. 100-204, Sec. 307(a), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: "Members of the Committee shall be appointed for terms of two years and may be reappointed for 1 or more terms."

Subsec. (b)(3)(B). Pub. L. 100-204, Sec. 307(b), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: "A vacancy in the Commission shall be filled in the same manner in which the original appointment was made."

Effective Date of 1987 Amendment

Section 307(c) of Pub. L. 100-204 provided that: "The amendment made by subsection (a) [amending this section] shall apply to members of the Cultural Property Advisory Committee first appointed after the date of enactment of this Act [Dec. 22, 1987]."

Delegation of Functions

For delegation of certain functions of the President under this section, see Ex. Ord. No. 12555, Mar. 10, 1986, 51 F.R. 8475, set out as a note under section 2602 of this title.

SECTION 2606. IMPORT RESTRICTIONS

(a) Documentation of lawful exportation

No designated archaeological or ethnological material that is exported (whether or not such exportation is to the United States) from the State Party after the designation of such material under section 2604 of

this title may be imported into the United States unless the State Party issues a certification or other documentation which certifies that such exportation was not in violation of the laws of the State Party.

(b) Customs action in absence of documentation

If the consignee of any designated archaeological or ethnological material is unable to present to the customs officer concerned at the time of making entry of such material—

(1) the certificate or other documentation of the State Party required under subsection (a) of this section; or

(2) satisfactory evidence that such material was exported from the State Party--

(A) not less than ten years before the date of such entry and that neither the person for whose account the material is imported (or any related person) contracted for or acquired an interest, directly or indirectly, in such material more than one year before that date of entry, or

(B) on or before the date on which such material was designated under section 2604 of this title, the customs officer concerned shall refuse to release the material from customs custody and send it to a bonded warehouse or store to be held at the risk and expense of the consignee, notwithstanding any other provision of law, until such documentation or evidence is filed with such officer. If such documentation or evidence is not presented within ninety days after the date on which such material is refused release from customs custody, or such longer period as may be allowed by the Secretary for good cause shown, the material shall be subject to seizure and forfeiture. The presentation of such documentation or evidence shall not bar subsequent action under section 2609 of this title.

(c) Definition of satisfactory evidence

The term "satisfactory evidence" means--

(1) for purposes of subsection (b)(2)(A) of this section--

(A) one or more declarations under oath by the importer, or the person for whose account the material is imported, stating that, to the best of his knowledge --

(i) the material was exported from the State Party not less than ten years before the date of entry into the United States, and

(ii) neither such importer or person (or any related person) contracted for or acquired an interest, directly or indirectly, in such material more than one year before the date of entry of the material; and

(B) a statement provided by the consignor, or person who sold the material to the importer, which states the date, or, if not known, his belief, that the material was exported from the State Party not less than ten years before the date of entry into the United States, and the reasons on which the statement is based; and

(2) for purposes of subsection (b)(2)(B) of this section--

(A) one or more declarations under oath by the importer or the person for whose account the material is to be imported, stating that, to the best of his knowledge, the material was exported from the State Party on or before the date such material was designated under section 2604 of this title, and

(B) a statement by the consignor or person who sold the material to the importer which states the date, or if not known, his belief, that the material was exported from the State Party on or before the date such material was designated under section 2604 of this title, and the reasons on which the statement is based.

(d) Related persons

For purposes of subsections (b) and (c) of this section, a person shall be treated as a related person to an importer, or to a person for whose account material is imported, if such person--

(1) is a member of the same family as the importer or person of account, including, but not limited to, membership as a brother or sister (whether by whole or half blood), spouse, ancestor, or lineal descendant;

(2) is a partner or associate with the importer or person of account in any partnership, association, or other venture; or

(3) is a corporation or other legal entity in which the importer or person of account directly or indirectly owns, controls, or holds power to vote 20 percent or more of the outstanding voting stock or shares in the entity.

(Pub. L. 97-446, title III, Sec. 307, Jan. 12, 1983, 96 Stat. 2358.)

Delegation of Functions

For delegation of certain functions of the President under this section, see Ex. Ord. No. 12555, Mar. 10, 1986, 51 F.R. 8475, set out as a note under section 2602 of this title.

SECTION 2607. STOLEN CULTURAL PROPERTY

No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States.

(Pub. L. 97-446, title III, Sec. 308, Jan. 12, 1983, 96 Stat. 2360.)

References in Text

For the effective date of this chapter, referred to in text, see section 315 of Pub. L. 97-446, set out as an Effective Date note under section 2601 of this title.

SECTION 2608. TEMPORARY DISPOSITION OF MATERIALS AND ARTICLES SUBJECT TO THIS CHAPTER

Pending a final determination as to whether any archaeological or ethnological material, or any article of cultural property, has been imported into the United States in violation of section 2606 of this title or section 2607 of this title, the Secretary shall, upon application by any museum or other cultural or scientific institution in the United States which is open to the public, permit such material or article to be retained at such institution if he finds that –

(1) sufficient safeguards will be taken by the institution for the protection of such material or article; and

(2) sufficient bond is posted by the institution to ensure its return to the Secretary.

(Pub. L. 97-446, title III, Sec. 309, Jan. 12, 1983, 96 Stat. 2360.)

SECTION 2609. SEIZURE AND FORFEITURE

(a) In general

Any designated archaeological or ethnological material or article of cultural property, as the case may be, which is imported into the United States in violation of section 2606 of this title or section 2607 of this title shall be subject to seizure and forfeiture. All provisions of law relating to seizure, forfeiture, and condemnation for violation of the customs laws shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this chapter, insofar as such provisions of law are applicable to, and not inconsistent with, the provisions of this chapter.

(b) Archaeological and ethnological material

Any designated archaeological or ethnological material which is imported into the United States in violation of section 2606 of this title and which is forfeited to the United States under this chapter shall --

(1) first be offered for return to the State Party;

(2) if not returned to the State Party, be returned to a claimant with respect to whom the material was forfeited if that claimant establishes --

(A) valid title to the material,

(B) that the claimant is a bona fide purchaser for value of the material; or

(3) if not returned to the State Party under paragraph (1) or to a claimant under paragraph

(2), be disposed of in the manner prescribed by law for articles forfeited for violation of the customs laws.

No return of material may be made under paragraph (1) or (2) unless the State Party or claimant, as the case may be, bears the expenses incurred incident to the return and delivery, and complies with such other requirements relating to the return as the Secretary shall prescribe.

(c) Articles of cultural property

(1) In any action for forfeiture under this section regarding an article of cultural property imported into the United States in violation of section 2607 of this title, if the claimant establishes valid title to the article, under applicable law, as against the institution from which the article was stolen, forfeiture shall not be decreed unless the State Party to which the article is to be returned pays the claimant just compensation for the article. In any action for forfeiture under this section where the claimant does not establish such title but establishes that it purchased the article for value without knowledge or reason to believe it was stolen, forfeiture shall not be decreed unless--

(A) the State Party to which the article is to be returned pays the claimant an amount equal to the amount which the claimant paid for the article, or

(B) the United States establishes that such State Party, as a matter of law or reciprocity, would in similar circumstances recover and return an article stolen from an institution in the United States without requiring the payment of compensation.

(2) Any article of cultural property which is imported into the United States in violation of section 2607 of this title and which is forfeited to the United States under this chapter shall --

(A) first be offered for return to the State Party in whose territory is situated the institution referred to in section 2607 of this title and shall be returned if that State Party bears the expenses incident to such return and delivery and complies with such other requirements relating to the return as the Secretary prescribes; or

(B) if not returned to such State Party, be disposed of in the manner prescribed by law for articles forfeited for violation of the customs laws.

(Pub. L. 97-446, title III, Sec. 310, Jan. 12, 1983, 96 Stat. 2360.)

References in Text

The customs laws, referred to in subsecs. (a), (b)(3), and (c)(2)(B), are classified generally to this title.

Codification

Section 2607 of this title, referred to in subsec. (c)(1), read in the original "section 208", and was translated as section 2607 of this title, which is section 308 of Pub. L. 97-446, as the probable intent of Congress.

SECTION 2610. EVIDENTIARY REQUIREMENTS

Notwithstanding the provisions of section 1615 of this title, in any forfeiture proceeding brought under this chapter in which the material or article, as the case may be, is claimed by any person, the United States shall establish --

(1) in the case of any material subject to the provisions of section 2606 of this title, that the material has been listed by the Secretary in accordance with section 2604 of this title; and

(2) in the case of any article subject to section 2607 of this title, that the article--

(A) is documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in a State Party, and

(B) was stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party concerned, whichever date is later.

(Pub. L. 97-446, title III, Sec. 311, Jan. 12, 1983, 96 Stat. 2361.)

References in Text

For the effective date of this chapter, referred to in par. (2)(B), see section 315 of Pub. L. 97-446, set out as an Effective Date note under section 2601 of this title.

SECTION 2611. CERTAIN MATERIAL AND ARTICLES EXEMPT FROM THIS CHAPTER

The provisions of this chapter shall not apply to--

(1) any archaeological or ethnological material or any article of cultural property which is imported into the United States for temporary exhibition or display if such material or article is immune from seizure under judicial process pursuant to section 2459 of title 22; or

(2) any designated archaeological or ethnological material or any article of cultural property imported into the United States if such material or article --

(A) has been held in the United States for a period of not less than three consecutive years by a recognized museum or religious or secular monument or similar institution, and was purchased by that institution for value, in good faith, and without notice that such material or article was imported in violation of this chapter, but only if --

(i) the acquisition of such material or article has been reported in a publication of such institution, any regularly published newspaper or periodical with a circulation of at least fifty thousand, or a periodical or exhibition catalog which is concerned with the type of article or materials sought to be exempted from this chapter,

(ii) such material or article has been exhibited to the public for a period or periods aggregating at least one year during such three-year period, or

(iii) such article or material has been cataloged and the catalog material made available upon request to the public for at least two years during such three-year period;

(B) if subparagraph (A) does not apply, has been within the United States for a period of not less than ten consecutive years and has been exhibited for not less than five years during such period

in a recognized museum or religious or secular monument or similar institution in the United States open to the public; or

(C) if subparagraphs (A) and (B) do not apply, has been within the United States for a period of not less than ten consecutive years and the State Party concerned has received or should have received during such period fair notice (through such adequate and accessible publication, or other means, as the Secretary shall by regulation prescribe) of its location within the United States; and

(D) if none of the preceding subparagraphs apply, has been within the United States for a period of not less than twenty consecutive years and the claimant establishes that it purchased the material or article for value without knowledge or reason to believe that it was imported in violation of law.

(Pub. L. 97-446, title III, Sec. 312, Jan. 12, 1983, 96 Stat. 2362.)

SECTION 2612. REGULATIONS

The Secretary shall prescribe such rules and regulations as are necessary and appropriate to carry out the provisions of this chapter.

(Pub. L. 97-446, title III, Sec. 313, Jan. 12, 1983, 96 Stat. 2363.)

SECTION 2613. ENFORCEMENT

In the customs territory of the United States, and in the Virgin Islands, the provisions of this chapter shall be enforced by appropriate customs officers. In any other territory or area within the United States, but not within such customs territory or the Virgin Islands, such provisions shall be enforced by such persons as may be designated by the President.

(Pub. L. 97-446, title III, Sec. 314, Jan. 12, 1983, 96 Stat. 2363.)

Delegation of Functions

For delegation of certain functions of the President under this section, see Ex. Ord. No. 12555, Mar. 10, 1986, 51 F.R. 8475, set out as a note under section 2602 of this title.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   [X] this brief contains [*7,267*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

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Dated: October 31, 2011

/s/ Peter K. Tompa
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 31st day of October, 2011, I caused this Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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Counsel for Appellees

I further certify that on this 31st day of October, 2011, I caused the required number of bound copies of the Brief of Appellant and Joint Appendix to be hand-filed with the Clerk of the Court, and one copy of the Joint Appendix to be served, via UPS Ground Transportation, upon Counsel for Appellees at the above address.

/s/ Peter K. Tompa
Counsel for Appellant