**RECORD NO. 09-5439**

**ORAL ARGUMENT NOT YET SCHEDULED**

In The

# United States Court of Appeals

For The District of Columbia Circuit

**ANCIENT COIN COLLECTORS GUILD; INTERNATIONAL ASSOCIATION OF PROFESSIONAL NUMISMATISTS; PROFESSIONAL NUMISMATISTS GUILD, INC.,**

***Plaintiffs - Appellants,***

**v.**

**UNITED STATES DEPARTMENT OF STATE,**

***Defendant - Appellee.***

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**KATE FITZ GIBBON; ARTHUR HOUGHTON; GERALD STIEBEL**

***Amicus Curiae for Appellant***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

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# BRIEF OF APPELLANTS

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## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

### A. Parties and Amici.

Plaintiff-appellants are Ancient Coin Collectors Guild ("ACCG"), the International Association of Professional Numismatists ("IAPN"), and the Professional Numismatists Guild ("PNG"). The ACCG is a non-profit collector advocacy organization. The IAPN is a non-profit international organization. The PNG is a non-profit corporation. Defendant-appellee is the United States Department of State, an agency of the Executive Branch of the United States Government.

Certain former members of the Cultural Property Advisory Committee ("CPAC") are appearing in this Court as amici curiae. No amici curiae appeared in the district court.

### B. Rulings Under Review.

The rulings under review are the order and memorandum of the district court issued on November 23, 2009. The order and opinion are found in the Joint Appendix ("JA") at pages 416-428 and appear as items #27 and #28 on the district court docket (D.D.C. No. 07-CV-2074). The district court's opinion is available at 2009 U.S. Dist. LEXIS 109303 (D.D.C. November 23, 2009).

### C. Related Cases

This case has not previously been before this Court, except on the Department of State's motion for summary affirmance, which was denied. This case has not been before any other court except the court below. There are no related cases of which appellants are aware.

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September 7, 2010

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## RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. Rule 26.1, Plaintiffs-Appellants, The Ancient Coin Collectors Guild ("ACCG"), the International Association of Professional Numismatists ("IAPN"), and the Professional Numismatists Guild ("PNG") submit their corporate disclosure statements.

(a) PNG and ACCG are organized as non-profit corporations.

(b) ACCG has no parent company; and no publicly-held company has a 10% or greater ownership in ACCG.

(c) ACCG is a Missouri based non-profit corporation organized under Section 501(c)(4) of the Internal Revenue Code. ACCG is committed to promoting the free and independent collection of coins from antiquity. The goal of this guild, founded in 2004, is to foster an environment in which the general public can confidently and legally acquire and hold any numismatic item of historical interest regardless of date or place of origin. ACCG strives to achieve its goals through education, political action, and consumer protection. Membership of the ACCG is comprised of collectors, independent scholars and numismatic professionals who care passionately about preserving, studying and displaying ancient coins from all cultures. In addition to individual memberships, the guild is supported by 20 Affiliate Member organizations. The guild does not in any way

support, condone or defend the looting of archaeological sites, nor the violation of any nation's laws concerning the import or export of antiquities.

(d) IAPN is a non-profit international organization established within the terms of points 60 to 72 of the Swiss Civil Code. IAPN is made up of the leading international numismatic firms and was founded in 1951 in Geneva, Switzerland. IAPN broadly represents the interests of the small businesses of the international numismatic trade. The objectives of the IAPN are the development of a healthy and prosperous numismatic trade conducted according to the highest standards of business ethics and commercial practice.

(e) PNG has no parent company; and no publicly-held company has a 10% or greater ownership in PNG.

(f) PNG is a non-profit corporation organized under Section 501(c)(6) of the Internal Revenue Code. PNG was founded in 1955 comprised of the country's top rare coin and paper money experts. PNG broadly represents the interests of the small businesses of the numismatic trade within the United States. PNG member-dealers must adhere to a strict code of ethics and demonstrate knowledge, integrity and responsibility in their business dealings, and they must agree to binding arbitration to settle unresolved disputes over numismatic property. The organization hosts PNG day shows in conjunction with the American Numismatic association and Central States Numismatic Society. It also actively promotes

numismatic education and hobby enjoyment with informative brochures, lectures and seminars by member-dealers and other important projects.

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## GLOSSARY

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|---|---|
| ACCG | Ancient Coin Collectors Guild |
| CAARI | Cyprus American Archeological Research Institute |
| CPAC | Cultural Property Advisory Committee |
| CPIA | Convention on Cultural Property Implementation Act |
| ECA | Bureau of Education and Cultural Affairs |
| FACA | Federal Advisory Committee Act |
| FOIA | Freedom of Information Act |
| IAPN | International Association of Professional Numismatists |
| JA | Joint Appendix |
| PNG | Professional Numismatists Guild |

## 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 Columbia on November 23, 2009, under 28 U.S.C. § 1291. The district court's jurisdiction was based upon 5 U.S.C. §§ 552(a)(4)(B), 552(a)(6)(C)(i) and 28 U.S.C. § 1331. The Notice of Appeal was filed on December 22, 2009.

## STATEMENT OF THE ISSUES

This appeal presents the following four issues for review:

1.) Did the district court err in finding that the government met its burden of establishing that it conducted an adequate search for responsive documents requested by the plaintiffs-appellants pursuant to the Freedom of Information Act ("FOIA")?

2.) Did the district court err in finding that the government met its burden of establishing that the documents requested by the plaintiffs-appellants pursuant to the FOIA, including but not limited to Cultural Property Advisory Committee ("CPAC") reports, were protected by 19 U.S.C. § 2605(h) and (i) and therefore properly withheld pursuant to Exemption 3, 5 U.S.C. § 552(b)(3)?

3.) Did the district court err in finding that the government met its burden of establishing that the documents requested by the plaintiffs-appellants pursuant to the FOIA, including but not limited to CPAC reports, were protected by the

deliberative process privilege and therefore properly withheld pursuant to Exemption 5, 5 U.S.C. § 552(b)(5)?

4.) Did the district court err in finding that the government met its burden of establishing that the documents requested by the plaintiffs-appellants pursuant to the FOIA, including but not limited to CPAC reports, were properly classified pursuant to Executive Order 12,958 and therefore properly withheld pursuant to Exemption 1, 5 U.S.C. § 552(b)(1)?

## STATUTES AND REGULATIONS

The FOIA statute requires an "agency" to make records available upon request unless the agency can show the requested records fall within one of nine exemptions in the Act. *See* 5 U.S.C. § 552(a)(3), (b). It is the burden of the agency withholding records to establish that the records are properly exempt. *See* 5 U.S.C. § 552(a)(4)(B).

The Convention on Cultural Property Implementation Act ("CPIA"), 19 U.S.C. §§ 2600-2613, regulates requests for import restrictions to United States. The CPIA sets up the Cultural Property Advisory Committee ("CPAC") and requires it to hold hearings and advise the ECA on import restriction requests. 19 U.S.C. § 2605. Once the government enters into a Memorandum of Understanding with a foreign country on import restrictions, it must file a report to Congress. 19 U.S.C. § 2602(g)(2). Among other things, the government is required to indicate

whether there were any differences between the government's final action and the CPAC recommendations and if there were differences, the reasons for the differences. *Id*. The relevant statutory provisions are reprinted in the addendum to this brief.

## STATEMENT OF THE CASE

This appeal arises from a series of FOIA requests sent by the Ancient Coin Collectors Guild ("ACCG"), International Association of Professional Numismatics ("IAPN") and the Professional Numismatics Guild ("PNG") to the United States Department of State. (JA 13-21). These FOIA requests were made between July 30, 2004 and October 11, 2007 and sought records pertaining to the Department of State's Bureau of Education and Cultural Affairs ("ECA") and the advisory committee that advises ECA, the Cultural Property Advisory Committee ("CPAC"). *Id*. Specifically, plaintiffs' eight FOIA requests sought records on the State Department's inclusion of coins in the restrictions of cultural artifacts with China, Italy and Cyprus[1]. *Id*.

On November 15, 2007, having received neither a production of documents nor a production date on most of the responsive records, plaintiffs filed their Complaint. (JA 7-21). Following its processing of responsive records, the State Department filed its motion for summary judgment on its search for responsive

[1] One of the requests, Count IV of the Complaint, is not at issue in this appeal.

material and the material it withheld. Plaintiffs' cross-motion followed and ultimately, the court concluded that defendant had established that its search for responsive records was adequate and that the withheld documents were protectable pursuant to FOIA Exemptions 1, 2, 3, 5, 6, and 7(C)[2] and granted summary judgment for the defendant. (JA 416-427). Plaintiffs filed a timely notice of appeal. (JA 429).

## STATEMENT OF FACTS

Foreign nations may seek import restrictions to the United States on their antiquities. These restrictions, however, may not be unilaterally imposed upon the United States. The ability to seek and receive the import restrictions were conceived by the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("the 1970 UNESCO Convention"). *See* 823 U.N.T.S. 231 (1972) (JA 332). The 1970 UNESCO Convention was ratified by the United States Senate in 1972, subject to reservations intended to preserve the "independent judgment" of the United States as to whether, and to what extent, to impose import restrictions on cultural artifacts at the behest of the parties of the 1970 UNESCO Convention. *See* U.S. Senate Report 97-564, located at http://exchanges.state.gov /heritage/culprop/laws/pdfs/97-564 (last visited Aug. 16, 2010). In 1983, Congress

[2] The use of FOIA Exemptions 2, 6 and 7(C) are not at issue in this appeal.

passed the Convention On Cultural Property Implementation Act ("CPIA"), 19 U.S.C. §§ 2600-2613. Requests for import restrictions are acted upon pursuant to the CPIA. 19 U.S.C. § 2603(a)(3). Primary decision-making on the requests resides with the State Department's Under Secretary for ECA. *Id*. By statute, CPAC holds hearings and advises the ECA on import restriction requests. *Id*. CPAC is responsible for recommending what specific items are on the designated list for import restrictions. 19 U.S.C. § 2604(f)(4). While the ECA ultimately makes the final decisions on whether to grant the import restrictions, once the government enters into a Memorandum of Understanding with a foreign country on import restrictions, it must file a report to Congress. 19 U.S.C. § 2602(g)(2). Among other things, the government is required to indicate whether there were any differences between the government's final action and the CPAC recommendations and if there are differences, the reasons for the differences. *Id*.

Over the past decade, Cyprus, Italy and China have sought restrictions on the import of ancient coins to the United States. (JA 233). The import restrictions on Cypriot coins were approved in 2007. (JA 241). Jay Kislak, Chair of CPAC at the time, stated that the CPAC recommendations were different than the final State Department action. (JA 235) This fact, however, was not reported to Congress, as required pursuant to 19 U.S.C. § 2602(g)(2).

Beginning on July 30, 2004, Appellants made a series of FOIA request to the State Department for information related to the import restriction requests. (JA 13-21). After the filing of this lawsuit in November of 2007, the State Department released a number of documents but withheld others pursuant to FOIA Exemptions 1, 2, 3, 5, 6 and 7(c). (JA 138-144, 161, 168-169, 190-191, 197-199, 202-203).

The government moved for summary judgment basing its justifications for its search and withholding of responsive documents on the declaration of Margaret Grafeld, the State Department's Information and Privacy Coordinator and the Director of the State Department's Office of Information Programs and Services. (JA 34-112). Appellants opposed the summary judgment motion and cross-moved. However, on November 20, 2009, the district court granted summary judgment for of the government. (JA 428). After a timely appeal, the government moved for summary affirmance of the district court decision, which was denied on June 9, 2010. (JA 429).

## SUMMARY OF ARGUMENT

To justify its actions under the FOIA, the burden is on the government to justify its actions. 5 U.S.C. § 552(a)(4)(B). In this case, the government, despite the district court's finding, did not meet its burden in establishing that the responsive records were withholdable under the FOIA. Further, the government

did not meet its burden in establishing that its search for responsive records was adequate.

The government withheld records pursuant to a number of FOIA exemptions. Many of the records were withheld pursuant to FOIA Exemption 3. FOIA Exemption 3 allows for the withholding of records that are "specifically exempted from disclosure by statute" if the statute (A) requires withholding or (B) establishes criteria for withholding. 5 U.S.C. § 552(b)(3). The statute in question here is 19 U.S.C. §§ 2605(h) and (i). The district court erroneously found that these two subsections allowed for the withholding of the records in question.

Subsection 2605(h) does not allow for the withholding of records pursuant to a FOIA request. This subsection incorporates the Federal Advisory Committee Act ("FACA"), 5 U.S.C. Appendix 2, including the FACA's provisions that allow for advisory committee meetings to be closed and certain documents to be withheld during the pendency of the CPAC process. 19 U.S.C. § 2605(h). Specifically, the subsection allows for, among other things, the withholding of records during pending CPAC proceedings "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." *Id*. Thus, the plain language of the statute states that this is a

temporal matter for withholding information during the pendency of the CPAC process. It in no way invokes FOIA or is meant to be a bar to release pursuant to a valid FOIA request. If CPAC records are to be withheld pursuant to the FOIA, one of the other eight (8) exemptions must be used to withhold the information.

Furthermore, even if subsection 2605(h) can be construed to be an exemption 3 statute, the government did not meet its burden in demonstrating that it met these requirements. The statute says that "the President or his designee" must find that "the disclosure of the matters" before the CPAC "would compromise the Government's negotiating objectives or bargaining positions on the negotiations of any agreement authorized by this chapter." *Id*. The record does not establish that this was ever done by the President or his designee. The district court decision was based solely on the declaration of Margaret Grafeld, who made the conclusory statement in her declaration on behalf of the FOIA withholding that the Bureau's Assistant Secretary had determined that disclosure of the information "would compromise the U.S. Government's negotiation objectives and/or bargaining position on the negotiation of agreements." (JA 423). Grafeld's statement is not related to any actual CPAC negotiation and does not state that the Assistant Secretary ever made this statement pursuant to subsection 2605(h) while the responsive CPAC proceedings were pending. This statement is not the same as a verifiable fact that the CPAC meetings were closed pursuant to the subsection.

Thus, as no evidentiary basis for the finding that the provision of the subsection was met, there is no way that the records could properly be found withholdable pursuant to FOIA Exemption 3, even if subsection 2605(h) is found to be an actual FOIA Exemption 3 statute.

Further, subsection 2605(i)(1) also does not allow the withholding of documents pursuant to FOIA Exemption 3 in this instance. The district court found that subsection 2605(i)(1), which protects information submitted in confidence by the private sector to CPAC allowed the government to withhold certain information at issue in this case pursuant to FOIA Exemption 3. (JA 424). The government never explained how it concluded that *any of* the materials provided by the private sector were provided in confidence, yet the district court nevertheless accepted the government's conclusory and unsupported statement that the material were provided in confidence. The government failed to satisfy its burden of proof under subsection 2605(i)(1), and the district court's finding that the subsection allowed the withholding of responsive material was unjustified based on the record.

The government also withheld records pursuant to FOIA Exemption 1, 5 U.S.C. § 552(b)(1), because they are classified confidential. However, the district court's finding failed to adequately take into account the fact that the records in question, which were submitted by a foreign nation, were prepared with the

assistance of a non-governmental party. This fact undercuts the government's basis for classification and withholding the records pursuant to FOIA Exemption 1.

Additionally, the government withheld certain material pursuant to FOIA exemption 5, pursuant to the deliberative process privilege. The use of this privilege is also inapplicable in this instance for two reasons. Initially, the evidence presented, and ignored by the district court, demonstrated that the deliberative process privilege was inapplicable to the findings of CPAC. Second, much of the material is factual, and despite the district court's finding otherwise, the materials were not shown by the government to be "deliberative facts." Thus, FOIA Exemption 5 does not withhold certain of the records at issue in this matter.

Finally, the government did not meet its burden in establishing that it conducted a reasonable search for responsive documents. The district court approved the governments search and summarily dismissed the Appellants' arguments concerning the failure of the government to properly search the locations where records likely were located as well as to disclose the search terms used in its searches. As such, the government did not meet its burden in searching for responsive records.

## STANDARD OF REVIEW

When a district court decides a FOIA case at summary judgment, this Court reviews the decision de novo. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1111-12 (D.C. Cir. 2007); *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 998 (D.C. Cir. 1998).

## ARGUMENT

It has long been establish that the FOIA reflects the "strong policy" that "the public is entitled to know what its government is doing and why." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980). The FOIA requires agencies to conduct reasonable searches for records responsive to FOIA requests. *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). The FOIA then requires that these records be disclosed unless they are subject to one of the limited exemptions provided in 5 U.S.C. § 552(b). FOIA's "strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991); *see also* 5 U.S.C. § 552(a)(4)(B). If the government does not "carry its burden of convincing the court that one of the statutory exemptions apply," the requested records must be disclosed. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987). In this case, the government failed to carry its burden of proving that (a) it conducted an adequate search for the

requested records and (b) that they fell within the withholding exemptions invoked by the government.

## I. Exemption Three Does Not Apply to the Withheld Records

Records may be withheld under Exemption 3 where it is established that, first, the asserted statute is a statute of exemption under the FOIA, and, second, the material satisfies the criteria for exemption under that statute. 5 U.S.C. § 552(b)(3); *CIA v. Sims*, 471 U.S. 159, 167 (1985); *Fitzgibbon v. CIA*, 911 F.2d 755, 761 (D.C. Cir. 1990). In this case, the State Department has failed to establish that the withheld material is exempt pursuant to Exemption 3.

### *A. 19 U.S.C. § 2605(h) Is Not An Exemption 3 Statute*

19 U.S.C. § 2605(h) of the CPIA states that the provisions of the FACA apply to CPAC except that the requirements of the FACA dealing with "open meetings, public notice, public participation and public availability of documents shall not apply to" CPAC "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." 19 U.S.C. § 2605(h). Thus, this subsection of the law authorizing CPAC makes clear that CPAC is subject to the FACA, but allows, *in certain instances*, CPAC to close its meetings and not disclose information where a

finding is made that to follow the openness requirements of FACA would jeopardize negotiations with foreign nations on the matters CPAC is statutorily required to discuss and advise on.

This CPIA subsection, however, is not a withholding statute for FOIA purposes. For a statute to allow the withholding of material pursuant to a FOIA request, it must be established that it "(A) requires that the material be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). As subsection 2605(h) does not require material to be withheld from the public, the issue is whether the particular criteria for withholding in the subsection allow for withholding information pursuant to a FOIA request.

The district court found that subsection 2605(h) "specifically exempts a provision of the Federal Advisory Committee Act that makes FOIA's provisions applicable to the advisory committee." (JA 422). Thus, according to the district court, the subsection "is a disclosure-prohibiting statute. As such, the information is properly withheld if it falls within the statute's established criteria for withholding." (JA 423). The district court's conclusion, however, is not supported by existing case law or the facts in this situation.

The district court's conclusion is based on the theory that if material may be validly withheld during a pending CPAC process, FACA then allows for it to be withheld whenever a FOIA request is made. However, in evaluating whether a statute qualifies as one allowing for withholding pursuant to Exemption 3, an agency's exercise of its discretion is governed by the purported withholding statute itself, (here subsection 2605(h))– not the FOIA. *See Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987). Thus, subsection 2605(h) only protects certain information from disclosure pursuant to the FACA when certain temporal conditions are met. The district court did not discuss, nor did the government establish that this subsection serves as a bar to withholding information to any *subsequent FOIA* request for this information.

While it appears that this issue is one of first impression before this Court, case law implies that when material is exempted during the advisory committee process, a FOIA request is the proper avenue to receive access to this material. *See generally Food Chemical News v. Department of Health and Human Services*, 980 F.2d 1468, 1472 (D.C. Cir. 1993) ("Disclosure of section 552(a)(2) materials clearly does not require a FOIA request, as FOIA requests are needed only for materials not 'made available under paragraphs (1) and (2)' of section 552(a)."); *National Security Archive v. Archivist of the United States*, 909 F.2d 541, 545 (D.C. Cir. 1990) (FOIA requests to the proper entity required for disclosure of not previously disclosed

advisory committee materials). Thus, withholding the material during the advisory comittee process does not bar its production pursuant to an independent FOIA request and subsection 2605(h) does not act as an Exemption 3 withholding statute.

*B. Withholding Criteria for Subsection 2605(h) Not Established*

In any event, even if subsection 2605(h) is found to be an Exemption 3 withholding statute, the withholding criteria of the statute have not been established to allow the material to be withheld in this case.

The criterion that would allow for the withholding is that "the President or his designee" must determine that there should be no public access to CPAC material where "the disclosure of matters involved in the Committee's proceedings would compromise the Government's negotiating objectives or bargaining positions on the negotiations . . ." 19 U.S.C. § 2605(h). No such determination was ever placed in the record. The district court relied on the declaration of Margaret Grafeld, made in defense of the FOIA lawsuit, which merely mimics the language of subsection 2605(h). (JA 68-69). The record in this case contains *no* specific finding by *any* ECA Assistant Secretary that CPAC meetings should be closed pursuant to this subsection. The district court did not address this omission. However, a finding of an ECA Assistant Secretary would have to have been made and put into the record for it to be properly established that subsection 2605(h) allowed for withholding pursuant to Exemption 3. Because no such finding was

made, the record fails to establish that the government demonstrated that subsection 2605(h) may be used to withhold material in any instance.

*C. Withholding Criteria for 19 U.S.C. § 2605(i)(1) Not Established*

19 U.S.C. § 2605(i) allows for information submitted in confidence by the private sector to either the government or CPAC to be withheld from disclosure. 19 U.S.C. § 2605(i). Thus, for information to be withheld pursuant to Exemption 3 under this subsection, the government must demonstrate that the withheld information was submitted by the private sector in confidence. Despite the district court's finding, the government has failed to establish that this information was provided in confidence, and therefore it is not eligible for withholding pursuant to FOIA Exemption 3.

To justify its withholding, the government provided two paragraphs from Margaret Grafeld. Grafeld states that she was "advised" that the information is shared on a confidential basis. (JA 70). This information is shared "because the illicit trade in cultural property involves significant, worldwide criminal activity." (JA 71). Further, Grafeld states that information is provided to "ECA staff during research-gathering trips" to "cultural property sites" and the disclosure of this information could "undermine the Department's relationships with the private individuals who provide this information. *Id*. Grafeld adds that "disclosure of the

specific locations… *could* cause future looting of these sites." *Id.* (emphasis supplied).

Ms. Grafeld's conclusory and speculative statements do not establish how the government has determined that this information was provided in confidence by the private sector. While this subsection's applicability under the FOIA is a case of first impression, the issue of the government's burden on a showing of confidentiality is not. For example, to establish confidentiality pursuant to FOIA Exemption 7(D), the confidentiality must be established on a specific case by case basis. *U.S. Department of Justice v. Landano*, 508 U.S. 165, 179-180 (1993). *Landano* held "the question is not whether the requested document is of the type that the agency *usually* treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential." *Id*. at 172. (emphasis supplied). In this case, the State Department's actions are of *exactly* the sort the *Landano* Court found improper. Ms. Grafeld's declaration states that confidentiality was proper in this case because 'members of the private sector *frequently* share information with [CPAC] and the Department on a confidential basis. Those who collect, study, and curate archaeological and ethnological material *often share* their observations about how such material enters the U.S. These individuals provide this information with an expectation of confidentiality . . ." (JA 70-71) (emphasis supplied). There are absolutely no facts

entered into the record about the conditions under which the withheld records were provided by individuals in each specific instance where the government believes communications were made in confidence. As such, the government did not meet its burden in justifying its use of FOIA Exemption 3 under this subsection.[3]

## II. Exemption One Does Not Apply to the Withheld Records

Records may be withheld pursuant to FOIA Exemption 1 if the information has been deemed classified "under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy" and is "in fact properly classified pursuant to such Executive Order." 5 U.S.C. § 552(b)(1). The records at issue were classified pursuant to Executive Order 12,958 Section 1.4(b) and/or 1.4(d). However, the records at issue are not properly classified, and as such, may not be withheld pursuant to Exemption 1.

The government makes much of the fact that it consulted with the government of Cyprus and that Cyprus desired that their material not be disclosed by the State Department. Grafeld Decl., 30 (JA 63). However, other facts (ignored by the district court in finding that Exemption 1 applied) indicate that this material has not been treated as such by either the foreign nations or the State Department.

[3] Subsection 2605(i)(2) was found to not exempt the records because no implementing regulations were ever issued. (JA 424). As this subsection was not a basis for the district court's finding that the government properly withheld the requested records, this subsection is not a focus of this appeal.

The withheld information concerning Cyprus was created with a private U.S.-based organization, the Cyprus American Archeological Research Institute ("CAARI"), which has made no secret of its work on the materials. *See* "CAARI – 30 Years," *available at* http://www.caari.org/CAARIat30.htm (last visited Aug. 12, 2010) (quoting CAARI's President Gustave Feissel as saying CAARI worked with both the U.S. Embassy and the Cyprus Government "on the GOC submitted for the renewal" of a Memorandum of Understanding between Cyprus and the U.S. to restrict the import of Cypriot antiquities into the U.S.) (JA 382). Thus, while Cyprus may wish for the State Department to keep these records out of the hands of the public, Cyprus did not treat this material as confidential matter while creating the records. While this appears to be a matter of first impression before this Court, the actions of Cyprus should outweigh their supposed wishes in this instance and this material should not be deemed appropriate for classification.

The withheld information concerning the People's Republic of China concerns the classification by the government of that nation's actual request for import restrictions. The State Department placed what it considers a summary of the request on its website. (JA 317-329). The State Department never explained how this summary differs from the actual full document. While the district court was correct that releasing a summary of the request does not automatically make the document lose its classified status pursuant to the holding in *Public Citizen v.*

*Department of State*, 11 F.3d 198, 201 (D.C. Cir. 1993), the government must, at the very least, explain how the released summary differs from the classified document. *Id.* There was no explanation provided concerning the differences between the released summary and the document the government has classified. Thus, the burden of demonstrating that this document was appropriately classified has not been established and summary judgment was inappropriate for the withholding of the document.

## III. Exemption Five Does Not Apply to the Withheld Records

The deliberative process privilege of FOIA's Exemption 5 protects information that is both deliberative and pre-decisional to the adoption of agency policy and both elements of the privilege must be established before a document may be withheld. *See Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992). A communication is considered pre-decisional when it is created "antecedent to the adoption of an agency policy." *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978)(en banc). A document is considered deliberative where it "makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F. 2d 1136, 1143-44 (D.C. Cir. 1975). The burden is on the agency to establish that *both* elements of the privilege have been properly invoked. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854,

866 (D.C. Cir. 1980). The records at issue here do not meet the requirements necessary to be protected pursuant to the deliberative process privilege of Exemption 5.

The government withheld material included in CPAC reports, including entirely factual material and final CPAC recommendations pursuant to the deliberative process privilege. (JA 87-88, 103). However, neither final CPAC recommendations nor the factual material is appropriate for withholding pursuant to the deliberative process privilege.

First, under the CPIA the records of all CPAC proceedings should be made public unless it is determined during the pendency of the CPAC proceedings that the release of CPAC's proceedings would "compromise the Government's negotiating objectives or bargaining positions on the negotiations of any agreement . . ." 19 U.S.C. § 2605(h). In this case, there was *no evidence whatsoever* in the record establishing that the government found, *during the pendency of the CPAC proceedings*, that release of the proceedings would compromise the government's position in the manner stated in the statute. Instead, the only material in the record on the point consists of an unsupported *after-the-fact* statement by Ms. Grafeld that "the Department and USIA have consistently determined that the disclosure of matters involved in Committee proceedings would compromise the U.S. Government's negotiation objectives and/or

bargaining position on the negotiation of agreements." (JA 68-69). Yet the Grafeld Declaration contains no evidence supporting a conclusion that the required findings were *actually made in this case* in a timely fashion. The district court completely disregarded this absence of evidence in finding that the deliberative process privilege allowed the withholding of the CPAC reports. Further, the district court ignored the statement of a former CPAC chair about why CPAC reports should be released – including his statements concerning State Department reporting requirements to Congress. (JA 233-235). The government is required to indicate whether there were any differences between its final action and the CPAC recommendations, and if there were differences, the reasons for these differences. 19 U.S.C. § 2602(g)(2). Additionally, CPAC reports are required to be released to Congress. 19 U.S.C. § 2605(f)(6). These requirements establish that Congress did not intend CPAC recommendations to be treated as internal recommendations maintained only within the State Department. Thus, these CPAC recommendations are not wholly deliberative in nature and not subject to the deliberative process privilege.

Further, the factual information withheld in this instance is not entitled to protection pursuant to the deliberative process privilege. Factual material is generally not protected pursuant to the deliberative process privilege. *See Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1982).

However, certain facts may be withheld as deliberative. *Mapother*, 3 F.3d 1533 at 1539-40. To be withholdable facts, their inclusion in the document must be an "exercise of judgment" *Id*. at 1539. Facts that "reflect[ed] no point of view" are not protectable. *Id*. at 1539-40. While the government established that the choosing of these facts was a deliberate distillation of the information, (JA 74-75), they never established whether the facts reflected a point of view. Thus, these facts are not covered by the deliberative process privilege.

## IV. The Search For Responsive Records Was Not Adequate

A search for records is found to be adequate under the FOIA when an agency demonstrates that "it has conducted a 'search reasonably calculated to uncover all relevant documents.'" *Weisberg v. U.S. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)(quoting *Weisberg v. Department of Justice*, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983)). An agency must establish "beyond material doubt" that its search was "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999). The district court cited the standard enunciated in *Perry v. Block*, 684 F.2d 121 (D.C. Cir. 1982), in reaching its decision. (JA 419 n.3). Under this standard, "[i]n the absence of countervailing evidence or apparent inconsistency of proof, affidavits that explain in reasonable detail the scope and method of the

search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA." *Perry*, 684 F.2d at 177.

The government's description of its search in this case failed to even meet the district court's stated standard for a number of reasons. Specifically, the government failed to meet its burden in describing its search for responsive records in two locations. The first concerns the government's search for e-mails from Maria Kouroupas, the Executive Director of CPAC. The government never explained why no e-mails from Ms. Kouroupas were located. According to the government, the search was conducted by ECA staff themselves and involved searching both manually and electronically for responsive documents. (JA 50-51). However, the government never stated how long the e-mails they searched for are actually preserved by ECA staff, nor did they ever state if archived or backup tapes were searched for responsive records. The district court rejected Appellants' arguments about the deficiencies of the government's search and instead upheld the search as adequate. (JA 419). Using this rationale to make a search adequate, the government could always make a threshold showing that its search was sufficient, as it would never be required to either explain how long the types of documents it is searching for are retained within the offices searched or if it searched archived backup records. These searches, like the one conducted here, would serve to defeat FOIA requesters' access to records even if they are found to

be "adequate." Thus, the government's failure to describe certain elements of its search should not be found to be a description of an adequate search.

Additionally, the government's description of its search for records responsive to the requests at issue that were sought in the Office of the Undersecretary for Political Affairs provided scant details of the search itself. (JA 53-54). The district court only stated that the absence of the *search terms* did not make the search inadequate. (JA 419 n.3). However, there was more than just the absence of the search terms in the government's description of the search. Also omitted were whether manual or electronic searches were conducted for these records and the time frames included in these searches. As such, the omissions by the government do not meet the standard set forth in *Perry* and as such, the government's search for records in the office of the Undersecretary for Political Affairs was not reasonable.

## CONCLUSION

For the foregoing reasons, this Court should reverse the district court's orders of November 20, 2009, and remand the case for further proceedings.

Respectfully submitted,

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September 7, 2010

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Dated: September 7, 2010

/s/ Scott A. Hodes
*Counsel for Appellants*

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 7th day of September, 2010, I caused this Brief of Appellants and Joint Appendix 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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I further certify that on this 7th day of September, 2010, I caused the required number of bound copies of the Brief of Appellants and Joint Appendix to be hand-filed with the Clerk of the Court and a copy of the Joint Appendix to be served, via UPS Ground Transportation, upon all case participants, at the above listed addresses.

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# ADDENDUM A

From the U.S. Code Online via GPO Access
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[Laws in effect as of January 3, 2007]
[CITE: 5USC552]

# TITLE 5--GOVERNMENT ORGANIZATION AND EMPLOYEES

## PART I--THE AGENCIES GENERALLY

## CHAPTER 5--ADMINISTRATIVE PROCEDURE

## SUBCHAPTER II--ADMINISTRATIVE PROCEDURE

### Sec. 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by yhe agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b)

under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term ``search'' means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to--

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term ``a representative of the news media'' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term ``news'' means information that is

about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ``news'') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed. Pub. L. 98-620, title IV, Sec. 402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either--

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall--

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except--

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, ``unusual circumstances'' means, but only to the extent reasonably necessary to the proper processing of the particular requests--

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can

show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term ``exceptional circumstances'' does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records--

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term ``compelling need'' means--

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall--

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the equest using the assigned tracking number, including--

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B)

would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance

continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include--

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days

that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency--

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency

to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests; and

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member

of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term--

(1) ``agency'' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) ``record'' and any other term used in this section in reference to information includes--

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall--

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency--

(1) have agency-wide responsibility for efficient and appropriate compliance

with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90-23, Sec. 1, June 5, 1967, 81 Stat. 54; Pub. L. 93-502, Secs. 1-3, Nov. 21, 1974, 88 Stat. 1561-1564; Pub. L. 94-409, Sec. 5(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95-454, title IX, Sec. 906(a)(10), Oct. 13, 1978, 92 Stat. 1225; Pub. L. 98-620, title IV, Sec. 402(2), Nov. 8, 1984, 98 Stat. 3357; Pub. L. 99-570, title I, Secs. 1802, 1803, Oct. 27, 1986, 100 Stat. 3207-48, 3207-49; Pub. L. 104-231, Secs. 3-11, Oct. 2, 1996, 110 Stat. 3049-3054; Pub. L. 107-306, title III, Sec. 312, Nov. 27, 2002, 116 Stat. 2390; Pub. L. 110-175, Secs. 3, 4(a), 5, 6(a)(1), (b)(1), 7(a), 8-10(a), 12, Dec. 31, 2007, 121 Stat. 2525-2530.)

# ADDENDUM B

*(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.