

Cultural Property Law

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Introduction

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I. Introduction

Although, in the past, the *United States Attorneys' Bulletin* has included individual articles relating to cultural property crime, this issue is the first that deals exclusively with this subject. It happens to be coming soon after the posting of *The Prosecution of Cultural Property Crime*, an online training program available on LearnDOJ for Assistant United States Attorneys who have such cases. It was created in conjunction with the U.S. State Department.

II. Why is cultural property important?

Cultural property represents the human history and achievements of societies. In its physical form, it includes, among other things, antiquities, art, artifacts, and architecture. Because of its physical nature, it may be under constant threat of theft or damage—even destruction. Art and antiquities may be forged resulting in fakes being sold to unsuspecting victims. Native American art and grave items, including human remains, may be looted and sold in violation of law. Art may be stolen from museums or private collections, sometimes during moments of historical conflict such as Holocaust Era art theft and, more recently, looting of antiquities in the Middle East.

Archaeological crime includes vandalism of, and theft from, archaeological sites and collections, and trafficking of restricted archaeological remains. Common motives include a fascination with the past, a desire to collect artifacts, and knowledge of the value of the artifacts coupled with an intent to sell.

Beyond the obvious legal violations, some collectors do not understand the moral, historical, and scientific implications of separating an item from where it was found, and thus separating it from its historical context, its story, and from what it could tell us about how it was used and valued in the past. The item simply becomes an object, and its larger meaning is lost. The piece of the historical and cultural puzzle that it would have provided is likely gone forever, and when human remains are involved, the spiritual link is disturbed.

III. Enforcement

Domestically, there is a division of legal authority and responsibility between federal and state governments relating to this issue. Issues involving the Archaeological Resources Protection Act (ARPA) and the Native American Graves Protection and Repatriation Act (NAGPRA) are part of a unitary scheme for federally-owned and controlled lands, including tribal lands. Other than the trafficking provisions of ARPA and NAGPRA, states are responsible for state-owned and controlled lands, in addition to those that are locally owned.

The Indian Arts and Crafts Act (IACA) has a truth-in-advertising aspect, which allows the purchaser to know that "Indian-made" is, in fact, made by Indians, as defined in the Act. In addition, the IACA provides critical economic benefits for Native American cultural development. Forgery and

fraudulent Indian arts and crafts diminish the livelihood of Native American artists and craftspeople by lowering both market prices and standards.

In the area of fine art, antiquities, and architecture, enforcement can be through both general and specific statutes, including both civil and criminal forfeiture. There are various agencies that come into play in the investigative and enforcement process, including the FBI Art Theft Program, Homeland Security Investigations, State Department Cultural Heritage Center, Interpol, Interior Department, National Park Service, DOJ's Environment and Natural Resources Division, the Criminal Division's Office of Human Rights and Special Prosecutions, and the Office of International Affairs. There are other sources for subject matter expertise, including the Smithsonian and local or regional museums and universities.

Here are some examples of artifacts and art and the various ways they were handled when they were discovered or recovered.



Figure 1: *Geronimo's headdress, recovered through the FBI's Art Theft Program.*



Figure 2: *This 850- year old macaw feather sash was found by a hiker in 1955 in a cave in Utah and properly donated to the Edge of Cedars State Museum.*



Figure 3: *Adele Bloch-Bauer 1*, From Wikimedia Commons, the free media repository

This is an example of a painting by Austrian artist Gustav Klimt, “Adele Bloch-Bauer 1,” also called the Woman in Gold or the Lady in Gold, which was appropriated by the Nazis during the time of the Holocaust from a Viennese Jewish family, the Bloch-Bauers. It was literally taken off the wall of their home by the Nazis. It took litigation by Adele’s niece in the 21st Century to get this painting back from the Austrian government, which had now laid claim to it. The litigation was successful and the painting is now hanging in the Neue Gallery in New York City. Although one of the most famous examples of Holocaust Era art theft, it is far from a unique one.



Figure 4: *Euphronios Krater*, From Wikimedia Commons, the free media repository

This ceramic is called the Euphronios Krater, an ancient Greek terra cotta calyx-krater, a bowl used for mixing wine with water. Created around the year 515 BC and painted by ceramics painter Euphronios, it was owned for 40 years by the Metropolitan Museum of Art in New York. Records in Italian courts of an investigation indicated that the krater was looted from an Etruscan tomb near Cerveteri in 1971. It was sold to the Met by an American antiquities dealer living in Rome for \$1.2 million in 1972. It remained there until just a few years ago when it was agreed that it had, indeed, been looted, and was returned to Italy.

Looting of artifacts, as with most of these crimes, is often done for profit, and sometimes it occurs in conflict zones. Looting and destruction of antiquities from conflict zones, sadly, is not a new phenomenon. Certainly some of this was carried out on a wholesale basis during the Second World War, with the Klimt painting being just one example. The looting of the Baghdad Museum in 2003, and the looting of archaeological sites at the same time, are more recent examples. Currently, looting and *intentional* destruction appears to be happening on an industrial scale in the conflict zones of the Middle East, mainly in Syria and Iraq.

The dedication of cultural professionals cannot be emphasized enough. Recently, an 81-year old Syrian antiquities expert in Palmyra was beheaded for not revealing where the treasures of his culture had been hidden for safekeeping. Sadly, architectural structures cannot be hidden, and many sites, including Palmyra, have been either severely damaged or completely destroyed. But there has also been systematic looting of smaller, more saleable objects, as well, and western authorities are on the lookout for these items showing up for sale at live or online auctions. It is likely that the profits from some of these sales go towards the financing of terrorist activities.

Of course, focus on looting also means that fakes and forgeries may show up on the market as well, defrauding consumers who believe that these items are both authentic and legal.

Just so you remember that there can be cultural property crime and vandalism close to home, here is an item that you will all recognize.



Figure 5: *Liberty Bell*

It is the Liberty Bell in Philadelphia, which rang to announce the first public reading of the Declaration of Independence in 1776. In 2001 a suspect struck Liberty Bell several times with an 8 lb. hammer, leaving at least five dents on the flare near the bottom of the bell.

IV. The Importance of Cultural Property Cases

Because these cases usually get excellent press coverage, they are important examples to discourage criminals from committing cultural property crimes. In the event there is a repatriation to a foreign government, there is immense goodwill. Most significantly, a United States Attorney's office gets to play a part in preserving the cultural history of a society.

Experts in this field have written the articles which follow. More information is available for your use online, along with a video training program. Sample documents, pleadings, articles, and other reading materials, can be found, with subject matter links for additional information on the subjects—the art, the architecture, and the artifacts which may be the subject of litigation.

V. Conclusion

I hope you find this United States Attorneys' Bulletin helpful. I am happy for you to contact me, as well, and I will guide you to the right place for more information. ❖

ABOUT THE AUTHOR

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The Legal Framework for the Prosecution of Crimes Involving Archaeological Objects

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I. Introduction

Controlled, scientific excavation of archaeological and historic sites is crucial to the retrieval of all remains of past human life in association with each other so that human history can be reconstructed and all aspects of life understood, including economics, trade, health, diet, religious ritual and function, burial methods, family structure, political organization, technology, and literature. Artistic and utilitarian objects, faunal and floral remains, architectural features, human remains and their original contextual relationship to each other are all equally essential in achieving an optimal reconstruction and understanding of the past. Individual objects that are looted out of their context provide little information beyond what is intrinsic in their shape and decoration. This full body of contextualized information is a destructible, non-renewable cultural resource. Once it is destroyed, it cannot be regained. The looting of archaeological sites destroys this knowledge and forever impairs our ability to understand our past and ourselves.

Illegal conduct involving cultural objects encompasses traditional theft of objects from public and private collections, the looting of archaeological and ethnographic objects from sites and cultural communities, and smuggling across borders (illegal export and import). It is widely recognized that much of this illegal conduct is carried out for the purpose of supplying the international art market with objects for sale. The art market itself has been booming in recent years, and so, even while methods of detecting stolen artworks and law enforcement efforts have increased, the financial incentive to supply the market has also increased. Another element that has recently entered the equation is the link between the sale on the international market of stolen or looted archaeological objects and the funding of terrorism and armed conflict, particularly in Syria, Iraq, and parts of North Africa.

Three terms are often used interchangeably in reference to antiquities: looted, undocumented, and illegal. These terms are not synonymous, although the categories may overlap. Before examining the different legal actions that may be involved in the recovery of an object, it is necessary first to clarify what these terms mean and how they should be used.

A looted antiquity is one recovered from the ground in an unscientific manner. The antiquity is decontextualized, and what it can tell us about the past is limited to the information intrinsic within the object itself, rather than what might have been learned from the object's full associated context. Looting also jeopardizes the object's physical integrity because the process of looting often destroys or damages fragile objects and those not desired by the market.

An illegal antiquity is one whose history or handling involves some violation of law. As will be discussed later, the antiquity may be characterized as stolen property if it is removed from its country of modern discovery in violation of a national law vesting title to antiquities in that nation. An illegal antiquity may also be contraband if it has been imported in violation of an import restriction or was not properly declared upon entry.

An undocumented antiquity is one that has poor, or only recent, evidence of its ownership history (provenance) and how it was obtained. The term is also often used more specifically in voluntary codes of museums and professional associations to indicate an antiquity whose existence out of the country of modern discovery is not documented before 1970 (the date of adoption of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property) or that was not legally obtained and exported from its country of discovery after 1970.

Objects often fit into all three of these categories, but an object may also, for example, be looted but documented (if the object was recovered unscientifically, but its ownership history is known for a sufficiently long period of time), or legal (depending on the laws of the country of discovery and those of the country where the antiquity is currently located). An object that was stolen in one country may be transferred to a good faith purchaser in a country that recognizes the “good faith purchaser” doctrine by which such a purchaser may acquire valid title, even though there is a theft in the chain of title, or under another doctrine. *See Autocephalous Greek-Orthodox Church of Cyprus and the Republic of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 927 F.2d 278 (7th Cir. 1990) (discussing but rejecting applicability of the Swiss good faith purchaser doctrine); *Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010) (rejecting applicability of the Swiss good faith purchaser doctrine, but subsequently holding that claim is barred by New York’s doctrine of laches); *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. CV 05-3459-JFW (Ex), 2015 U.S. Dist. LEXIS 76590 (C.D. Cal. June 12, 2015) (cutting off claim of descendants of original owner under Spanish law of adverse possession); *Greek Orthodox Patriarchate v. Christies, Inc.*, 98 Civ. 7664(KMW), 1999 U.S. Dist. LEXIS 13257 (S.D.N.Y. Aug. 18, 1999) (barring claim of original owner of Archimedes palimpsest under French good faith purchaser doctrine).

A documented history back to 1970 is often used as a proxy to indicate legality, although it does not guarantee legality, or to indicate that any initial looting happened long enough ago that its acquisition will not provide further financial incentive to the contemporary looting of sites. While this concept of “undocumented” may, at times, intersect with legal questions involving an object, it is based on purely voluntary decisions of professional associations and is not a definition of legality or illegality.

When an object is illegally exported from its country of origin and brought to the United States, the United States Government can recover the object under only three legal theories. The first is if the object was misdeclared, or not properly declared, upon import into the United States, or its entry in some other way violates provisions concerning proper importation into the United States. The second is if the object is characterized as stolen property, in which case its import violates the National Stolen Property Act (if the object is worth than \$5000), or may violate the Archaeological Resources Protection Act, regardless of the object’s monetary value. The third is if there is a specific agreement between the United States and the country of origin by which the United States recognizes the other country’s export controls. It is crucial to note that mere illegal export from a foreign country does not make the object illegal in the United States unless there is a violation that makes the object illegal under U.S. law. While other types of cultural objects may be subject to these same broad categories of illegal conduct, special legal doctrines have been crafted, both statutorily and judicially, that apply to antiquities because the looting of antiquities raises particular societal concerns.

II. Theft and stolen property

Theft occurs when a rightful owner is deprived of possession of property without permission. Theft, in the traditional sense, occurs when an object is located in either a private collection or a public one (such as a museum, library, archive, or religious institution) and is stolen. Such theft does not, however, form the primary subject of this article because the relevant law is well known that applies to thefts of all types of personal movable property, including cultural objects, and there is no particular reason to distinguish such thefts based on the type of property at issue.

The law, however, has developed particular doctrines to deal with the theft of archaeological objects that are looted directly from the ground and had not been reduced to actual possession in modern times. Beginning in the mid-nineteenth century, many nations that are rich in archaeological resources and ancient monuments enacted national ownership laws that vest ownership of such objects in the nation. Reducing the economic value of looted antiquities by denying title to the finder and subsequent purchaser, thereby making them unsalable, these laws have the purpose of deterring the initial theft by reducing market demand. These laws serve the dual purposes of preventing unfettered export of antiquities and of protecting archaeological sites in which antiquities are buried. As the knowledge that could be recovered through controlled, scientific excavation of sites increased throughout the nineteenth and twentieth centuries, the role of national ownership laws in protecting the contextual integrity of archaeological sites eclipsed their role in preventing removal of ancient artifacts from a particular country.

When ownership of an antiquity is vested in a nation, one who removes the antiquity without permission is a thief, and the antiquities are stolen property. This enables both punishment of the looter and recovery of possession of the antiquity from either the looter or a subsequent purchaser. Vesting laws thus create ownership rights that are recognized even when such antiquities are removed from their country of discovery and are traded in foreign nations. National ownership laws were typically enacted as part of a larger legal regime that aimed to protect sites, limit permitted excavation to those with certain qualifications, and provide for the disposition of artifacts recovered through excavation. Some of the earliest such laws were passed in Greece, Egypt, and Turkey, but they are now common throughout the Mediterranean, Central and South America, and parts of Asia. UNESCO maintains a database of national cultural heritage laws, and this can be a useful starting place for determining whether a particular country has a national ownership law. See http://portal.unesco.org/culture/en/ev.php-URL_ID=33928&URL_DO=DO_TOPIC&URL_SECTION=201.html.

A series of judicial decisions in the United States, beginning with the federal criminal prosecutions in *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977); 593 F.2d 658 (5th Cir. 1979), established that archaeological objects removed in violation of a nation's vesting statute retain their characterization as stolen property, even after they are brought to the United States. This triggers the availability of various legal actions, including civil replevin, forfeiture, and criminal prosecution, depending on the relevant factual circumstances. The most recently litigated case on this issue was the conviction of the New York dealer, Frederick Schultz, who conspired to deal in antiquities stolen from Egypt in violation of the National Stolen Property Act (NSPA), 18 U.S.C. § 2315 (stating that "[w]hoever receives, possesses, conceals, stores, barter[s], sells, or disposes of any goods . . . of the value of \$5,000 or more . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken . . . shall be fined under this title or imprisoned not more than ten years, or both."). *United States v. Schultz*, 333 F.3d 393, 399 (2d Cir. 2003). This doctrine is now accepted in the circuits that most often confront market issues related to antiquities, including the Second, Fifth, Ninth, and Eleventh circuits. Several district courts have also recognized the efficacy of foreign national ownership laws, and these laws have served as the basis for settlement of foreign national claims in prosecutions, in private replevin actions, and in negotiated settlements of claims. While no court has subsequently questioned the efficacy of national ownership laws to vest title, or the characterization of such objects as stolen property under U.S. law, these cases tend to be highly fact specific and require considerable investigation to establish the necessary facts.

The decisions in *United States v. McClain* and *United States v. Schultz* establish the criteria required for recognition of a foreign national ownership law of archaeological remains. Based on these holdings, one can deduce that there are four elements that must be satisfied before an archaeological object will be recognized as owned pursuant to a foreign national ownership law: (1) the vesting law must be clearly an ownership law on its face; (2) the nation's ownership rights must be enforced domestically, and not only upon illegal export; (3) the object must have been found within the country

claiming ownership; and (4) the object must have been located within the country at the time the law was enacted.

The purpose of the first requirement is that the vesting must be clear and unambiguous so as to give notice to U.S. citizens who might be adversely affected by these laws, particularly in a criminal prosecution. *Schultz*, 178 F. Supp. 2d at 447; *McClain*, 545 F.2d at 997-1002. As these elements are deduced from two criminal prosecutions, *Schultz* and *McClain*, it is not certain whether the standard of clarity is the same in non-criminal litigation, such as a civil replevin action or a civil forfeiture action (which is nonetheless a quasi-criminal proceeding).

The purpose of the second requirement is to distinguish national ownership from export controls because export controls are not enforced by another nation absent a specific agreement to do so. Examples of such agreements will be discussed below, but if the *only* illegality associated with a particular object is illegal export from a foreign country, that object is not considered illegal in the United States. The purpose of the third requirement is to ensure that the national ownership law is not given extraterritorial effect, and the purpose of the fourth requirement is to ensure that the national ownership law is not given retroactive effect. The third and fourth factors may pose challenges in terms of the factual aspects of any given case.

III. Violations of customs provisions

A. General customs provisions

Customs laws, in general, require the declaration of country of origin and value of objects to be imported. In the more typical case of importation of commercial goods, the primary purpose of these declaration requirements is to determine the amount of customs duties. These requirements also assist in the regulation of importation of goods when the goods may be subject to some other form of import restriction, or they may simply have the goal of maintaining the integrity of the import process. See *United States v. An Antique Platter of Gold, known as a Gold Phiale Mesomphalos c. 400 B.C.*, 184 F.3d 131 (2d Cir. 1999) (affirming forfeiture of ancient *phiale*, whose value and country of origin were misdeclared in order to preserve the integrity of the importation process).

In addition, the United States' Customs statute prohibits the importation of goods that have been "stolen, smuggled, or clandestinely imported" if they have been "imported into the United States contrary to law . . .". 19 U.S.C. § 1595a(c)(1)(A) (2015). In the case of stolen objects, the National Stolen Property Act can be the underlying law in the "contrary to law" provision. The characterization of an archaeological object taken in violation of a foreign country's national ownership law as stolen thus fits the paradigm of importation "contrary to law." Since enactment of the Civil Asset Forfeiture Reform Act in 2000, stolen property can also be forfeited directly under the NSPA. 18 U.S.C. § 981(a)(1)(C) (2015). However, it is important to note that a forfeiture carried out under Title 19 is exempt from CAFRA's provisions. Export of goods contrary to law is prohibited under both 18 U.S.C. § 554 and 19 U.S.C. § 1595a(d). More general import bans may be imposed under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-07. The general Customs provisions provide for either criminal prosecution, 18 U.S.C. §§ 542 and 545, or civil forfeiture, 19 U.S.C. § 1595a(c)(1)(A), depending upon the circumstances.

B. Import restrictions under the 1970 UNESCO Convention

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 17, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971) (1970 UNESCO Convention or Convention) is the preeminent legal instrument that addresses the international movement of cultural objects. Although the United States was one of the first market nations

to take steps toward ratification of the 1970 UNESCO Convention, today there are 130 States Parties. For an updated list, see <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E&order=alpha>.

The Senate gave its unanimous consent to ratification in 1972. However, the Senate stated its view that the Convention is executory in nature. This meant that for the Convention to have domestic legal effect, Congress would have to enact legislation by which the Convention would be implemented into domestic law. The implementing legislation, known as the Convention on Cultural Property Implementation Act (CPIA), 19 U.S.C. §§ 2601-13, was enacted in December 1982 and signed into law by President Reagan in January 1983. The CPIA explicitly implements only two sections of the 1970 UNESCO Convention—Article 7(b), referring to “stolen cultural property,” and Article 9, referring to specific measures to protect archaeological and ethnological materials—although it incorporates other sections, including the definition of cultural property in Article 1 of the Convention and measures that a State Party should take to protect its cultural heritage, outlined in Article 5.

1. “Stolen cultural property”

Of the two substantive provisions of the CPIA, the more straightforward one concerns cultural property stolen from public or religious institutions, reflecting Article 7(b) of the Convention. Section 308 of the CPIA states:

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 title, or after the date of entry into force of the Convention for the State Party, whichever is later, may be imported into the United States.

19 U.S.C. § 2607 (2015). The CPIA references the Convention’s definition of “cultural property” as “includ[ing] 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.” *Id.* § 2601 (6). The Convention definition is very broad and includes virtually every sort of cultural object that might be housed in a museum or other type of public secular or religious institution.

The primary change in United States domestic law that this section of the CPIA produced was essentially one of remedy. It had always been possible for private litigants, including foreign governments recognized by the United States, to enter United States courts to reclaim their stolen property in a civil replevin action. The United States interpreted the Convention’s admonition to prohibit the import of cultural property stolen from such an institution to mean that such import should be prohibited at the border. The CPIA thus gives to the Department of Homeland Security (formerly Customs) the authority to seize and forfeit such property at the border, although such property can also be seized and forfeited after it has entered the country. This provision can prove useful in the case of recovery of documented cultural property that is stolen from a State Party with whom the United States does not have diplomatic relations.

The only elements that the government must prove to seize and forfeit such property is that the cultural property was stolen from the institution after the date on which both the United States and the country of origin became parties to the Convention (whichever date is later) and that the cultural property came from a documented public collection. There is no need for the government to establish that the importer had any knowledge of, or intent to commit, any wrongdoing. This provision of the CPIA thus grants significant “enhanced” protection beyond the National Stolen Property Act itself.

2. Import restrictions for undocumented archaeological and ethnological materials

Article 9 is the second section of the 1970 UNESCO Convention implemented by the CPIA. The United States’ implementation of Article 9 is complex and splits this provision into two sections of the

statute. The first statutory provision is found in Section 303 of the Act, [19 U.S.C. § 2602](#), which provides a mechanism by which the United States can enter into bilateral agreements or memoranda of understanding (MOU) with other States Parties for the imposition of import restrictions on certain categories of designated archaeological or ethnological materials. The CPIA allows the United States to enter such an agreement with a requesting State Party without the necessity of Senate ratification of a new treaty. These agreements pertain only to archaeological and ethnological materials, rather than to the broader category of cultural property previously discussed. The agreements turn the violation of another State Party's export controls into a violation of United States import controls with respect to designated archaeological and ethnological materials.

Unlike the Convention, the CPIA offers a definition of the archaeological and ethnological materials to which the Article 9 provisions may apply.

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 under water; 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.

[19 U.S.C. § 2601\(2\) \(2015\)](#).

A State Party initiates the process by submitting a request for a bilateral agreement to the United States through diplomatic channels. The request is referred to the Cultural Property Advisory Committee, which consists of eleven members appointed by the President—three are experts in archaeology or anthropology; three are experts in the international sale of archaeological, ethnological and other cultural property; two represent the museum community, and three represent the general public. *Id.* § 2605(b). This Committee evaluates requests from States Parties for bilateral agreements and makes recommendations to the President (who has delegated this function to the Assistant Secretary of State for Educational and Cultural Affairs) as to whether the statutory criteria are satisfied. The decision-maker determines whether the criteria specified by the CPIA have been satisfied and, if so, initiates negotiation of a bilateral agreement to impose import restrictions under Section 303. During the process of negotiation, the United States may unilaterally take emergency action under Section 304 if an emergency condition, as defined in that section, is found to exist.

The statutory determinations required for a bilateral agreement are:

- (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 . . . 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 . . . 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.

Id. § 2602 (a)(1). A bilateral agreement may not last more than 5 years, but it may be renewed an indefinite number of times. The criterion for renewal is that the same conditions that originally justified the agreement still exist. *Id.* § 2602(e).

Over the 33 years that the CPIA has been in effect, the United States has entered into bilateral agreements with only 15 nations (as of early 2016): Belize, Bolivia, Bulgaria, Cambodia, China, Colombia, Cyprus, El Salvador, Guatemala, Hellenic Republic, Honduras, Italy, Mali, Nicaragua, and Peru. A sixteenth agreement, with Canada, was in effect from 1997 to 2002, and a request from Egypt is currently pending. In several cases, import restrictions under the emergency provisions were imposed for particular materials from several of these countries before the respective bilateral agreement was negotiated and finalized. These include, for example, Maya artifacts from the Cara Sucia region of El Salvador, culturally significant archaeological objects from the Sipan Region of Peru, and Maya artifacts from the Péten region of Guatemala. In these cases, the emergency import restrictions folded into a bilateral agreement that then covered a broader range of materials. Some of the agreements have been renewed several times.

The United States maintains permanent restrictions on the importation of cultural materials illegally removed from Iraq after August 1990 under the Emergency Protection for Iraqi Cultural Antiquities Act (EPIC Act), enacted in late 2004. Sections 3001–03, [P.L. 108-429](#). This legislation authorized the President to exercise his authority under the CPIA to prohibit import of designated archaeological and ethnological materials from Iraq. This legislation is notable for defining the archaeological and ethnological materials of Iraq in accord with United Nations Security Council Resolution 1483 of 2003, in place of the normal CPIA definitions of these types of materials. 19 U.S.C. § 2601(24) (2015). In addition, although these import restrictions were authorized under the emergency provisions of the CPIA, [19 U.S.C. § 2603](#), the EPIC Act provided that Iraq did not need to first bring a request for a bilateral agreement, and the import restrictions last for an indefinite period of time. These import restrictions went into effect in April 2008. Legislation modeled on the special Iraq legislation was enacted by the House in June 2015 and is currently pending in the Senate, S. 1887. If enacted, this legislation would impose comparable import restrictions on cultural materials illegally removed from Syria after March 2011.

Import restrictions imposed pursuant to either of the CPIA provisions become effective upon publication of a notice in the Federal Register. The agreement includes a designated list of archaeological or ethnological materials that represent categories of objects, rather than specific objects, that are subject

to import restriction. These designated categories are listed in the Federal Register notice. The Cultural Heritage Center of the State Department's Bureau of Educational and Cultural Affairs maintains a Web site, <http://eca.state.gov/cultural-heritage-center/cultural-property-protection>, that provides information about the import restrictions, including a chart of all import restrictions by country, with their effective dates and a database of available images that are illustrative of the designated categories of materials whose import is restricted.

An archaeological or ethnological object that falls into one of the designated categories that is subject to import restriction may be imported into the United States if it is accompanied by an export license, 19 U.S.C. § 2606(a), or if satisfactory evidence can be presented showing that the object left the country of origin more than 10 years before the date of entry or on or before the date the import restriction went into effect. 19 U.S.C. § 2606(b) (2015). The Department of Homeland Security enforces compliance with the import restrictions. The only remedy available under the CPIA is civil forfeiture of the object. *Id.* § 2609.

One challenge posed by the use of bilateral agreements (and also of foreign national ownership laws) is the lack of congruence between modern boundaries and ancient cultures. The boundaries of modern nations and ancient cultures, even indigenous communities, do not necessarily coincide. The Inca culture in South America, the Maya culture of Central America, and the Roman culture of the Mediterranean and Europe are but a few examples of ancient cultures that span more than one modern nation's borders. This means that determining the country of origin of a particular object can be very difficult, especially when this is done based exclusively on stylistic and cultural features of the object.

The first judicial opinion concerning the CPIA focused on the question of whether a particular possessor qualified for compensation, as allowed under the CPIA, when the importer or current possessor "establishes that it purchased the article for value without knowledge or reason to believe it was stolen" unless the State Party, "as a matter of reciprocity, would in similar circumstances recover and return an article stolen from such an institution in the United States without requiring the payment of compensation." *Id.* § 2609(c). In a case involving a manuscript stolen from the National Archives of Mexico, the court found that the possessor had not acted in good faith and, further, that Mexico would not require the payment of compensation under similar circumstances if the United States sought to recover cultural property stolen from a U.S. institution. *United States v. An Original Manuscript*, 96 Civ. 6221 (LAP), 1999 U.S. Dist. LEXIS 1859 (S.D.N.Y. Feb. 19, 1999).

The first reported decision discussing import restrictions imposed under a CPIA bilateral agreement concerned the importation of two Colonial period paintings from Peru. *United States v. Eighteenth Century Peruvian Oil on Canvas Painting of the "Doble Trinidad" or "Sagrada Familia con Espiritu Santo y Dios Padre," and Seventeenth Century Peruvian Oil on Canvas Painting of "San Antonio de Padua" and "Santa Rosa de Lima,"* 597 F. Supp. 2d 618 (E.D. Va. 2009). The U.S.-Peru agreement includes "[o]bjects that were used for religious evangelism among indigenous peoples," including paintings of the Colonial period. *Archaeological and Ethnological Material From Peru*, 62 Fed. Reg. 31,713 at 31,720 (Dep't of Treasury, June 11, 1997). There was some question as to whether the paintings originated from Bolivia or Peru, but as the same categories of ethnological objects were covered by the bilateral agreements with both countries, the court did not find it necessary to determine which country was the country of origin. This approach is limited, however, to the circumstance in which all of the likely modern countries of origin have a bilateral agreement with the United States covering the same categories of objects.

The only other reported decisions concerning the CPIA bilateral agreements involve a test case instigated by the Ancient Coin Collectors Guild (ACCG) to challenge the validity of import restrictions on ancient coins from Cyprus and China. In April 2009, The ACCG arranged for the import through Baltimore, Maryland, of unprovenanced coins that fit Cypriot and Chinese designated coin types. The United States District Court for the District of Maryland dismissed the ACCG's complaint on the ground,

among others, that neither the Department of State nor Customs and Border Patrol, a bureau of the Department of Homeland Security, had exceeded their authority under the CPIA. *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection, Dep't of Homeland Security, et al.*, 801 F. Supp. 2d 383 (D. Md. 2011). The U.S. Court of Appeals for the Fourth Circuit affirmed this decision, relying in part on the sensitive nature of the conduct of foreign affairs and Congress' delegation to the Executive of significant discretion in carrying out the CPIA. *Ancient Coin Collectors Guild v. Customs and Border Protection, Dep't of Homeland Security, et al.*, 698 F.3d 171 (4th Cir. 2012). The Fourth Circuit also held that once the United States meets its burden of establishing that the object is of a type appearing on a designated list, the importer bears the burden of establishing that the object is eligible to be imported into the United States. The court concluded that "the importer need not document every movement of its articles since ancient times. It need demonstrate only that the articles left the country that has requested import restrictions before those restrictions went into effect or more than ten years before the date of import." *Id.* at 183. This decision provides substantive guidance that no particular category of ancient artifacts, including ancient coins, is, by its nature, ineligible to be placed on a particular designated list. Litigation is ongoing to determine whether these particular coins are properly forfeitable.

IV. Domestic cultural heritage of the United States

Legal issues related to the domestic cultural heritage of the United States can be divided into those related specifically to the protection of archaeological sites and resources found on federal lands and those related to Native American heritage. The first attempt at the federal level to protect archaeological heritage came with enactment of the Antiquities Act of 1906, 16 U.S.C. §§ 431–433. The Antiquities Act provides that the President may set aside as national monuments "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" located on lands owned or controlled by the federal government (including Indian tribal land, forest reserves, and military reservations). The Act also penalizes the destruction, damage, excavation without a permit, appropriation, or injury of any historic or prehistoric ruin, monument, or object of antiquity. In 1974, the Ninth Circuit Court of Appeals held that the criminal provisions of the Act were unconstitutional because the legislation failed to define adequately terms such as "ruin," "monument," and "object of antiquity." The Act thus violated due process by failing to give a person of ordinary intelligence a reasonable opportunity to know what the Act prohibited. *United States v. Diaz*, 499 F.2d 113, 115 (9th Cir. 1974).

In part in response to the *Diaz* decision, the Archaeological Resources Protection Act (ARPA) was enacted in 1979. ARPA vests ownership of archaeological resources found on federally-owned and tribal lands, with exceptions now provided in the Native American Graves Protection and Repatriation Act, in the federal government, and requires that anyone who wishes to excavate or remove archaeological resources from such lands first obtain permission from the federal government. 16 U.S.C. § 470cc; § 470EE(a) (2015). ARPA also prohibits trafficking in archaeological resources obtained in violation of ARPA or any other federal law or regulation, *id.* § 470EE(b), and prohibits the trafficking in interstate or foreign commerce of any archaeological resources taken or held in violation of federal, state or local law, *id.* § 470EE(c). Finally, it provides for both civil fines and criminal penalties. *Id.* §§ 470EE(d); 470FF. Specifically, the criminal provisions of ARPA are:

- (a) Unauthorized excavation, removal, damage, alteration, or defacement of archaeological resources

No person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit

....

- (b) Trafficking in archaeological resources the excavation or removal of which was wrongful under Federal law

No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated or removed from public lands or Indian lands in violation of—

- (1) the prohibition contained in subsection (a) of this section, or
 - (2) any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law.
- (c) Trafficking in interstate or foreign commerce in archaeological resources the excavation, removal, sale, purchase, exchange, transportation or receipt of which was wrongful under State or local law

No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.

- (d) Penalties

Any person who knowingly violates, or counsels, procures, solicits, or employs any other person to violate, any prohibition contained in subsection (a), (b), or (c) of this section shall, upon conviction, be fined . . . or imprisoned . . . or both.

[16 U.S.C. § 470EE\(a\)–\(d\) \(2002\)](#). While subsection (b) refers specifically to artifacts from federal or Indian lands, subsection (c) refers to artifacts illegally trafficked in interstate or foreign commerce. This opens the possibility, as discussed below, for the application of ARPA to cases involving artifacts from private or state lands located within the United States and artifacts from foreign countries.

ARPA cured the defect of the Antiquities Act by providing a clear definition of an "archaeological resource" as:

any material remains of past human life or activities which are of archaeological interest, . . . includ[ing], but not . . . limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.

[16 U.S.C. § 470BB\(1\) \(2015\)](#). The definition of "archaeological resource" is not limited to objects found on federal lands. Therefore, crimes involving archaeological resources from private land within the United States, as in *United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993) (prosecution of dealer for selling artifacts illegally removed from private land and transferring them across state lines), and from foreign countries, as in *United States v. Melnikas*, 929 F. Supp. 276 (S.D. Ohio 1996) (prosecution charge based on ARPA for theft and import of manuscripts stolen from various European collections, including the Vatican), may be prosecuted under ARPA. Where the object originates in a foreign country, it must be characterized as stolen property, either in the traditional sense or as previously discussed in terms of archaeological objects subject to foreign national ownership, so that possession and other activities would be in violation of state laws relating to stolen property.

The Native American Graves Protection and Repatriation Act (NAGPRA) is a comprehensive approach to the disposition of Native American human remains and cultural items. [25 U.S.C. §§ 3001–13 \(2015\)](#). NAGPRA has three primary components. First, under certain circumstances, NAGPRA provides

for the restitution of newly-discovered human remains and associated burial items discovered on federally-owned or controlled land to Native American tribes. It provides a priority order of the ownership of Native American human remains and objects, including lineal descendants, the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered, or those tribes with the “closest cultural affiliation” with the remains or objects. *Id.* § 3002(a).

Second, NAGPRA provides a mechanism for the restitution to Native American tribes of human remains, associated and unassociated burial goods, sacred objects, and objects of cultural patrimony, that are in the collections of federal agencies and museums that receive federal funding. The definitions of these categories are:

"cultural items" means human remains and —

- (A) "associated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects;
- (B) "unassociated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe;
- (C) "sacred objects" which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents;
- (D) "cultural patrimony" which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

Id. § 3001(3). NAGPRA establishes a mechanism by which federal agencies and museums notify tribes through the publication of inventories or summaries of their Native American holdings and procedures by which such items may be repatriated to the appropriate tribe or Native Hawaiian organization. *Id.* §§ 3003-04.

Finally, NAGPRA prohibits trafficking in Native American human remains without the right of possession, as provided under NAGPRA, and in cultural items that were obtained in violation of NAGPRA. 18 U.S.C. § 1170 (a)-(b) (2015). In *United States v. Corrow*, which concerned objects of cultural patrimony obtained by a dealer from the family of a *hataali*, or Navajo religious singer, the Tenth Circuit held that the criminal provisions were not unconstitutionally vague. 119 F.3d 796 (10th Cir. 1997). The Ninth Circuit came to the same conclusion in *United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999), which involved Hopi masks and other cultural items from the Pueblo of Acoma.

V. Cultural Heritage Resource Crimes Sentencing Guideline

In November 2002, Congress adopted a Cultural Heritage Resource Crimes Sentencing Guideline, 18 U.S.C. Appx. § 2B1.5, in order to capture the intangible values inherent in cultural resources, particularly where the commercial value of an artifact may be relatively low, and to incorporate these values as part of the determination of an appropriate sentence for an offender. The guideline applies to both purely domestic crimes and to crimes involving artifacts originating in other countries. The guideline continues the use of commercial and archaeological values and the cost of repair and restoration in calculating a defendant's offense level, although the inclusion of all three values is now considered to be the general rule, as appropriate to each case. The guideline also creates a series of special offense characteristics that may increase the defendant's sentence and that attempt to capture further the intangible values that have been harmed through the defendant's conduct.

The mechanics of the guideline are fairly complex, incorporating definitions and concepts from an array of other U.S. federal statutes. The initial determination is whether a particular object fits the definition of a cultural heritage resource. This definition includes: archaeological resources under the Archaeological Resources Protection Act; cultural items under the Native American Graves Protection and Repatriation Act; designated ethnological material under the Convention on Cultural Property Implementation Act; historic property or historic resources under the National Historic Preservation Act, [16 U.S.C. § 470w\(5\)](#); commemorative work; and objects of cultural heritage, as defined in the Theft of Major Artwork Act, [18 U.S.C. § 668\(a\)\(2\)](#). If the object involved in the defendant's crime qualifies as a cultural heritage resource, then there is an enhancement in the defendant's base offense level.

If the crime itself involved one or more additional enumerated factors, then the offense level is again increased. These additional factors include: whether the offense involved a particular type of object, including human remains; funerary objects; cultural patrimony or sacred objects, as defined by NAGPRA; archaeological or ethnological materials designated under the CPIA; cultural property as defined by the CPIA; and pre-Columbian monumental or architectural sculpture or murals, as defined under the Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act, [19 U.S.C. §§ 2091-95](#). Another enhancement is triggered if the crime took place at a particular designated location, such as a site listed on the World Heritage List; a national monument, park, cemetery, memorial, or marine sanctuary; a National Historic Landmark; or a museum, as defined in the Theft of Major Artwork Act, [18 U.S.C. § 668\(a\)\(1\)](#), except that the Sentencing Guideline includes museums located in foreign countries, as well as in the United States. These types of objects and places designated in the Sentencing Guideline have all been recognized for special protection under federal law. Finally, there are additional enhancements if the defendant has "engaged in a pattern of misconduct involving cultural heritage resources," used or threatened to use a dangerous weapon in committing the crime, or the crime was "committed for pecuniary gain or otherwise involved a commercial purpose." 18 U.S.C. App. § 2B1.5(b) (2015).

This special Sentencing Guideline represents several policy determinations by the Sentencing Commission in devising the guideline. First is that criminal prosecutions, accompanied by appropriate and meaningful sentences, are crucial if crimes involving cultural heritage resources are to be adequately deterred. The Sentencing Commission wrote in its Reason for Amendment that the guideline "recognizes both the federal government's long-standing obligation and role in preserving such resources, and the harm caused to both the nation and its inhabitants when its history is degraded through the destruction of cultural heritage resources. . . ." The Sentencing Commission, in a prescient comment, acknowledged "the increased potential for the symbols of our nation's heritage and culture to be targets of violent individuals, including terrorists . . .". Finally, the Commission wrote that "offenses involving cultural heritage resources are more serious because they involve essentially irreplaceable resources and cause intangible harm to society." The reasons underlying the special Sentencing Guideline thus incorporate and reflect a broader policy of the federal government to deter destruction and damage to cultural heritage resources,

primarily through criminal prosecution and appropriate sentences as means to accomplish that deterrence.



ABOUT THE AUTHOR

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Cultural Property Prosecutions

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I. Introduction

This article will cover two topics: (1) potential charges to consider in cultural property prosecutions, and (2) authentication and appraisal of cultural property. It is based on a presentation for “The Prosecution of Cultural Property Crime,” an online training program created in conjunction with the U.S. State Department that is available on LearnDOJ for Assistant United States Attorneys who have such cases.

II. Overview of potential charges to consider

Many statutes apply to cultural property investigations and prosecutions. They range from stolen property laws of general applicability to more tailored statutes relating to specific types of cultural property.

Probably the most fundamental statute of general applicability is the National Stolen Property Act (NSPA), and, in particular, the portion of that act that governs interstate transportation of stolen property, [18 U.S.C. §§ 2314-15](#). Among the more specific statutes are those designed to protect Native American cultural property. *See* Archaeological Resources Protection Act, [16 U.S.C. § 470 \(2015\)](#); Illegal Trafficking in Native American Human Remains and Cultural Items, [18 U.S.C. § 1170 \(2015\)](#); Native American Graves Protection and Repatriation Act, [25 U.S.C. § 3001 \(2015\)](#). Another charge of relatively narrow scope is Theft of Government Property, [18 U.S.C. §§ 641 and 2114](#), which applies when the stolen property is owned by the U.S. Government.

If robbery or extortion are involved in the facts of your case, the Hobbs Act, [18 U.S.C. § 1951](#), should be considered. And don't forget that it is often the cover up that creates criminal liability, so consider False Statements, [18 U.S.C. § 1001](#), Obstruction of Justice, [18 U.S.C. §§ 1501-21](#), and Perjury, [18 U.S.C. §§ 1621-23](#).

Customs violations can form the basis for a cultural property investigation and prosecution. Consider Entry Via False Classification, [18 U.S.C. § 541](#), Entry Via False Statements, [18 U.S.C. § 542](#), Unlawful Export, [18 U.S.C. § 554](#), and Unlawful Import, [18 U.S.C. § 545](#). Keep in mind that if you charge unlawful export or unlawful import, you will need to identify exactly what makes the export or import unlawful; that is, you must prove the underlying unlawful act as a predicate.

In forgery and stolen property cases, consider charging Wire Fraud, [18 U.S.C. § 1343](#), or Mail Fraud, [18 U.S.C. § 1341](#). These charges might be supported in a forgery case if, for example, the subject is knowingly offering inauthentic cultural property for sale and claiming it is authentic. Conversely, if the subject is selling an authentic object that is stolen—but is falsely asserting he has valid title—a wire fraud or mail fraud charge might be appropriate.

Also bear in mind that you can charge Aiding and Abetting, [18 U.S.C. § 2\(a\)](#), Causing, [18 U.S.C. § 2\(b\)](#), and Conspiracy, [18 U.S.C. § 371](#), depending on how wide a net you want to cast.

A. Theft of major artwork

Theft of major artwork, [18 U.S.C. § 668](#), is a charge to consider when cultural property is stolen from a museum. Since the statute applies only to cultural property stolen from a museum (a defined term), it will not be applicable to theft from a private collection. The statute also requires that the stolen property qualify as an “object of cultural heritage,” meaning an object that is either over 100 years old and worth more than \$5,000, or worth more than \$100,000. In the case of objects more than 100 years old, the \$5,000 minimum value requirement might seem *de minimis*, but be careful. There are circumstances in which an object of cultural heritage has significant archaeological value that is not reflected in its price.

Here is an example of a theft of major art work prosecution involving Wyatt Yeager, who was the collections manager at the American Numismatic Association Money Museum in Colorado Springs. See <http://www.justice.gov/archive/usao/de/news/2012/Yeager%20Plea%20Release.html>. Shortly after starting work there, Yeager started embezzling rare coins. He ended up stealing almost \$1,000,000 worth. He then quit and moved to Ireland. He sold the stolen coins through a number of different auction houses in the United States, Germany, and Australia. One of the coins he sold in Australia is called the Holey Dollar and is worth over \$155,000. It was created in response to a coin shortage in the British colony of New South Wales in 1812. Evidently Spanish coinage was readily available, so the colonial government ordered that Spanish coins be transformed into coins of New South Wales. This was accomplished by punching a hole in a Spanish coin and then re-stamping the new coin, with the result that for every one Spanish coin, two coins of New South Wales were created: the Holey Dollar (with a hole in the middle) and the Dump (made from the punched out part of the Holey Dollar). The Dump is worth over \$58,000.

We faced a number of challenges at the outset of this case, starting with the fact that the theft was discovered long after Yeager had left the museum. (This is not an uncommon phenomenon in cultural property cases.). Another challenge arose from the fact that some of the auctions took place in foreign jurisdictions. There is also an inherent difficulty in coin cases when it comes to identification of the stolen property: coins are not unique items when originally minted—or otherwise created as the Holey Dollar and Dump were. The fact that they are now rare is a good fact for the prosecution, but it only serves to reduce the probability of identification error. In order to prove guilt beyond a reasonable doubt, you will need to prove that the coin at issue is the specific coin that was stolen. To accomplish this, you should look first at the museum's inventory, which hopefully contains photographs of objects in the collection. In the case of Yeager, the Money Museum's inventory was incomplete. This made it difficult for us to prove exactly what coins the Money Museum held at the time of the theft.

Every problem has a solution. We addressed the Money Museum inventory problem by conducting a painstaking review of the Money Museum’s records, which—in the absence of a rigorous inventory—consisted mostly of accession records. We were thus able to reconstruct a snapshot of the Money Museum’s holdings at the time that Yeager started work.

To obtain information about the foreign sales of the stolen coins, we sent Mutual Legal Assistance Treaty requests to Germany and to Australia, but this yielded no substantial evidence. However, an Internet search was fruitful, as the auction houses in the United States, Germany, and Australia advertised the sales online, using photographs of the coins. Fortunately, the Money Museum had taken pictures of some of the coins in its collection (including the Holey Dollar and the Dump). Consequently, we were able to compare the auction house images (both online images and photographs published in catalogues) with the photographs from the Money Museum. By comparing the two sets of photographs, we could identify unique imperfections (including manufacturing marks, wear marks, and the like) in the coins. By matching these marks in the two sets of images, we could match the coins.

The ultimate solution to our problems was Yeager’s decision to put all this behind him. He agreed to surrender himself from Ireland, plead guilty to theft of major artwork, and stipulate to the loss amount.

B. Wire Fraud

Marcus Patmon stole two Pablo Picasso etchings—entitled “Jacqueline Lisant” and “Le Repas Frugal”—from a gallery in Palm Beach, Florida, in May of 2008. *See* <https://www.fbi.gov/baltimore/press-releases/2009/ba100209c.htm>. Together, they were worth about \$450,000. In July of 2008, an art dealer in California received the “Le Repas Frugal” etching from Patmon, who said he wanted to sell it for \$395,000. The art dealer did some Google-based sleuthing and found a news article about the theft of a “Le Repas Frugal” etching in Palm Beach. She noticed that Patmon’s return address was Miami, and became suspicious. Etchings, of course, are not unique objects in the sense that a painting is. Nevertheless, she considered the coincidence significant enough to contact the Palm Beach Police, who referred the matter to the FBI. An FBI undercover agent was introduced by the art dealer to “assist” Patmon with the sale.

At the outset of this case, we faced several challenges. One was venue. I was in Delaware, the theft was in Florida, and the interstate transportation of stolen property had been committed between Florida and California. Another challenge was that, while we had possession of “Le Repas Frugal,” we did not know the location of “Jacqueline Lisant.” And of course, the ultimate challenge was proving Patmon’s knowledge and intent beyond a reasonable doubt.

We solved the venue problem by charging wire fraud, based on the numerous telephone calls between Patmon in Florida and the undercover agent in Delaware. These undercover communications also solved the problem of proving Patmon’s knowledge and intent. Although Patmon was guarded in these conversations, he did say enough to demonstrate that he was knowingly and intentionally trafficking stolen art. For example, when the undercover agent mentioned that he had heard of a theft of Picasso etchings in Palm Beach, Patmon denied involvement, claiming he inherited the etchings from his grandfather. (People do inherit things from grandfathers, but be aware that undocumented inheritance is a common claim in the world of stolen art and antiquities.). In response to Patmon’s denial of any connection to the theft, the undercover agent told Patmon that the etching was worth over \$400,000 in a legitimate transaction, but less than \$100,000 if stolen. The difficulty in making a sale, said the undercover agent, will be in establishing that the etching is not the stolen one. Rather than discussing possible means to prove the legitimacy of the etching, Patmon told the undercover to try to get \$100,000. The legitimate owner of a Picasso etching worth \$400,000 is not likely to accept an offer of \$100,000 just because the buyer mistakenly thinks it is stolen. I thus considered this statement by Patmon sufficient to prove his guilty knowledge.

After the undercover operation was concluded, we executed a search warrant at Patmon's home and located "Jacqueline Lisant" behind the sofa. In the end, Patmon pleaded guilty.

C. NSPA and foreign cultural property

Many nations, unlike the United States, have laws (often called "patrimony laws") that assert national ownership of all cultural property originating within the nation's borders. Ordinarily, this cultural property is defined as archeological material removed from the ground within the nation's borders. An object brought to the United States in violation of these patrimony laws can be treated as stolen property under the NSPA by virtue of the fact that the owner (the foreign state) did not authorize its removal. The paradigm is analogous to an auto theft case where the automobile owner says: "That's my car and I didn't give anyone permission to drive it."

The application of the NSPA in this context was validated in *United States v. McClain (McClain I)*, 545 F.2d 988 (5th Cir. 1977), and *United States v. McClain (McClain II)*, 593 F.2d 658 (5th Cir. 1979) (cultural property smuggled from Mexico). Subsequently, another court, in *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), approved the treatment of foreign patrimony as stolen property within the meaning of the NSPA. Defendant Frederick Schultz was a well-known New York antiquities dealer who conspired with a British confederate, Jonathan Tokeley-Parry, to smuggle artifacts from Egypt to the United States through Britain. Tokeley-Parry obtained cultural objects in Egypt and painted them to look like cheap tourist trinkets in order to smuggle them into Britain. In Britain, Tokeley-Parry removed this paint and altered the objects to appear part of a private, fictional collection he called the "Thomas Alcock Collection." Then the objects were sent to Schultz in New York for sale, along with phony provenance from the "Thomas Alcock Collection."

Ultimately this scheme was undone by an alert British customs officer who thought a cheaply painted object was too heavy to be a tourist trinket, and held the object for investigation. Scotland Yard got involved, and Tokeley-Parry ended up confessing and cooperating against Schultz. Another important aspect of international cooperation in the *Schultz* case involved the role of the government of Egypt, which was necessary to prove the existence of the Egyptian patrimony law and the absence of any authority to remove the objects from Egypt. Schultz was convicted after trial and his conviction was affirmed on appeal.

D. Customs violations

Importation prosecutions often originate in Customs Form 7501, which requires an importer to identify the country of origin of the objects being imported. The form also requires the importer to describe the merchandise and to provide a dollar value for the merchandise. Knowingly entering false information on Customs Form 7501 is a violation of law. False statements during importation served as the basis for a civil forfeiture in *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999).

E. Alternatives to criminal prosecutions

If you are not able to prove a case criminally because of a lack of evidence of criminal intent, you might consider pursuing civil forfeiture. Criminal investigations start with the goal of arresting a violator. But sometimes even the most thorough investigations do not yield sufficient evidence to justify an arrest or are encumbered by issues like the statute of limitations. Consider alternatives.

The case of the gold monkey head provides an example of an alternative approach. The gold monkey head was a Moche artifact from Peru that the FBI found on display in a U.S. museum in 1998. It had been looted from the Royal Tombs of Sipan in northern Peru in about 1987—during a time of rampant looting in the region—and thereafter was exported illegally to the United States. When the gold monkey head was discovered in the United States in 1998, Peru asserted ownership on the basis of its

national patrimony law. Moreover, Peru sought assistance from the United States on the basis of a 1990 emergency import restriction prohibiting the importation of Moche artifacts and a 1997 memorandum of understanding to the same effect. The FBI interviewed the museum director who said that the monkey head had been donated by a donor who said he inherited it. However, when the FBI interviewed the donor, he gave a different version of events, saying he had purchased the monkey head in 1987 from a stranger for cash and had no documentation of that sale or of the importation from Peru. On the basis of this information, the FBI seized the monkey head in 1998. The donor's lawyer sent a letter to the U.S. Attorney's office objecting to the seizure, arguing that the 1990 emergency regulations and the 1997 memorandum of understanding did not apply because the donor had obtained the monkey head in 1987. The museum also objected, contending that the gold monkey head did not originate in the Royal Tombs of Sipan. In 2000, without resolution of any of these issues, the gold monkey head was returned to the museum.

I happened to be at the museum as part of FBI Art Crime Team training in 2007, and saw the gold monkey head on exhibit. I also happened to be there with the FBI agent who conducted the investigation in 1998. I became interested in effecting the monkey head's return to Peru, but had to acknowledge serious obstacles, starting with the statute of limitations and laches. We considered different options to deal with these challenges, and in the end decided simply to ask the museum if it would consider returning the monkey head to Peru voluntarily. We explained why we thought it was appropriate under the circumstances, and the museum—to its credit—ultimately decided that it would do so. As a result, the gold monkey head was repatriated to Peru in December 2011.

III. Authenticating and appraising art and artifacts

Investigations into cultural property will require consultation with experts on a number of topics. The big three are valuation, authentication, and identification. To determine valuation, you might call upon professional appraisers, art dealers, or connoisseurs. Forensic scientists, curators, or academics might be used for authentication and identification.

A. Rule 702

The testimony of these experts will be governed by Rule 702 of the Federal Rules of Evidence, which requires, among other things, that the testimony be the product of "reliable principles and methods." This requirement of Rule 702 is often the basis for objections to expert testimony in cultural property cases. For example, if you call an art dealer to the stand, that art dealer might be experienced in his field and an expert in the ordinary sense of the word. However, your opponent might object, contending that an art dealer's testimony—though based on a substantial fund of knowledge—is *not* grounded on "reliable principles and methods." Be prepared to address this challenge.

Bias is always an issue to consider in vetting an expert witness. An art dealer, for example, might have an overarching reason—unrelated to the merits of your case—for wanting a painting valued at a high price: namely, it might help sales of other works by that artist. Similarly, an academic expert might be biased in the sense of having taken a position on an issue in the academic literature that would be bolstered by a consistent court opinion. Keep these considerations in mind both in selecting your expert and in challenging the other side's expert.

If all else fails under Rule 702, don't forget about Rule 701, which permits lay opinion testimony.

B. Appraisal

In establishing a monetary value for cultural property, you are also likely to encounter the problems of unique objects and small markets. If the subject of your investigation is a one-of-a-kind

painting, for example, it might be difficult to come up with comparable works of art to establish value. (Art appraisers, like appraisers in other fields such as real estate, estimate value by comparing the asset in question to similar assets that have been recently sold.). Compounding this challenge, there might be only a small number of people interested in a particular artwork, and a smaller number still who can afford to bid on it. These factors will affect the amount of information available to support the expert's testimony.

C. Authentication

It has been said that there are three pillars to authentication: provenance, connoisseurship, and forensics. Provenance is the documentary history of a cultural object, including records of sale, importation documents, correspondence, authentication certifications, and the like. Connoisseurship is the discerning judgment of a subject matter expert based on training and experience, particularly in fine arts. Forensics is the use of scientific tests and techniques to prove a relevant fact. Many take a sharp view as to which method of proof is most important in the context of cultural property. I tend to think of authentication as a mosaic; that is, I am happy to consider evidence from all three of these areas.

When it comes to authenticating a work of fine art, first determine whether the artist is living. If so, do not overlook the opportunity to interview that artist. Do not be surprised, however, if the artist does not actually remember the work in question or otherwise has difficulty in conclusively authenticating it. This happens more often than you would think because some artists do not keep careful records of their work.

Likewise, an authentication board might be a good source for an authentication witness, but keep in mind that a number of authentication boards will no longer render opinions on authentication due to liability concerns. Two prominent examples are the Warhol Authentication Board and the Krasner-Pollock Foundation, neither of which will provide authentication opinions. Another source to consider is the artist's *catalogue raisonne*, if there is one.

A word about connoisseurship: connoisseurs are not likely to render an opinion in the language you desire for use in court. For example, if you are prosecuting a forgery case, you will want a connoisseur witness to say that the work in question is a fake. However, in all likelihood, the most you will get is: "It's not right." Conversely, when it comes to positive proof of a painting's authenticity, the connoisseur is not likely to say, "It's authentic." He or she will more likely say, "It is consistent with the artist's style." This can be frustrating. Here are a couple of suggestions to bolster a connoisseur witness in these circumstances. Ask the witness to articulate, in detail, the basis for his opinion. Although his ultimate opinion might be stated in weak terms, he might have a rigorous explanation in support of his conclusion. You might also ask the witness to provide a full description of his rich experience and many years of training. Also, you might also ask the witness about his level of certitude. If he is "100 percent" certain that the painting is "not right," that's pretty good.

Forensic evidence can be extremely powerful in the right circumstances, in proving both positives and negatives. For example, in a forgery case, forensic methods might supply a conclusive negative, such as a 20th Century acrylic paint found in a purported 19th Century painting. Be mindful, however, that even advanced forensic methods are subject to false results. And even if the results are not false, there still might be a legitimate explanation. For example, the 20th Century acrylic paint might be present in the 19th Century painting because it was repaired or restored in the 20th Century.

Forensic methods can likewise be used to positively prove authenticity. For example, if a particular painting is known to have been painted over another painting, forensic methods, such as x-ray, might show a ghost image of the underlying painting. Likewise, an artist might have—intentionally or unintentionally—left fingerprints on his work. If that artist's true fingerprints are known—some artists' colorful lives involve periodic arrests—standard fingerprint methodology can be employed. It is also possible that a painting contains the artist's DNA from a stray hair or a good sneeze. This will be particularly helpful in the case of a living artist who can supply a DNA sample.

One word of caution, particularly in the case of criminal prosecutions: avoid a trial that comes down to a battle of the experts. If the case turns on whether the jury believes your witness or the other side's, the jury's uncertainty might amount to reasonable doubt.

D. Bronze Age “Shang Dynasty sword”

Here is an example of an investigation of cultural property that turned out to be a forgery. Homeland Security Investigations received a tip that a Bronze Age “Shang Dynasty sword” was being offered for sale at an auction house in Georgia. (As it happened, that auction house had its own Discovery Channel reality show.). The auctioneer advised that the consignor said the sword had been acquired by the U.S. military from one of Saddam Hussein's palaces in Iraq, and that it had come into his hands in ordinary commerce. This was a questionable assertion on its face because property seized by the military generally becomes the property of the U.S. Government. Initially I thought we might have a case of stolen government property, in violation of [18 U.S.C. § 641](#).

Experts were engaged to determine the authenticity of the sword. We asked a connoisseur for his opinion, and he concluded, “It's not right.” We asked a forensics expert about the sword, and he concluded that the Bronze Age sword was not made of bronze. We asked an academic expert for his opinion, and he found inconsistencies between the consigned sword and known Shang Dynasty bronze swords in that the grip was the wrong shape, the blade was the wrong shape, and a number of decorative marks and inscriptions amounted to gibberish. Ultimately, we seized and forfeited the sword.

E. Cuzco School paintings

Another example of the use of an expert involved Cuzco School paintings from Peru. Four of these paintings were sold at auction in the United States. The dealer stated that the consignor said the paintings had been in a family collection in the United States for more than 10 years. The Peruvian government told us that the paintings had been stolen from churches in Peru, although the police records relating to the thefts had been destroyed. We checked a number of different stolen art databases to see if the paintings were listed, with negative results. A negative search of databases is not dispositive, however, because stolen art is not always listed in such databases.

We obtained photographs of the paintings taken in the Peruvian churches where they hung before being stolen. (Records of this quality—and particularly photographic records—are not something you can count on in a case like this.). Unfortunately, we could not match these *in situ* photographs to the paintings sold at the U.S. auction because all four paintings had been substantially restored after the thefts. However, the auctioneer in the United States had taken photographs of the backs of the paintings being auctioned. Pictures of this kind are sometimes taken by art dealers because the backs of paintings yield significant information, important in the art trade, but equally important in criminal investigations. These photographs showed water stains, tears, and other damage. An expert was able to match these marks on the backs of the paintings sold in the U.S. to identical marks on the faces of the paintings photographed in Peru. Using multiple points of comparison, the expert confirmed that each of the four paintings sold in the U.S. was stolen from Peruvian churches. We were thus able to seize and forfeit the paintings and return them to Peru.

F. Andrew Wyeth

Still another example involves a forged Andrew Wyeth water color painting entitled “Wreck on Donut Point.” We received information that the painting—which had previously sold for \$35,000—was scheduled for sale at auction. Andrew Wyeth had recently died, and the painting was expected to sell at a high price, even though the painting was not well known. We obtained a photograph of the true painting from Mrs. Wyeth, who kept meticulous records of her husband's body of work. Comparing the photograph to the painting being offered for sale, it was obvious that the latter was a forgery. The coloring

and composition were all wrong. Using scaled records from Mrs. Wyeth, an expert was able to demonstrate measurable differences between the true painting and the forgery: some of the figures were in the wrong place in the forgery. On this basis, we seized and forfeited the forged painting.

Not long after we seized “Wreck on Donut Point,” we learned of another possible Andrew Wyeth forgery involving a water color painting entitled “Snow Birds.” It was no accident that both of these forgeries appeared shortly after the artist’s death, as this is often viewed as an optimal time to move fraudulent art. The painting was offered at a major auction house for sale and was expected to yield a sale price between \$300,000 and \$500,000. An art dealer identified a gap in the painting’s provenance published by the auction house, calling the painting’s authenticity into question. We once again obtained records from Mrs. Wyeth, and an expert compared them to the painting offered for sale. In this case, the differences were not obvious. However, using scaled records, the expert was able to identify errors in the painting offered for sale: two subtle bleeds of water color. It was an excellent forgery, but a forgery nevertheless. We seized the painting and forfeited it.

IV. Conclusion

Cultural property investigations and prosecutions can be particularly challenging, but they can also be particularly rewarding. Protecting cultural property protects history, a worthwhile endeavor for the government and for government prosecutors. ❖

ABOUT THE AUTHOR

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Tribal SAUSAs: A Force Multiplier for Protecting Tribal Culture

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I. Introduction

“I looked at those things and didn’t want to see them. Many of them would be sacred, part of a burial, private—I didn’t want to look at them. People were trading them, making profits from them, like commodities in the marketplace.” This 2009 quote is from then-Assistant Secretary for Indian Affairs, Larry Echo Hawk, concerning items seized by the Federal government during an enforcement operation in Utah. *See Return artifacts to tribes, Echo Hawk says*, NATIVE TIMES (June 11, 2009), <http://nativetimes.com/index.php/news/federal/2327-return-artifacts-to-tribes-echo-hawk-says>. The case led to

charges being brought against numerous defendants in New Mexico, Colorado, Utah, and Arizona. This enforcement operation resulted in the seizure of hundreds of artifacts that had to be cataloged, stored, and hopefully, ultimately, repatriated to the appropriate tribe—a long and often arduous process.

Sadly, the theft of American Indian/Alaska Native (AI/AN) relics and artifacts is common. The black-market is lucrative, with individuals in the United States and abroad willing to pay large sums of money for stolen AI/AN religious objects like headdresses, Katsinam, funereal objects, and sometimes even human remains. *See Despite Legal Challenges, Sale of Hopi Religious Artifacts Continues in France*, N.Y. TIMES (June 9, 2014), http://www.nytimes.com/2014/06/30/arts/design/sale-of-hopi-religious-items-continues-despite-us-embassys-efforts.html?_r=0. Some AI/AN cultures believe these objects are imbued with divine spirits and that outsiders who photograph, collect, or sell them are committing sacrilege. *See Hopis Try to Stop Paris Sale of Artifacts*, N.Y. TIMES (Apr. 3, 2013), http://www.nytimes.com/2013/04/04/arts/design/hopi-tribe-wants-to-stop-paris-auction-of-artifacts.html?pagewanted=all&_r=0. Clearly, no one feels these cultural losses and violations more acutely than the citizens of Tribal Nations.

When these objects are trafficked overseas for sale, the legal issues become very complicated and may involve the Office of International Affairs, the U.S. State Department, and foreign government officials. *See id.* However, in domestic cases, federal and state governments may have the responsibility and legal authority to respond to these issues. Relevant federal statutes include the Archaeological Resources Protection Act (ARPA) and the Native American Graves Protection and Repatriation Act (NAGPRA).

For many tribal communities, the desecration of artifacts and tribal culture is every bit as painful as a contemporary homicide, beating, or sexual assault. The depth of this pain and destruction may not be fully known or appreciated by personnel working in the Anglo-system as some tribes forbid the sharing of cultural and spiritual practices with non-Indians. The overwhelming majority of federal prosecutors are non-Indian. So, can the Department of Justice increase the number of AI/AN prosecutors and attorneys available to work cultural property law violations? Does existing Department policy explicitly value tribal culture and tradition? Can tribal prosecutors and attorneys litigate cases in federal court on behalf of the United States? Each of these questions can be answered in the affirmative.

This article serves to highlight the development of Department of Justice policy and programs, over the past seven years that institutionalize its commitment to affirming and strengthening tribal sovereignty. Tribal culture, history, and traditional practices are intertwined with tribal sovereignty. To pay attention to one is to uphold the other.

II. Department of Justice Indian Country Law Enforcement Initiative

In 2009, Department leadership began a series of listening sessions with tribal leaders, culminating with then-Attorney General Holder participating in a nationwide tribal leader summit in St. Paul, Minnesota. At these events, many tribal leaders spoke passionately about the high rates of violence plaguing their people and communities. The Department's response to violent crime in Indian country was a primary focus of these conversations. However, a second significant thread was the desire of tribal leaders to be provided the opportunity and resources to exercise their sovereign authority and to hold offenders accountable in tribal justice systems.

On January 11, 2010, then-Deputy Attorney General (DAG) David Ogden issued a memorandum to all United States Attorneys with districts that included Indian country, declaring that “public safety in tribal communities is a top priority for the Department of Justice.” *See* Memorandum from David W. Ogden, Deputy Attorney General, Dep't of Justice, to United States Attorneys with Districts Containing Indian Country (Jan. 11, 2010), <http://www.justice.gov/dag/memorandum-united-states-attorneys-districts-containing-indian-country>. The DAG noted a number of challenges confronting tribal criminal

justice systems: scarce law enforcement resources, geographic isolation, vast reservations, and insufficient federal and state resources dedicated to Indian country. *Id.* Yet, “[d]espite these challenges, tribal governments have the ability to create and institute successful programs when provided with the resources to develop solutions that work best for their communities.” *Id.*

In an effort to advance the work of the United States in Indian country, the DAG memorandum directed that: (1) every U. S. Attorney’s office (USAO) with Indian country in its district, in coordination with its law enforcement partners, engage at least annually in consultation with the tribes in that district, and (2) every newly confirmed U.S. Attorney in such districts must conduct a consultation with tribes in his or her district and develop or update the district’s operational plan within eight months of assuming office. Obviously, the subject matter of each district’s plan will vary depending on whether the district is a PL 280 (criminal jurisdiction delegated by statute to the state) or non-PL 280 (federal government has jurisdiction in Indian country depending on the Indian/non-Indian status of the suspect and victim, and the type of crime committed) jurisdiction, the number of tribes in the district, and the unique history and resource challenges of the tribes. Districts were instructed that operational plans should include topics like “a plan to develop and foster an ongoing government-to-government relationship, a plan to improve communication, and a plan to initialize a tribal Special Assistant United States Attorneys’ (SAUSA) program.” *Id.* To assist with the development of district operational plans, the DAG instructed the Executive Office of United States Attorneys’ (EOUSA) to develop and provide model approaches for district tribal consultations and operational planning to the USAOs.

In April 2010, the EOUSA Director issued an internal memorandum titled “Indian Country Law Enforcement Initiative District Operational Plans.” This memorandum provided guidance on the development and timing of USAOs’ operational plans. Accordingly, since 2010, every USAO with Indian country responsibility has an operational plan, and each plan includes certain core elements: communication, to include declination information; law enforcement coordination in investigations; victim advocacy; training; outreach; combating violence against women; and accountability.

While neither the DAG nor EOUSA memorandums specifically address cultural property crimes, this topic may be an important one to add to future consultation agendas. Moreover, USAOs may wish to consider adding a plan for the investigation and prosecution of cultural property law crimes to their operational plans.

The EOUSA Director memorandum also addresses the important work done by a particular group of Assistant United States Attorneys (AUSAs) known as Tribal Liaisons. All USAOs with Indian country responsibility have at least one designated Tribal Liaison who serves as the primary point of contact for tribes in the district. Tribal Liaisons are an important component of the United States Attorneys’ offices’ efforts in Indian country. The Tribal Liaison program was first established in 1995 and codified in 2010. Tribal Liaisons play a critical and multi-faceted role. In addition to their duties as prosecutors, Tribal Liaisons generally fulfill a number of other functions. Tribal Liaisons often coordinate and train law enforcement agents investigating violent crime and sexual abuse cases in Indian country, as well as Bureau of Indian Affairs criminal investigators and tribal police presenting cases in Federal court.

Tribal Liaisons often serve in a role similar to a district attorney or community prosecutor in a non-Indian country jurisdiction, and are accessible to the community in a way not generally required of other AUSAs. Tribal Liaisons are assigned specific functions dictated by the nature of the district. Tribal Liaisons typically have personal relationships with tribal governments, including tribal law enforcement officers, tribal leaders, tribal courts, tribal prosecutors, and social service agency staff.

Tribal Liaisons also know and work well with state and local law enforcement officials from jurisdictions adjacent to Indian country. These relationships enhance information-sharing and assist in the coordination of criminal prosecutions, whether federal, state, or tribal. It is important to note that while the Tribal Liaisons are collectively the most experienced prosecutors of crimes in Indian country, they are

not the only AUSAs doing these prosecutions. The volume of cases from Indian country requires these prosecutions in most USAOs to be distributed among numerous AUSAs.

III. The Tribal Law and Order Act of 2010

The Tribal Law and Order Act (TLOA), [Pub. L. No. 111-211](#), tit. II, 124 Stat. 2261 (2010), was signed into law by the President on July 29, 2010. In Section 202 of TLOA, Congress reiterated earlier acknowledgements by the President and Congress that tribal law enforcement is typically the first responder to crime on the reservation and that a tribe's own justice system is often the most appropriate venue for maintaining law and order in Indian country. With the passage of TLOA, Congress, in part, intended to empower tribal law enforcement agencies and tribal governments. For example, Subtitle A of TLOA is titled "Federal Accountability and Coordination," and it specifically addresses the prosecution of crimes in Indian country, to include the appointment of Assistant United States Attorneys as tribal liaisons and the appointment of SAUSAs.

Concerning tribal liaisons, TLOA amended The Indian Law Enforcement Reform Act to require the appointment of at least one tribal liaison in every federal judicial district with Indian country responsibility. By statute, the duties of the tribal liaison shall include the following:

- (1) Coordinating the prosecution of Federal crimes that occur in Indian country.
- (2) Developing multidisciplinary teams to combat child abuse and domestic and sexual violence offenses against Indians.
- (3) Consulting and coordinating with tribal justice officials and victims' advocates to address any backlog in the prosecution of major crimes in Indian country in the district.
- (4) Developing working relationships and maintaining communication with tribal leaders, tribal community and victims' advocates, and tribal justice officials to gather information from, and share appropriate information with, tribal justice officials.
- (5) Coordinating with tribal prosecutors in cases in which a tribal government has concurrent jurisdiction over an alleged crime, in advance of the expiration of any applicable statute of limitation.
- (6) Providing technical assistance and training regarding evidence gathering techniques and strategies to address victim and witness protection to tribal justice officials and other individuals and entities that are instrumental to responding to Indian country crimes.
- (7) Conducting training sessions and seminars to certify special law enforcement commissions to tribal justice officials and other individuals and entities responsible for responding to Indian country crimes.
- (8) Coordinating with the Office of Tribal Justice, as necessary.
- (9) Conducting such other activities to address and prevent violent crime in Indian country as the applicable United States Attorney determines to be appropriate.

[25 U.S.C. § 2810\(b\) \(2015\)](#).

To increase coordination and communication among federal and tribal jurisdictions and to empower tribal governments with the authority, resources, and information necessary to safely and effectively do justice in their own communities, TLOA amends two statutes to provide for the appointment of SAUSAs. First, the Indian Law Enforcement Reform Act was amended to provide that each United States Attorney

in an Indian country district is authorized and encouraged to appoint SAUSAs “to prosecute crimes in Indian country as necessary to improve the administration of justice[.]” *Id.* § 2810(d)(1)(A). The addition of a SAUSA is especially encouraged where either “the crime rate exceeds the national average crime rate” or “the rate at which criminal offenses are declined to be prosecuted exceeds the national average declination rate.” *Id.* § 2810(d)(1)(A)(i)-(ii). United States Attorneys are instructed by [25 U.S.C. § 2810](#) to do the following:

- (B) to coordinate with applicable United States district courts regarding scheduling of Indian country matters and holding trials or other proceedings in Indian country, as appropriate;
- (C) to provide to appointed Special Assistant United States Attorneys appropriate training, supervision, and staff support; and
- (D) to provide technical and other assistance to tribal governments and tribal court systems to ensure that the goals of this subsection are achieved.

Id. § 2810(d)(1)(B)-(D).

TLOA also amended Title 28 of the United States Code, entitled “Judicial Code and Judiciary.” Accordingly, “the Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires, including the appointment of qualified tribal prosecutors and other qualified attorneys to assist in prosecuting federal offenses committed in Indian country.” [28 U.S.C. § 543\(a\) \(2015\)](#). In this section, Indian country is defined by [18 U.S.C. § 1151](#). Once appointed, these SAUSAs can be granted the authority to perform all the functions that an Assistant United States Attorney can perform, or specific limited actions, as desired by the United States Attorney. *See* DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 3-2.000 (2015). Per DOJ policy, SAUSAs are named to temporary appointments, not to exceed two years. The appointment can be extended indefinitely. SAUSAs are federal employees as defined by [5 U.S.C. § 2015](#).

Any otherwise-eligible attorney may be appointed as a SAUSA. SAUSAs are subject to essentially the same conditions of employment as other DOJ employees, including personnel security and suitability requirements, citizenship, and standards of conduct. All SAUSAs may be terminated at any time for any reason. [28 U.S.C. §543\(b\) \(2015\)](#).

Following the passage of TLOA, EOUSA and Justice Management Division examined the potential for ethical concerns where a tribal attorney appointed as a SAUSA is compensated by the tribe. Supplemental Standards of Ethical Conduct for Department of Justice Employees at [5 C.F.R. § 3801.106](#) prohibits compensation for the outside practice of law, absent a waiver from the DAG. Many of the individuals appointed as SAUSAs are paid by the tribe while working at the USAO. The Department has issued a blanket waiver for cross-designated state and local attorneys. *See* DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ PROCEDURE § 3-4.213.001 (2015). However, this waiver did not include tribal SAUSAs. Following consultation with DOJ’s Ethics Office and the Office of Attorney Recruitment and Management, a decision was made to update the waiver policy to include tribal SAUSAs. The waiver policy is limited to attorneys who are employed by an Indian tribe and not practicing law in a private capacity. The waiver policy now covers the appointment of all SAUSAs. A conflict of interest analysis must be conducted for each new SAUSA, and EOUSA’s General Counsel’s Office should be consulted if there are any actual or apparent conflicts of interest.

At the end of November 2015, there were 25 Tribal SAUSAs working in 11 federal judicial districts. Four additional districts were in the process of either replacing a SAUSA who left their position with the tribe or initiating a new SAUSA position with a tribe. The majority of tribal SAUSAs have their salaries paid by their employing tribe. However, several districts have tribal SAUSAs dedicated to prosecuting intimate partner violence cases through a special initiative funded by the Office on Violence Against Women (OVW). *See* <http://www.justice.gov/opa/pr/office-violence-against-women-announces->

agreements-cross-designate-tribal-prosecutors. An OVW grant to the tribe covers costs associated with the hiring of these specialized SAUSAs.

Though more than half of the existing tribal SAUSAs practice almost exclusively in tribal court, they serve a critical case screening role and regularly forward cases to the USAO for prosecution. Five SAUSAs currently prosecute cases in both federal and tribal court, and one tribal SAUSA's primary role is outreach. Every USAO with an existing tribal SAUSA program has remarked about the increase in communication and coordination that now exists between the Federal government and the tribe. The tribal SAUSA program is an important one. As USAOs look to either initiate a tribal SAUSA position or enhance an existing program, perhaps consideration can be given to creating a position targeted at cultural property law violations. An AI/AN attorney may bring a different perspective and insight to these cases.

In addition to using tribal prosecutors and attorneys as SAUSAs for cultural property law cases, USAOs may want to explore the possibility of using Department of Homeland Security and Customs and Border Patrol attorneys as SAUSAs. A number of these individuals may have significant experience handling cases where stolen artifacts are trafficked overseas.

IV. Cultural property law training for prosecutors

In July 2010, EOUSA launched the National Indian Country Training Initiative (NICTI) to ensure that Department prosecutors, as well as state and tribal criminal justice personnel, receive the training and support needed to address the particular challenges relevant to Indian country prosecutions. This training effort is led by the Department's National Indian Country Training Coordinator and is based at the National Advocacy Center (NAC) in Columbia, South Carolina. Since its inception, the NICTI has delivered dozens of training opportunities at the NAC or in the field, including well over 100 lectures around the country for other federal agencies, tribes, and tribal organizations. Importantly, DOJ's Office of Legal Education covers the costs of travel and lodging for tribal attendees at classes sponsored by the NICTI. This allows many tribal criminal justice and social service professionals to receive cutting-edge training from national experts at no cost to the student or tribe. All tribal SAUSAs are encouraged to attend these trainings not only for the substantive knowledge imparted, but also for the opportunity to network with federal partners.

The Department should encourage all USAOs, and not just Indian country districts, to have at least one AUSA or SAUSA on staff with training on cultural property law. Even districts without a significant Indian country caseload can encounter a major NAGPRA or ARPA case. For example, in 2014, the FBI seized thousands of artifacts from a home in rural central Indiana. Many of the seized items were Native American and "described as having immeasurable cultural significance." *See FBI seizes Native American, other artifacts at rural Indiana home*, CBS NEWS (Apr. 2, 2014), <http://www.cbsnews.com/news/fbi-seizing-artifacts-at-rural-indiana-home/>.

Every couple of years or so, the NICTI hosts a live training titled "Cultural Property Law: Criminal/Civil Enforcement Seminar." This training covers topics like NAGPRA, ARPA, the Indian Arts and Crafts Act, restitution, and the National Stolen Property Act. In addition, DOJ's video on demand library has programming available 24/7 for DOJ and USAO personnel interested in the topic.

V. Principles for Working with Federally Recognized Indian Tribes

In December 2014, the Attorney General issued guidelines stating principles for working with federally recognized Indian tribes. *See Attorney General Guidelines Stating Principles for Working with Federally Recognized Indian Tribes*, 79 Fed. Reg. 73905 (Dec. 12, 2014). These guidelines address several overarching principles for Department of Justice personnel working with tribes: a commitment to furthering the government-to-government relationship with each tribe; respect and support for the tribes'

authority to exercise their inherent sovereign powers; and commitment to tribal self-determination, tribal autonomy, tribal nation-building, and maximizing tribal control over governmental institutions in tribal communities. *Id.* This important document further covers topics like consultation and communication with tribes, culture and mutual respect, law enforcement and litigation, nation-building and tribal justice systems, coordination and outreach, and sustainability.

While these principles do not specifically address the Department's efforts regarding cultural property crimes, several principles do inform the need for federal prosecutors to actively work these cases in partnership with tribes. For example, we are "to respectfully consider traditional tribal cultural practices and values" and be "sensitive to the need for effective cross-cultural communications." *Id.* Through the principles document, the Attorney General reiterates the Department's commitment to fully implementing the Tribal Law and Order Act of 2010, among other statutes, and also its belief that working with tribes to strengthen their justice systems is critical to fulfilling the promise of these statutes. *Id.* And, importantly, the Department "supports tribes' efforts to build innovative approaches to law enforcement, public safety, and victim services." *Id.* The development of a tribal SAUSA initiative is just one example of an innovative approach to law enforcement and a potential means of addressing cultural property law cases.

VI. Conclusion

Congress, the Attorney General, the Deputy Attorney General, and tribal leaders have all spoken publicly about the unique legal relationship that the United States has with federally recognized tribes. The challenge is to build a sustainable, mutually respectful response to crime in Indian country. This response includes cultural property law offenses. Sometimes this effort must be accomplished with limited resources. One possibility for supplementing resources and enhancing expertise is developing a tribal SAUSA program. USAOs are authorized and encouraged by law and DOJ policy to develop a tribal SAUSA program. This effort should be done in partnership with tribes, following government-to-government consultation. Tribal prosecutors and attorneys may know the culture and traditions of their employing tribe far better than do their federal counterparts. Moreover, tribal SAUSAs may be able to advise their federal counterparts about the least damaging way to seize, handle, or store stolen artifacts during the course of an investigation and prosecution. Tribal SAUSAs can provide vital assistance to federal law enforcement and prosecutors on cultural property law violations, and also local training.

The fight to protect the history, traditions, and culture of the First Americans is vitally important. Once the graves are disturbed, the cave art defaced, or the Katsinam shipped overseas, the damage is devastating. The looters and black-market dealers must be brought to justice. Tribal SAUSAs can be an effective force multiplier in this effort.

When all the trees have been cut down, when all the animals have been hunted, when all the waters are polluted, when all the air is unsafe to breathe, only then will you discover you cannot eat money. [Cree Prophecy](#). ❖

ABOUT THE AUTHOR

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Using the Forfeiture Laws to Protect Cultural Heritage

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I. Introduction

Most prosecutors think of asset forfeiture as a tool used to recover property in drug, money laundering, or fraud cases, and do not realize that it can be used to recover cultural property as well. In fact, the Archaeological Resources Protection Act (ARPA), the Cultural Property Implementation Act (CPIA), and other less well-known statutes contain forfeiture provisions of their own, and the forfeiture provisions in statutes that are normally used in other contexts, like the National Stolen Property Act or the Customs laws, may be used to recover cultural property as well.

This article discusses how to use those statutes.

First, one needs to know how forfeiture works and what some of the terms mean, so I will begin with a brief introduction to administrative, civil, and criminal forfeiture, and discuss how and when each procedure applies. Then I will turn to the forfeiture provisions that are specific to cultural property.

The bad news is that there is no one generic forfeiture statute that applies to all violations of federal law. Every crime has its own forfeiture provision (or may have no forfeiture provision at all). There are different forfeiture provisions for ARPA, for CPIA, for a Customs violation, and so forth, and each involves its own procedures and describes a different set of assets that are subject to the forfeiture laws. Thus, for every violation, it is necessary to find the applicable statute, determine what Congress allows to be forfeited, and decide which procedures apply.

In some cases, only the cultural property itself can be forfeited, while in other cases, the property used to commit the offense, or property traceable to it, can be forfeited as well. Likewise, in some cases,

criminal forfeiture is the only option, while in others we may be able to do the forfeiture civilly, or either civilly or administratively. There is no rhyme or reason to this—it is the result of the forfeiture laws for different offenses being enacted at different times after being drafted by different committees of Congress.

So after the introduction to forfeiture procedure, I will review each of the major cultural property protection statutes and discuss what may be forfeited and what procedures apply in each case, using examples from real cases to illustrate each point.

II. A quick introduction to forfeiture procedure

Asset forfeiture comes in three flavors: administrative, civil, and criminal.

A. Administrative forfeiture

Administrative forfeiture is basically an abandonment proceeding: a law enforcement agency seizes the property, sends notice to everyone who appears to have an interest in it, and if no one files a claim, declares the property forfeited to the United States. Its obvious virtue is that the forfeiture can be completed without the need to file any civil or criminal proceeding in the district court, unless someone files a claim.

Property eligible for administrative forfeiture generally includes currency in any amount, or personal property up to \$500,000 in value. [19 U.S.C. § 1607 \(2015\)](#). Real property, however, cannot be forfeited administratively. *Id.* [18 U.S.C. § 985\(a\)](#).

Because the vast majority of all forfeitures are uncontested, the vast majority of forfeitures are administrative forfeitures. It is an efficient way of recovering property, while respecting the due process rights of any property owner who wants to file a claim. Accordingly, if administrative forfeiture is authorized for the offense under investigation, the prosecutor will definitely want to encourage the agency to pursue administrative forfeiture.

On the other hand, if someone does contest the administrative forfeiture, the property is not eligible for administrative forfeiture, or if the investigating agency does not have administrative forfeiture authority, it will be necessary to commence a civil or criminal forfeiture proceeding in the district court.

B. Civil forfeiture

Civil forfeiture cases are *in rem* actions against the property; that is why they have funny names, like [United States v. Eighteenth Century Peruvian Oil on Canvas](#), 597 F. Supp.2d 618, 622 (E.D. Va. 2009), or [United States v. 323 Quintales of Green Coffee Beans](#), 21 F. Supp.3d 122, 128 (D.P.R. 2013). Naming the property as the defendant does not mean that the property has done something wrong. Rather, civil forfeiture is just a procedural device that allows the court to adjudicate all of the competing claims to the property in one case, at one time, in a single forum. See [United States v. Ursery](#), 518 U.S. 267, 295-96 (1996) (Kennedy, J. concurring).

The important thing to know about civil forfeiture is that it does not require a conviction or the filing of a criminal charge. True, the Government files the civil forfeiture action to confiscate the property because it was derived from, or used to, commit a crime, but it may do that even if it is unable, for any reason, to bring a criminal case, or chooses not to do so. All that is required is the existence of a federal statute authorizing civil forfeiture and proof that the property was derived from, or used to, commit the relevant offense. See [United States v. \\$6,190.00 in U.S. Currency](#), 581 F.3d 881, 885 (9th Cir. 2009).

Civil forfeiture has become controversial because of its unfortunate association with currency seizures during highway stops, but there is nothing wrong with civil forfeiture; it is just a procedural device for resolving everyone's interest in the property at the same time when there is no criminal case.

The Government still has to prove that a crime was committed and that the property was involved in that crime; it just doesn't have to obtain a criminal conviction.

Typically, a prosecutor will file a civil forfeiture action when:

- The wrongdoer is dead or is a fugitive
- The statute of limitations has run on the criminal case
- The property has been recovered, but it is not known who committed the crime giving rise to the forfeiture
- The defendant has pled guilty to a crime different from the one giving rise to the forfeiture
- There is no federal criminal case because the defendant has already been convicted in a state, foreign, or tribal court
- There is no criminal case because the interests of justice do not require a conviction
- The defendant uses someone else's property to commit the crime

That last instance is perhaps the most important. We cannot forfeit a third party's property in a criminal case because the third party has had no opportunity to participate in the proceeding. So, for example, if the defendant uses his wife's car to commit a crime, we could not forfeit her car in the criminal case, even if she knew all about the crime and let it happen. But we can forfeit the car in a civil case by naming the car as the property subject to forfeiture and giving the wife the opportunity to contest the forfeiture, either on the merits or by asserting an innocent owner defense.

How is this done? Every U.S. Attorneys' office has at least one civil forfeiture expert who would handle a case like this if it had to be done civilly, so there is no need for every AUSA to learn civil forfeiture procedure. In short it works like this: Pursuant to [18 U.S.C. § 983](#) and Supplemental Rule G, Federal Rules of Civil Procedure, the Government must file a complaint against the property and give notice to all persons with an interest in it that they have the right to intervene by filing a claim to the property and an answer to the complaint. The case then proceeds through civil discovery as in any other civil case, and will most often be resolved on a motion for summary judgment or in a civil trial.

Any person with an interest in the property, including a third party who purchased the property from the wrongdoer (a "bona fide purchaser for value"), can assert a claim. That person is called the claimant. The claimant can oppose the forfeiture by contesting the underlying facts or by asserting the innocent owner defense.

Under the innocent owner defense, property cannot be forfeited—even if the Government establishes its connection to a crime—if the owner of the property was unaware of the criminal activity or was a bona fide purchaser for value. *See* [18 U.S.C. § 983\(d\) \(2015\)](#). This applies to all civil forfeiture cases *except* those filed under the Customs laws in Title 19. *See id.* [18 U.S.C. § 983\(i\)](#) (exempting forfeitures under Title 19 and certain other statutes from most of the provisions of the Civil Asset Forfeiture Reform Act (CAFRA)). For cases filed under the Customs laws in Title 19, there is no innocent owner defense. *See* [United States v. One Lucite Ball](#), 252 F. Supp. 2d 1367, 1378 (S.D. Fla. 2003) (innocent owner defense in section 983(d) does not apply to forfeiture under 19 U.S.C. § 1595a); [United States v. The Painting Known as "Hannibal,"](#) 2010 WL 2102484, *4 (S.D.N.Y. May 18, 2010) (because the forfeiture action was brought pursuant to § 1595a(c), owner of merchandise had no innocent owner defense when importer misstated the value of the merchandise on the Customs documents). This "Customs carve-out" turns out to have major implications for forfeitures in cultural property cases.

As a general proposition, however, innocent owners are protected in civil forfeiture cases. So if someone uses my bulldozer to desecrate an Indian mound, but I was totally oblivious, I can oppose the forfeiture and get the bulldozer back, even though, in terms of the statute, it was a vehicle used to commit

the ARPA offense. Fair enough, but should an innocent owner defense apply to human remains or other cultural artifacts that should rightfully belong to a tribe or to the public? The innocent owner defense contains an exception that recognizes that there are some things that even an innocent owner should not be able to recover, like contraband or other things that are illegal to possess, such as endangered species of animals taken in violation of wildlife protection laws. *See* 18 U.S.C. § 983(d)(4) (2015). How that exception applies to cultural property, however, is still unclear.

In any event, if civil forfeiture is so wonderful, why not have the forfeiture expert in the U.S. Attorneys' office forfeit everything civilly instead of making the criminal AUSAs include forfeiture as part of their criminal cases, when such cases are filed?

First, it is a lot of extra work to file and litigate a civil forfeiture case to achieve a result that could be accomplished easily as part of the defendant's sentence in a criminal case. Also, civil forfeiture has a serious limitation: because it is an *in rem* action against specific property, there is (with rare exceptions) no way to forfeit substitute assets or to obtain money judgments in civil forfeiture cases. If we cannot find the actual property derived from, or used to commit, the crime, there is no "defendant," and hence no civil forfeiture.

So, while there are exceptions to everything, civil forfeiture should be reserved for cases where the criminal forfeiture is not possible, or where a criminal case is not ready to indict. Where there are good reasons to file parallel civil and criminal matters, the civil case should not be used as a bargaining chip to resolve the criminal case, or vice versa. All manner of ethical land mines can lie along those roads.

C. Criminal forfeiture

Criminal forfeiture is imposed following a conviction and is part of the defendant's sentence for committing a federal crime. *See Libretti v. United States*, 516 U.S. 29, 39 (1995). It allows the forfeiture of the property to be wrapped up at the same time as the defendant's sentence, and thus saves us from having to file a separate case. Moreover, criminal forfeiture allows us to get a forfeiture order in the form of a money judgment if the proceeds of the crime have been dissipated by the time the defendant is convicted, and to forfeit substitute assets to satisfy the judgment.

Basically, criminal forfeiture proceeds as follows:

- 1) **Indictment.** A forfeiture notice must be included in the indictment. This is required by Rule 32.2(a) of the Federal Rules of Criminal Procedure and can be satisfied easily by tracking the language of the applicable forfeiture statute. Most often, the grand jury will name the forfeitable property in the indictment, but it can also be done separately in a bill of particulars.
- 2) **Plea Agreement.** Forfeiture should be addressed in any plea agreement, which should specify exactly what it is the defendant is agreeing to forfeit and provide that the defendant agrees to the entry of a Consent Order of Forfeiture at the change-of-plea hearing.
- 3) **Trial.** If the case goes to trial, the criminal trial will be bifurcated. That means that the forfeiture will be set aside until the defendant is convicted. At that point, there will be a separate forfeiture proceeding at which the Government must establish the forfeitability of the property by a preponderance of the evidence. The defendant can ask to have the jury retained to determine the forfeiture, or he can waive the jury and have the court decide the forfeiture, based on evidence already in the trial record or presented at a separate hearing. *See* FED. R. CRIM. P. 32.2(b)(5). If the case is tried to a jury, they will return a special verdict of forfeiture as to each asset, setting forth the ground(s) on which the forfeiture is based.

- 4) **Preliminary Order of Forfeiture.** Pursuant to Rule 32.2(b)(2), the court must issue a preliminary order of forfeiture terminating the defendant's interest in the property. The order becomes final as to the defendant at sentencing, and must be included in the judgment. *See id.* Rule 32.2(b)(4). If a Consent Order of Forfeiture was entered at the time of the defendant's guilty plea, there is no need for a further order, but if the defendant was convicted at trial, or no Consent Order was entered, the court *must* enter the forfeiture order before the defendant is sentenced.
- 5) **Ancillary Proceeding.** Following the entry of the forfeiture order, the Government must notify any third parties with a potential interest in the forfeited property that they have the right to contest the forfeiture in an ancillary proceeding. *See id.* Rule 32.2(c)(1); 21 U.S.C. § 853(n) (2015). This is basically a quiet title action. As mentioned earlier, property belonging to third parties cannot be forfeited in a criminal case—that is one of the reasons to do the forfeiture civilly—so to be sure that property of third parties is not being forfeited, the court must give them a post-trial hearing where they can argue that the property really belongs to them. For example, a collector might file a claim in the ancillary proceeding saying that he purchased the forfeited cultural artifact from the defendant as a bona fide purchaser for value. *See* 21 U.S.C. § 853(n)(6)(B) (2015).

How would all of this work in a typical cultural property case? You might, for example, indict a defendant for violating ARPA and include a forfeiture notice stating that upon conviction the Government will seek the forfeiture of x, y and z artifacts, plus the defendant's truck. The defendant could agree to the forfeiture of those things in a plea agreement, a jury could return a special verdict in the forfeiture phase of the trial finding that those things were forfeitable in terms of the statute, or the defendant could waive the jury and have the court determine if the property was forfeitable. In all events, the court would issue a preliminary order of forfeiture directing the defendant to forfeit the assets as part of his sentence, and we would make sure no third parties were offended by giving them notice of the forfeiture and conducting an ancillary proceeding if anyone filed a claim.

But criminal forfeiture is not always available. For all of the reasons mentioned earlier, there are times when we need to use civil forfeiture. And those times arise quite frequently in cases involving cultural property.

III. Cultural property cases

You can almost always tell a civil forfeiture case from a criminal case by the way the case is captioned: if it is *United States v. Miscellaneous Artifacts*, it is a civil case; if it is *United States v. Jones*, it is a criminal case.

For most cultural property offenses, Congress has authorized both civil and criminal forfeiture. However, for a variety of reasons, the majority of cultural property cases are civil forfeiture cases. Most often that is because there is no criminal case, and the focus is solely on getting the property back to the true owner. For example, if a painting was stolen by the Nazis in World War II, or an item looted from an archaeological site, it may not be possible to prosecute the thief, but we may be able to recover the property from the museum, collector, or auction house where it was found and return it to the family, tribe, or country, where it belongs.

A. Archaeological Resources Protection Act (ARPA)

There are three crimes set forth in ARPA, [16 U.S.C. § 470ee](#), which can lead to either criminal or civil forfeiture. In strictly non-technical terms, it is a crime to:

- 1) Dig up, remove, or damage an “archaeological resource” found on public or Indian lands without a permit
- 2) Buy or sell a resource that was removed from the public or Indian land in violation of ARPA (or in violation of any other Federal law, such as the Native American Graves Protection and Repatriation Act (NAGPRA), [25 U.S.C. § 3001](#) et seq.), or
- 3) Buy or sell a resource that was dug up, removed, or otherwise taken from public, Indian, or private land, in violation of state law

These provisions focus on the archaeological resources that were taken illegally or that were later bought or sold. The forfeiture provision of ARPA, however, [16 U.S.C. § 470gg\(b\)](#), provides for the forfeiture not only of the archaeological resources themselves, but also of all vehicles and equipment involved in any of the three enumerated violations. Thus, the Government can forfeit any artifacts excavated or removed from public or Indian lands, and the vehicles and equipment used to excavate, remove, or transport those artifacts.

This is a mixture of good news and bad news. It is good that the Government can use the forfeiture laws to recover looted artifacts, and it is good that the forfeiture is not limited to the artifacts themselves, but also includes the “equipment and vehicles” used to commit the offense, be they bulldozers, sophisticated spelunking tools, metal detectors, and perhaps even computers used to keep track of the inventory of stolen objects or records of their sale and distribution. But it is important to be aware of what the statute does not cover.

The ability to forfeit the instruments of the crime is limited to equipment and vehicles. Is an airplane or a boat used to access the archaeological site a “vehicle?” Maybe. Is the house, barn, or office building used to store or conceal the artifacts forfeitable? Probably not. How about a business, museum, academic chair, or federal grant that is used as a cover for the purloining of cultural antiquities and their distribution on the black market? No again.

To be as useful a tool as it could be for protecting archaeological resources, the forfeiture provision in ARPA, like the forfeiture provisions for many other federal statutes, ought to apply to more than just vehicles and equipment used to commit the offense. It should apply to any property, real or personal, used to commit or to facilitate the commission of the criminal offense. But, at the present time, it does not.

Most seriously, with respect to the excavated or stolen artifacts, the statute is limited to the artifact itself, and does not permit the forfeiture of any other “proceeds” or property traceable to the offense. So if the Government finds the stolen vase or amulet, it can be recovered through forfeiture; but if the thief has already sold the stolen property and received money in return, the money *cannot* be forfeited, except possibly as a substitute asset in a criminal forfeiture case.

The absence of any authority to confiscate the proceeds of the ARPA offense, other than the artifact itself, is the statute’s most glaring deficiency, and severely limits the utility of the law when there is no criminal prosecution. This is something that needs to be fixed.

B. Forfeiture procedure under ARPA

So what procedures apply to forfeiture in an ARPA case? That is, how would we use the forfeiture laws to recover either the artifact itself, or the vehicles or equipment used to commit the crime?

The first thing to notice about the forfeiture provision in ARPA is that it does not contain an administrative forfeiture provision. As stated earlier, administrative forfeiture is really an abandonment proceeding; it makes a full-blown federal case unnecessary when no one is contesting the forfeiture of the property.

ARPA, however, provides for only civil or criminal forfeiture. There is no administrative forfeiture provision, and thus no way for the investigative agency to handle the forfeiture administratively, even if there is no one contesting it. This means that we actually do have to make a “federal case” out of everything under ARPA, even though it appears totally unnecessary to do so.

Most of the reported ARPA cases that resulted in forfeiture have been criminal cases. *See, e.g., United States v. Brennan*, 526 F. Supp.2d 378 (E.D.N.Y. 2007) (discussing the interplay of forfeiture and restitution); *United States v. Sullivan*, 227 F. App'x. 380 (5th Cir. 2007) (no discussion of the forfeiture issues). In such cases, the forfeiture procedure is fairly straightforward, and the courts have not had much to say about it. Generally, an AUSA would just follow the steps outlined above, making sure that the court issues a forfeiture order at, or before, sentencing.

There is one aspect of criminal forfeiture under ARPA that is unique and potentially problematic: unlike virtually every other criminal forfeiture provision in federal law, ARPA's forfeiture provision appears to make the forfeiture discretionary rather than mandatory. *See* 16 U.S.C. § 470gg(b) (2015). So a defendant could conceivably argue that the judge has the discretion to let him keep the looted artifact, or the spade that he used to dig it up, if he or she wanted to do so. But criminal forfeiture under ARPA, like all other criminal forfeiture provisions, is also governed by 28 U.S.C. § 2461(c), which expressly makes criminal forfeiture mandatory upon the return of a guilty verdict. *See United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) (28 U.S.C. § 2461(c) makes criminal forfeiture mandatory in all cases; “The word ‘shall’ does not convey discretion The plain text of the statute thus indicates that forfeiture is not a discretionary element of sentencing. . . . Insofar as the district court believed that it could withhold forfeiture on the basis of equitable considerations, its reasoning was in error.”). How the courts will resolve the conflict between the two statutory provisions remains to be seen.

In all events, if there is no criminal case, or criminal forfeiture is not feasible for any of the reasons discussed above, the Government can file a civil forfeiture action against the artifact itself, or against the vehicle or equipment, and forfeit the property civilly under Section 470gg(b)(3). Forfeiture under that statute, however, is unquestionably discretionary, and the innocent owner defense would apply.

C. Convention on Cultural Property Implementation Act (CPIA)

ARPA applies to archaeological resources found within the United States. Cultural property, however, is often brought into the United States illegally from abroad. One way of recovering property in that situation is to invoke the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which is commonly known as the “Convention on Cultural Property.”

Congress implemented the Convention by enacting 19 U.S.C. § 2606, et seq. (the Cultural Property Implementation Act (CPIA)), which makes it unlawful to import “ethnological material” (defined in great detail in the regulations) into the United States without the permission of the country of origin. The forfeiture provision, 19 U.S.C. § 2609, authorizes the forfeiture of any ethnological material imported into the United States in violation of Section 2606.

Forfeitures under Section 2609 can be done administratively (assuming the seizing agency has administrative forfeiture authority), civilly, or criminally, but criminal forfeitures under the statute are relatively rare. Criminal forfeiture requires a conviction, and it is often the case that while the illegally imported material can be found, the importer cannot: he or she is either unknown or is overseas beyond the jurisdiction of the court.

For example, in *United States v. Eighteenth Century Peruvian Oil on Canvas*, 597 F. Supp.2d 618, 623 (E.D. Va. 2009), the Government used Section 2609 to file a civil forfeiture action to recover two oil paintings that had been stolen from churches in Peru or Bolivia and imported to the United States for sale. The facts were straightforward. A man named Ortiz brought two oil paintings into National Airport in Washington from Bolivia: one was called the *Doble Trinidad*, and the other was *San Antonio De Padua and Santa Rosa De Lima*. They were rolled up in cardboard tubes and had been cut from their frames with a razor.

No one could link them to a particular theft from a particular church—indeed, it was not clear if they were from Peru or Bolivia—and there was no proof that Ortiz was involved in the theft. However, art experts provided affidavits saying that they were a product of the Cuzco School in the 17th and 18th Centuries, in the Andean region around Cuzco (straddling the modern-day border between Peru and Bolivia).

The paintings fit the definition of “ethnological material” in that they were “the product of a tribal or nonindustrial society,” “used for religious evangelism” and, thus, “important to the cultural heritage” of the people of that region, and neither Peru nor Bolivia had given permission for the paintings to be exported out of either country. Thus, even though there was no criminal investigation or prosecution, there were grounds to recover the paintings through civil forfeiture.

There was a lot of arguing about whether the paintings came from Peru or from Bolivia, but for purposes of the Government’s motion for summary judgment in the civil forfeiture case, it did not matter. All that the Government had to do was to show by a preponderance of the evidence that the paintings fit the definition of ethnological material, and that they came from some country that was a party to the Convention and that had not given permission for them to be exported. As both Peru and Bolivia fit that description, the court granted summary judgment for the Government and left it to the Attorney General to decide how (and to whom) to repatriate the paintings.

More recently, in Baltimore, we had a case involving ancient Cypriot and Chinese coins imported into the United States by coin collectors. Customs agents seized the coins on the ground that they were being imported in violation of the CPIA, and the Government filed a civil forfeiture action against them.

Why civil forfeiture? Because the coins were of limited commercial value, this was not the type of case in which anyone thought a criminal prosecution would be appropriate. Nevertheless, to honor our obligation as a signatory to the Convention to prevent the United States from becoming a market for antiquities that are part of the cultural heritage of other countries, the Government needed to show that it was prepared to enforce the law. Civil forfeiture was the appropriate vehicle.

The claimant, the Ancient Coin Collectors Guild, opposed the seizure on a number of statutory and constitutional grounds. The gravamen of the Guild’s complaint was that the CPIA limited the rights of its members to collect ancient coins, but the court rejected each of its challenges to the CPIA on the merits. Among other things, the court held that it did not have jurisdiction to review the State Department’s procedure for including the coins on the list of archaeological materials covered by the CPIA, that the State Department did not exceed its statutory authority to issue regulations under the CPIA, and that banning the importation of the coins did not violate the Guild’s rights under the First Amendment. *Ancient Coin Collector’s Guild v. Customs and Border Protection*, 698 F.3d 171, 185 (4th Cir. 2012).

In the same case, a district court held that the burden of proof provisions and the deadlines for filing a forfeiture complaint in CAFRA (codified mainly in 18 U.S.C. § 983) do not apply to the CPIA because the CPIA is codified in Title 19, and thus falls within the Customs carve-out. *See Ancient Coin Collector’s Guild v. Customs and Border Protection*, 801 F. Supp. 2d 383, 399 n.11, 417-18 (D. Md. 2011). As discussed below, the same rule will apply if the coin collectors attempt to assert an innocent owner defense to the forfeiture under 18 U.S.C. § 983(d).

These cases illustrate the utility of the CPIA for repatriating cultural property when it applies, but unfortunately, it applies only if the property belonged to one of the countries that have bilateral or multilateral agreements with the United States, and we can show that the property left that country after the implementation of that agreement. See *United States v. Eighteenth Century Peruvian Oil on Canvas*, 597 F. Supp.2d at 623 (“the Government has the initial burden to show that the Defendant Paintings are designated ethnological material exported from a State that is a party to the UNESCO Convention and a bilateral agreement with the United States,” citing 19 U.S.C. §§ 2602, 2604 and 2606).

IV. Customs laws

A. 19 U.S.C. § 1497

The easiest way to forfeit cultural property being imported into the United States is to show that it was imported in violation of the Customs laws.

Title 19 U.S.C. § 1497 authorizes the forfeiture of “any article” that is not declared on a Customs form upon entry into the United States, if such declaration was required. To succeed in a forfeiture action under Section 1497, the Government need only prove that property was brought into the United States without the required declaration. The Government bears no burden with respect to the importer’s intent. See *United States v. Various Ukrainian Artifacts*, 1997 WL 793093, *2 (E.D.N.Y. Nov. 21, 1997), citing *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (Dec. 11, 1972).

In *Various Ukrainian Artifacts*, a buyer in the United States arranged to purchase 123 “religious artifacts”—valued at more than \$20,000—from a seller in Ukraine. The seller gave the artifacts to a flight attendant to transport, but she did not declare them upon arrival at JFK Airport, and the Government seized them for forfeiture under Section 1497.

The American buyer protested that the seller was the one responsible for complying with U.S. Customs laws and that he, the buyer, was an innocent owner who should not have to suffer the consequences of the forfeiture. The court held, however, that there is no innocent owner defense for a forfeiture under the Customs laws. 1997 WL 793093 at *3, citing *Bennis v. Michigan*, 516 U.S. 442, 446 (1996).

B. 19 U.S.C. § 1595a

The Customs statute that is used most often to recover cultural property under the forfeiture laws is probably 19 U.S.C. § 1595a. In particular, Section 1595a(c)(1)(A) authorizes the forfeiture of any “merchandise” that is “introduced or attempted to be introduced into the United States *contrary to law.*” So, for example, if property is stolen in a foreign country, introducing it into the United States would be “contrary to law,” and thus would subject the property to forfeiture under Section 1595a.

1. The “moon rock” case

In *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367 (S.D. Fla. 2003), the claimant met with undercover agents of the Customs Service and attempted to sell them a moon rock that was part of a gift that President Nixon made to the Government of Honduras in 1973. The moon rock had disappeared from the Presidential Palace, where it had been displayed in Honduras sometime in the past, and the claimant had acquired it from a Honduran army officer who had it in his possession.

The agents obtained a warrant for the seizure of the moon rock, and the United States subsequently filed a civil forfeiture action against it, asserting that it was stolen property that was introduced into the United States in violation of 19 U.S.C. § 1595a(c)(1)(A). The district court appointed an expert in Honduran law to research and analyze issues of Honduran law as they related to the cultural

patrimony of historic artifacts, and particularly as they related to the moon rock and the plaque on which it was mounted. Following a trial on the forfeiture action, the court adopted the expert's findings and concluded that the moon rock and plaque became inalienable national property of the Republic of Honduras in 1973, as a result of a completed gift by President Nixon.

Special legislation was necessary to alienate these items, the court said, and no such legislation was enacted. Thus, whoever took the items from the Presidential Palace committed larceny, making the rock and plaque stolen property. Accordingly, the court found that the moon rock was subject to forfeiture because it was stolen property that was introduced into the United States contrary to law.

The claimant tried to assert an innocent owner defense, claiming that he did not know the object was stolen, but again the court held that there is no innocent owner defense for forfeitures brought under the Customs laws. *Id.* at 1378.

2. The painting known as “Hannibal”

Another way of forfeiting property under Section 1595a(c) is to show that someone made a material misstatement of the value of the property on the Customs declaration. Making such a misstatement is a violation of 18 U.S.C. § 542, which means that the importation was “contrary to law,” for purposes of Section 1595a(c).

In *United States v. The Painting Known as “Hannibal”*, 2010 WL 2102484 (S.D.N.Y. May 18, 2010), the claimant arranged to have two works of art imported into the United States for sale through a broker in New York. The claimant had purchased the two items two years earlier for \$1 million and \$600,000, respectively, but the documents prepared by the importer and presented to Customs in New York stated their value as only \$100 each.

ICE agents seized the artwork and the Government filed a civil forfeiture action alleging that it was illegally imported into the United States in violation of Section 542, and thus was subject to forfeiture under Section 1595a(c). When the Government moved for summary judgment, the claimant opposed the motion on two grounds: that the misstatement of the artworks' value was not material, and that because the misstatements were made by a third party (the importer), the claimant was an innocent owner. The court rejected both arguments.

The “dramatic understatements of the values” of the defendant property were material, the court said, because by declaring the two works of art to be worth only \$100 each, the importer ensured that they would qualify for automatic entry into the United States. This avoided the formalities that accompany the importation of items of significant value. In addition, the court again held that the innocent owner defense is not available when a forfeiture action is brought pursuant to a Customs statute, such as 19 U.S.C. § 1595a(c).

The claimant argued that the Customs carve-out did not apply in this case and that he was entitled to assert an innocent owner defense because the underlying “law” to which the importation was “contrary” was a provision in Title 18—namely, 18 U.S.C. § 542. The court was not persuaded.

The exemption for Customs cases in Section 983(i) applies whenever the forfeiture action is brought pursuant to a forfeiture provision in Title 19, regardless of what other violations of law might be involved. Here, the forfeiture action was brought pursuant to the forfeiture provision in 19 U.S.C. § 1595a(c). For purposes of applying the innocent owner defense, the fact that the underlying crime was a violation of Title 18 was irrelevant. Accordingly, the court granted the Government's motion for summary judgment as to both works of art.

3. The painting known as “Le Marche”

Still another example of a civil forfeiture based on Section 1595a is one involving a painting known as “Le Marche” by Pissarro. The theory was that the painting was imported into the U.S. “contrary to law,” because it represented the proceeds of a crime. The cases cited here, however, dealt with procedural issues such as civil discovery and the availability of attorney’s fees, not with the merits of the forfeiture action. *See United States v. Painting Known as “Le Marche,”* 2010 WL 2229159 (S.D.N.Y. May 25, 2010); *United States v. Painting Known as “Le Marche,”* 2008 WL 2600659 (S.D.N.Y. June 25, 2008).

4. Three Burmese Statues and Portrait of Wally

Finally, there are two other cases worth reading in which the Government relied on Section 1595a(c) to forfeit cultural property. One case involved three statues carved of local materials in Burma in the 18th and 19th Centuries that were forfeited simply on the ground that importing *any* “product of” Burma was “contrary to law.” *See United States v. Three Burmese Statues,* 2008 WL 2568151 (W.D.N.C. June 24, 2008) (importing statues from Thailand violated 31 C.F.R. § 537.203, banning the importation of any “product of Burma”).

The other case, with a long legal history, involved a painting allegedly stolen by the Nazis from its Jewish owner in Austria during World War II, and imported into the United States by its present owner in the 1990s for display at a museum in New York. The forfeiture action was filed pursuant to 19 U.S.C. § 1595a(c) and 18 U.S.C. § 2314, alleging that the painting was property imported into the United States in violation of law because it was stolen property that could not be imported without violating the National Stolen Property Act, 18 U.S.C. § 2314. The case resulted in four decisions, spanning a decade, and discussed a myriad of issues under forfeiture law. *See United States v. Portrait of Wally,* 105 F. Supp. 2d 288 (S.D.N.Y. 2000) (*Wally I*); *United States v. Portrait of Wally,* 2000 WL 1890403 (S.D.N.Y. Dec. 28, 2000) (*Wally II*); *United States v. Portrait of Wally,* 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002) (*Wally III*); *United States v. Portrait of Wally,* 2009 WL 3246991 (S.D.N.Y. Sept. 30, 2009) (*Wally IV*).

C. 18 U.S.C. § 545

One alternative to basing a forfeiture on Section 1595a is to use 18 U.S.C. § 545, which makes it an offense to smuggle, “clandestinely introduce,” or otherwise import merchandise “contrary to law.” One advantage to bringing the forfeiture action under Section 545 is that, almost uniquely among forfeiture statutes, it authorizes the civil forfeiture of substitute assets—*i.e.* forfeiture of the *value* of the forfeitable property, if the property itself is unavailable. Accordingly, if forfeiture under 19 U.S.C. § 1595a is impossible because the smuggled or illegally imported asset cannot be found, Section 545 may be the way to recover at least the value of the property so that it may be restored to the rightful owner.

In the 1990s, the Government used Section 545 to forfeit cultural artifacts illegally brought into the United States, but unless the Government needs to rely on the substitute assets provision, it is not the preferred method of forfeiture today.

In *United States v. An Antique Platter of Gold,* 184 F.3d 131, 138-39 (2d Cir. 1999), a New York art dealer, on behalf of an American client, purchased an ancient Sicilian “Phiale” —a platter of gold— from a Swiss art dealer for approximately \$1.2 million. Under an Italian “patrimony” law, any archaeological item of Italian origin is presumed to belong to the Italian Government unless its possessor can show private ownership prior to 1902. That meant that the Phiale was Italian Government property, but the art dealer, who knew that the Phiale was of Italian/Sicilian origin, attempted to circumvent the Italian law by faxing a commercial invoice to a customs broker in New York, falsely indicating that the Phiale’s country of origin was Switzerland and falsely stating its value as \$250,000. The art dealer

thereafter transported the Phiale to New York, and the customs broker used the false invoice to clear the Phiale through customs and deliver it to the client.

When the scheme was discovered, the U.S. Attorney, acting at the request of the Italian Government, filed a civil forfeiture action against the Phiale under two alternative theories: that the property was imported in violation of Section 545 because the false statements made in the invoice concerning the country of origin and the value of the property were material misstatements, in violation of Section 542; and that the property was imported “contrary to law” within the meaning of Section 1595a because it constituted stolen property under Italian law and, thus, could not be imported into the United States under the National Stolen Property Act.

The owner of the Phiale—the client of the New York art dealer—filed a claim, but the district court granted summary judgment for the Government on both theories. The Second Circuit later affirmed the forfeiture under [18 U.S.C. § 545](#) without reaching the alternative theory under [19 U.S.C. § 1595a](#).

The first issue was whether the false statement regarding the country of origin was material. The panel held that it was. The claimant then argued that he was entitled to an innocent owner defense when a forfeiture is based on Section 545. The panel held that he was not.

At the time the case was decided in 1999, the ruling as to the innocent owner defense was correct: there was no uniform innocent owner defense to forfeitures under Title 18 until 2000, when Congress enacted Section 983(d) as part of CAFRA. When CAFRA took effect the next year, it made the innocent owner defense available in all cases *except* Customs cases brought under Title 19. Section 545 is a Customs statute, but it is in Title 18.

If this case were brought today under Section 545, the owner of the property would be entitled to assert an innocent owner defense. That makes Section 1595a the better way to go in future cases and, as we saw in *Lucite Ball* and *Hannibal*, Section 1595a(c) can be used when the basis for the forfeiture is *either* the false declaration in violation of Section 542 *or* the fact that the property was stolen in violation of foreign law.

All of this boils down to the following practice note: If you can bring a case under multiple forfeiture statutes, including a Title 19 statute, bring it under the Title 19 statute. You can use other theories as backups, but if you are aware of an innocent owner, you are setting yourself up for discovery and summary judgment motion practice on that issue. Ask yourself if the extra litigation is worth it in your case.

There is one case that haunts practitioners in this area that must be mentioned. It involved the mask of Ka-nefer-nefer, an Egyptian artifact owned by the St. Louis Art Museum. [United States v. Mask of Ka-Nefer-Nefer](#), 2012 WL 1094658, *3 (E.D. Mo. Mar. 31, 2012).

The mask of Ka-nefer-nefer was Egyptian cultural property that had been excavated, registered with the government, transferred to museum storage, logged as it moved about in a box, and eventually, when that box was opened, found to be missing. Egypt had not authorized its transfer or private ownership, yet the district court dismissed the forfeiture complaint, holding that the Government had not pleaded sufficient facts to show that the piece was “stolen, smuggled or clandestinely imported or introduced.” *Id.* at *2.

The problem concerned the district court’s interpretation of Supplemental Rule G(2)(f). The rule provides that a civil forfeiture complaint must set forth sufficient facts to support a reasonable belief that the Government will be able to establish the forfeitability of the property at trial. The complaint in *Ka-nefer-nefer* alleged the facts just mentioned, but the court held that a complaint based on Section 1595a(c) cannot allege simply that property went missing in Egypt and turned up in a U.S. museum; it must allege when, where, why, and by whom the property was stolen. The Eighth Circuit later affirmed the dismissal on the ground that the district judge did not abuse his discretion by not allowing the Government to

amend its complaint after the case was dismissed. *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737 (8th Cir. 2014).

V. Conclusion

Asset forfeiture is a powerful tool that, used in the right way, can allow the Government to recover property that is part of the cultural heritage of people and countries around the world. It is a vehicle that allows the United States to fulfill its moral, legal, and diplomatic obligations to prevent this country from becoming the repository or the market for the world's cultural artifacts, and to return that property to its rightful owners. And it is a way to punish and deter those in our own country who would desecrate gravesites, the hallowed ground of our battlefields, and other archaeological sites that belong to all of us, in the quest for treasure and profit.

With a little understanding of the rudiments of administrative, civil, and criminal forfeiture procedure, and an awareness of the potential that the forfeiture statutes provide, a prosecutor handling culture property cases can do much more than simply punish the wrongdoer; he or she can ensure that the heritage of our ancestors is restored to the people to whom it belongs. ❖

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Craft v. National Park Service: A **Landmark Case for the Cooperative Protection of Underwater Cultural Heritage**

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I. Introduction

In the early morning hours of October 2, 1987, the charter dive boat, *Vision*, slipped out of its berth at the Santa Barbara marina and sailed into dubious notoriety. Over the next several days, many of the self-described “wreck divers,” who were aboard as a part of a dive club outing, would engage in illegal activities that would result in federal and local officials bringing dozens of civil and criminal charges against them, the *Vision*’s captain, and its owners. In terms of the number of persons charged with offenses, the cases against the divers remain one of the largest law enforcement and prosecution actions ever brought for violations involving Underwater Cultural Heritage (UCH).

Like many good nautical yarns, the story began onshore when National Park Service (NPS) rangers at the Channel Islands National Park learned that a dive club from southern California was organizing a dive trip to visit shipwrecks in the Santa Barbara area. Many of the club members were especially interested in diving to recover shipwreck artifacts. The rangers had seen a magazine article describing a similar dive the previous year, during which some of the members reportedly removed artifacts from historic shipwrecks located within the Channel Islands National Marine Sanctuary. Established in 1980 by the National Oceanic and Atmospheric Administration (NOAA), the sanctuary comprises 1,252 square miles around the five northern Channel Islands (out to a distance of six nautical miles from the shore). The islands form the Channel Islands National Park and, by agreement between NOAA and the NPS, rangers enforce NOAA’s regulations for the sanctuary (currently found at [15 C.F.R. §922](#), Subpart G).

Because resource violations occurring under water are extremely difficult to detect, the rangers at the Park decided to place two rangers, undercover, on the boat. The rangers who were selected for the assignment were husband and wife. Significantly, they were experienced divers who had each made hundreds of dives mapping historic shipwrecks for the National Park Service, most notably the *USS*

Arizona in Pearl Harbor, Hawaii. They were trained and accustomed to diving with many individuals, and skilled at recognizing them underwater.

The *Vision* visited sites outside of the sanctuary during the first day of the dive trip. On the second and third days, however, the boat visited the sites of historic shipwrecks within the sanctuary. One of the sites was of the wreck of the *Winfield Scott*, an early steam vessel that carried passengers from Panama to San Francisco to help them reach California during the Gold Rush. Another site was of the *Goldenhorn*, a four-masted sailing ship built in Scotland in 1883, which plied trade routes to India, Australia, and California. Both sites were well-known and protected by federal and state laws. Indeed, at each site an announcement was made over the dive boat's public address system that the wrecks were off limits to anything other than looking, and had to be left alone.

Nevertheless, during several dives on the wrecks, the rangers either directly observed divers removing artifacts from the sites with tools that included hack saws and hammers, or excavating the seabed with rock picks and small sledge hammers in search of items. Back on board the *Vision*, the rangers saw additional artifacts that divers had removed from the wrecks. The rangers noted their observations and quietly radioed the Park Service ashore. When the *Vision* returned to Santa Barbara, it was met by a team of rangers, two agents from NOAA's National Marine Fisheries Service, and two county sheriffs. They interviewed suspects and seized hundreds of artifacts believed to have come from the historic wrecks.

With one exception, an 1851 gold coin brought up from the *Winfield Scott*, the items removed from the wreck sites were not monetarily valuable and did not fit the public notion of shipwreck loot. The nails, scraps of metal and wood, pieces of coal, and the firebricks that the divers brought to the surface were a far cry from the emeralds and gold bars more commonly the subject of television documentaries and magazine articles about underwater treasures. However, history can be revealed by objects that appear to be small and insignificant to the untrained eye, as well as items that are spectacular and intrinsically valuable. Government officials decided that the nails and copper sheathing that had been removed from the *Winfield Scott*, as well as the remaining pieces of coal that constituted the cargo aboard the *Goldenhorn* during her final voyage, represented links to California's past that were worth protecting. The cases and appeals that resulted from the *Vision*'s trip would take many years to resolve.

II. State criminal enforcement

The wreck sites of the *Goldenhorn* and the *Winfield Scott* are located on the seabed in the waters off the islands of Santa Rosa and Anacapa, respectively. This puts them within state jurisdiction, as well as inside the marine sanctuary. Anacapa Island is in Ventura County, and the District Attorney criminally prosecuted 16 individuals for misdemeanor violations of the California Penal Code and/or the California Administrative Code, for events that the rangers witnessed at the *Winfield Scott* site. See *Divers Face Criminal Charges in Pillaging of Wrecked Ship*, L.A. TIMES, Nov. 26, 1987, http://articles.latimes.com/1987-11-26/news/ve-24739_1_park-rangers; see also Cal. Penal Code § 622 1/2 (West, Ch. 1, 2015-2016 2d Ex. Sess.); Cal. Code Regs. tit. 14, § 630(a) (West, 1/15/16 Register 2016, No. 3). Seven persons were also prosecuted under the same statutes by the Santa Barbara County District Attorney for offenses committed off of Santa Rosa Island.

III. Federal enforcement

In this case, the federal government decided to leave the criminal prosecution to the State of California. However, there are criminal provisions in the Archeological Resources Protection Act (ARPA) and the National Stolen Property Act (NSPA) that could have been used to prosecute the divers. The ARPA prohibits the unauthorized excavation of archeological resources and the transportation of any archeological resource obtained in violation of state or local law. 16 U.S.C. §470ee(a)(c) (2015). The

NSPA prohibits the transportation of stolen goods in interstate commerce. [18 U.S.C. §2314 \(2015\)](#). Both statutes impose criminal penalties, either in fines, imprisonment, or both. [16 U.S.C. §470ee\(d\) \(2015\)](#); [18 U.S.C. §2314 \(2015\)](#); *see also* J. Michael Marous, *Medieval Manuscript Mystery*, 60 U.S. ATTORNEYS' BULL. 16, 21 (Oct. 1996) (discussing ARPA prosecution); OLE VARMER, U.S. DEPT. OF THE INTERIOR, BUREAU OF OCEAN ENERGY MANAGEMENT, UNDERWATER CULTURAL HERITAGE LAW STUDY 36–37 (2014).

NOAA sought civil penalties under the National Marine Sanctuaries Act as criminal penalties under this Act are limited to interference with law enforcement officials. After reviewing case reports describing violations witnessed by the rangers, the NOAA Office of General Counsel assessed civil penalties against 20 individuals, charging them with violating former regulations for the Channel Islands National Marine Sanctuary. *Craft v. National Park Service*, 34 F.3d 918, 921 (9th Cir. 1994). Depending upon the activities described in the case reports prepared by the Park Service rangers and the National Marine Fisheries Service Agents, the individuals were charged with violating one or both of the prohibitions set forth in [15 C.F.R. § 935.7\(a\)\(iii\)](#) and (a)(5) (which may now be found at [15 C.F.R. § 922.72\(a\)\(4\)](#) and (8)) (alteration of the seabed, and removal or damage of historical or cultural resources); [15 C.F.R. § 922.72\(a\)\(4\);\(a\)\(8\)](#) (2015).

Twelve of the twenty defendants settled their cases with NOAA, in most cases by paying fines ranging from \$500 to \$10,000. The remaining defendants requested an administrative hearing, which was conducted pursuant to NOAA's regulations found at [15 C.F.R. §904.1](#) et seq. The administrative hearing was the beginning of legal process that lasted six years and involved four distinct phases: (1) an administrative hearing before an administrative law judge resulting in an initial decision, (2) the defendants' appeal of the decision to the NOAA Administrator, (3) a lawsuit brought by the defendants challenging the constitutionality of NOAA's regulation prohibiting alteration of the seabed, and (4) an appeal to the Ninth Circuit of the Federal District Court's decision.

A. Administrative hearing

A consolidated hearing involving all seven defendants was heard by a Department of Commerce Administrative Law Judge and lasted four weeks. The rangers testified to the excavation activities they had observed in the sanctuary, the items they had seen removed, and identified the defendants as the violators. The artifacts seized from the divers were introduced into evidence as proof of the unlawful removal of cultural resources. The defendants' lawyers were allowed to conduct lengthy cross-examinations of the rangers, experts, and other witnesses presented by the NOAA prosecutors.

After hearing the testimony and reviewing written briefs submitted by the parties, the Administrative Law Judge upheld all of the charges brought by NOAA and assessed civil penalties against the defendants, ranging in amounts from \$1,000 for a single count of unlawful excavation of the seabed to \$100,000 for the excavation and removal violations committed by the divemaster. The decision is reported at 6 *Ocean Resources and Wildlife Reporter (O.R.W.)* 150 (NOAA 1990), [1990 WL 322728 \(Oct. 17, 1990\)](#). In his decision, the ALJ noted that the cap on fines in the regulations prevented him from fining more than \$50,000 per violation, which he thought was warranted based on the egregious actions of the divemaster.

B. Appeal of initial decision to the NOAA Administrator

The divers filed petitions for review of the Administrative Law Judge's decision with the NOAA Administrator in late 1990. The grounds for which an appeal may be brought are also set out in NOAA's procedural regulations, at [15 C F R § 904.273](#). The NOAA Administrator found that the defendants' petition did not satisfy the regulatory requirements, but reviewed the transcripts and the case history. The Administrator found no basis for granting an appeal and denied defendants' petition. [Clifton B. Craft, 6 O.R.W. 684, 687 \(1992\)](#).

C. Challenge in U.S. District Court to the constitutionality of the regulation prohibiting alteration of the seabed

Pursuant to former 16 U.S.C. § 1437(c) (1988), the defendants then filed a lawsuit in U.S. district court attacking the NOAA decision (the ALJ's initial decision was rendered a final agency action as a result of the Administrator's denial of the appeal). The plaintiffs argued that the district court should overturn the agency decision because the regulation prohibiting alteration of the seabed was unconstitutionally vague and overbroad, the prohibition against the removal of historical resources was ultra vires and unlawfully rescinded plaintiffs' pre-existing rights to dive and salvage, and the penalties assessed by NOAA were disproportionate to the harm caused.

The matter was briefed and argued by the parties and submitted to the district court on plaintiffs' motion for summary judgment. The court found that the language contained in the prohibition against altering the seabed was sufficiently clear, especially as applied to plaintiffs' conduct, and the challenge to the validity of the prohibition was rejected. Order Denying Plaintiffs' Motion for Summary Judgment at 3, *Craft v. National Park Service*, No. CV 92-1769-SVW (1992), [https://coast.noaa.gov/data/Documents/OceanLawSearch/Craft%20v.%20Nat%20Park%20Serv.,%20CV%20No.%2092-1769%20\(C.D.%20Cal.%201992\).pdf?redirect=301ocm](https://coast.noaa.gov/data/Documents/OceanLawSearch/Craft%20v.%20Nat%20Park%20Serv.,%20CV%20No.%2092-1769%20(C.D.%20Cal.%201992).pdf?redirect=301ocm).

The court also rejected plaintiffs' claim that their prior salvage activities on shipwrecks within the marine sanctuary created a preexisting right under the National Marine Sanctuaries Act (NMSA). *Id.* at 4. The court found that the Secretary of Commerce acted within his authority to regulate plaintiffs' right to continue engaging in salvage activities within the sanctuary. The court found that prohibiting removal of historical resources implements the statute's purpose to protect and preserve sanctuary resources, and to promote and support research, education, recreation, and the aesthetic value of the area. The court noted that if plaintiffs' argument that preexisting rights superseded the sanctuary regulations was accepted, it would render the statute meaningless. *Id.* The Secretary would be prohibited from preventing any activity, no matter how destructive, as long as the person engaging in the conduct had done so before the designation of the sanctuary. *Id.* The court upheld the validity of the regulation prohibiting the removal of historical resources.

Next, the district court rejected plaintiffs' claim that admiralty law gave them the right to remove artifacts from the shipwrecks. The court applied the analysis in *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985), a landmark case for the protection of UCH resources in National Parks, in which the Eleventh Circuit found that when the Federal Government creates a national park in navigable waters, "constructive possession" of resources beneath those waters vests in the United States. *Id.* at 1514. In passing the National Marine Sanctuary Act, Congress asserted its "constructive possession" of the Channel Islands National Marine Sanctuary. Order Denying Plaintiffs' Motion for Summary Judgment at 6 (citing *Klein*, 758 F.2d at 1514). The court held that in so doing, the United States had refused plaintiffs' salvage services. *Id.* at 7. Because the Federal Government was in "constructive possession" of the Channel Island Marine National Sanctuary, the regulations did not violate the plaintiffs' admiralty rights. *Id.*

Finally, the court found that the penalties set by the ALJ were warranted in law and justified in fact. All of the penalties were within the statutory limit and even the high penalty assessed against the divemaster was not an abuse of discretion because it was based on assessing the maximum penalty for two violations.

D. Appeal to the Ninth Circuit on the constitutionality of the regulation prohibiting alteration of the seabed

The only issue that the plaintiffs/appellants raised on appeal to the Ninth Circuit was that the prohibition against altering the seabed was unconstitutionally overbroad and vague. In its decision, the

court observed that various factors affect its analysis. *Craft v. National Park Service*, 34 F.3d 918 (9th Cir. 1994). The degree of vagueness tolerated by the Constitution is greater for a statute providing for civil sanctions than one involving criminal penalties because the consequences of imprecision are less severe. *Id.* at 922. Additionally, a scienter requirement may mitigate vagueness. *Id.* Finally, the court noted that the most important factor is whether the law threatens to inhibit the exercise of constitutionally protected rights, in which case a more stringent vagueness test applies. *Id.* (citing *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982); *United States v. Doremus*, 888 F.2d 630, 635 (9th Cir. 1989)).

Applying these factors, the Ninth Circuit upheld the regulation. It noted that the regulation only provided for civil, not criminal, penalties. *Id.* Next, it found that appellants' excavation activities were clearly prohibited by the language of the regulation. *Id.* Additionally, the court found that appellants were aware that their activities were prohibited, as evidenced by the announcement made at each site visited that the sanctuary wrecks were protected. *Id.* at 923. The court noted that, "Given these undisputed facts, appellants' claims that they lacked fair warning that their actions were prohibited ring hollow." *Id.* The court ruled that the regulation was neither overbroad nor unconstitutionally vague as applied to appellants' conduct, and upheld the district court decision.

IV. Impact of *Craft v. National Park Service*

The decision of *Craft* fundamentally modified maritime law by confirming that salvage activities in national marine sanctuaries are subject to the NMSA and other applicable federal statutes. While it questioned the application of the law of salvage to historic sanctuary resources, it clarified that even if there are rights under such law, the activities are still subject to the regulations requiring a permit to move, remove, or salvage historic sanctuary resources, as well as to make any alteration of the seabed in a National Marine Sanctuary. The divers asserted that under the maritime law of salvage, they had preexisting rights to salvage in the Channel Islands National Marine Sanctuary. *Id.* at 921, n.2. But, preexisting rights typically involve a preexisting lease, license, or permit from a federal agency. SHERRY HUTT, CAROLINE M. BLANCO, OLE VARMER, *HERITAGE RESOURCES LAW* 476 (Wiley 1999). Their argument that rights under salvage law constitute preexisting rights under the NMSA was rejected in this case, as it was in *United States v. Fisher*. *Id.* Thus, salvors must obtain a sanctuary permit before they conduct any salvage activities in a National Marine Sanctuary. Consistent with the court's authority under the Constitution, the court recognized that Congress, in enacting the NMSA, altered the law of salvage by requiring compliance with the NMSA, regardless of any right to salvage. After *Klein, Craft*, and *Fisher*—which relied on the decisions of *Klein* and *Craft*—it is now a matter of law that historic sanctuary resources are protected from unauthorized salvage, and salvors may be subject to civil and criminal penalties unless they obtained a permit for their activities in a National Marine Sanctuary. *See also* NOAA, *Craft v. National Park Service Case Summary*, COAST.NOAA.GOV., <https://coast.noaa.gov/data/Documents/OceanLawSearch/Craftv.NatlParkServ.CaseSummary.PDF?redirect=301ocm>.

The *Craft* decision resulted in a vast improvement to the penalty scheme for National Marine Sanctuary Violations. As the ALJ made very apparent in his decision, he would have assessed higher, more appropriate penalties if the regulations had not capped the penalty at \$50,000 per violation per day, because "such inadequate assessments do nothing to discourage such predatory activity." *In re Craft*, 6 O.R.W. 150, 182 (1990), 1990 WL 322728 (Oct. 17, 1990). The total penalty assessed against the plaintiffs was \$132,000, while the ALJ assessed a \$100,000 fine against the divemaster for his blatant disregard of the Sanctuary regulations. But even this fine was not high enough to counteract the damage the divers caused. Congress increased the maximum civil penalty from \$50,000 per violation per day to \$100,000 per violation per day, after the Administration submitted an amendment to Congress, citing the ALJ decision as the primary evidence of the need to raise the fines. 16 U.S.C. § 1437(d) (2015) (presently over \$140,000 per day per violation accounting for inflation). *Craft* is still good law and may be relied upon in any future enforcement cases regarding UCH prosecution in National Marine Sanctuaries.

While the Federal Government did not pursue criminal prosecution under the NSMA in the *Craft* case, in future UCH cases, ARPA 6(c) and the NSPA may be available for criminal penalties. These statutes could be used for cases including looting or unauthorized salvage of UCH sites, like the *Titanic* in the high seas, or even for UCH located in the lands and waters of foreign countries. For example, the trafficking provision of ARPA has been used successfully by the Department of Justice for the prosecution of international cultural heritage violations, as discussed in the Marous article. *See* MAROUS, *supra*, at 16–21. But the *Craft* case settled the conflict between salvage law and the NMSA by confirming that rights under salvage law do not constitute preexisting rights and, therefore, any salvage activity in a sanctuary requires a permit, regardless of whether the salvor had previous salvage rights. After *Craft*, if a salvor works a wreck in a sanctuary without a permit, they are subject to enforcement proceedings under the National Marine Sanctuaries Act and, potentially, ARPA and NSPA. The *Craft* case has been used by NOAA as support in other National Marine Sanctuaries Act enforcement cases, like *United States v. Fisher*, and should still be relied on today to protect UCH sites in Sanctuaries. ❖

ABOUT THE AUTHORS

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* *This article was written in tribute to Theodore (Ted) M. Beuttler, who passed suddenly on October 9, 2015, while doing something he loved: playing hockey. Mr. Beuttler worked for NOAA as an attorney for 32 years. Mr. Beuttler was the lead NOAA GC enforcement attorney in *Craft v. National Park Service*, and much of this article is taken from the summary he wrote on the case. Mr. Beuttler was a passionate and articulate attorney for the oceans and sanctuaries and an extraordinary bass player who will be missed, but not forgotten.*

The views and opinions expressed in this article are the authors' own and do not necessarily reflect the views of NOAA, the Department of Commerce, or the United States Government.

Cultural Property Crime in the U.S.: Overview of the FBI Art Crime Team Investigations from 2005-2015

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I. Introduction

Authorized in 2004, and stood up in 2005 with eight Special Agents, the Art Crime Team developed in response to the looting of the National Museum of Iraq in Baghdad in the early days of the war in 2003. The Art Crime Team, initially created as a rapid deployment team that would be used when singular art crime emergencies arose, has evolved into a well-integrated cadre of investigators directing their attentions to a variety of cultural property crimes under federal jurisdiction. Today the Art Crime Team consists of 16 Special Agents selected through competitive canvass, who work cultural property investigations as a collateral duty. The 16 Special Agents are assigned to field offices around the country, where they may open their own investigations or advise other Special Agents in their area of responsibility about cultural property investigations. Located in the Transnational Organized Crime – East Section of the Criminal Investigative Division, headquarters program staff support the team and coordinate efforts at the national level. The Department of Justice Human Rights Violations and Special Prosecutions Section provides assistance in prosecutions, as does the U.S. Attorney’s office in each district. Overseas, the Art Crime Team works with the FBI Legal Attaché in U.S. Embassies around the world. *See Art Theft*, FBI.GOV, https://www.fbi.gov/aboutus/investigate/vc_majorthefts/arttheft/arttheft.

Since inception, the team has recovered more than 11,850 objects, valued at over \$160 million, and returned them to their rightful owners. More than 88 successful prosecutions have resulted in convictions and incarceration of offenders. Examining the breadth of violations investigated over the last 10 years provides an introduction to the scope and nature of the problem in the United States at the federal and international level.

II. National Stolen Property Act, 18 U.S.C. § 2314 (1949)

The National Stolen Property Act, which is commonly referred to as the Interstate Transportation of Stolen Property statute, is the most frequently cited violation in cases of cultural property theft. Statistics drawn from the National Stolen Art File (NSAF) indicate that, in the United States, most art or other forms of cultural property are stolen during residential burglaries. Jurisdiction over art theft remains local unless it is determined the stolen property (valued at \$5000 or more) has crossed state or international boundaries or has been stolen from a museum (*See Part III, infra.*). At that point, the crime may enter federal jurisdiction.

Perpetrators of residential burglaries are not usually specialists in art theft, but merely opportunistic thieves who steal artwork along with jewelry, cash, electronics, and anything else that is easily removed and sold for cash. The art is usually sold for pennies on the dollar at the nearest flea market or antiques dealer. Even if reported stolen, art does not have serial numbers, and it cannot be

tracked readily in stolen property databases like those of the National Crime Information Center. Thus, the FBI created the NSAF in 1979 to record stolen artwork by entering unique identifying features and photographs into an index card file. The NSAF now is a searchable online database accessible to law enforcement and the public. Each year a number of missing pieces are identified and recovered. However, the overall recovery rate is quite low: under seven percent. *See National Stolen Art File (NSAF)*, FBI.GOV, https://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft/national-stolen-art-file.

In 2008, the FBI utilized the NSAF during an investigation of an art theft ring in the Pacific Northwest. A painting by J. G. Brown turned up in New York when a dealer who conducted due diligence in the NSAF found that the painting had been stolen earlier from a residence in Seattle. The FBI Art Crime Team agent traced the stolen painting in New York to one Jerry Hugh Christy in Seattle. Christy met art dealer Kurt Lidtke while in prison for burglary. Lidtke had been a prominent art dealer in Seattle, but went to prison for selling paintings on consignment without informing or paying the owners of the artwork. Together Christy and Lidtke planned to steal valuable artwork from Seattle collectors known to Lidtke from his time as an art dealer. Once out of prison, they put the plan into motion, obtained several paintings through burglary, and attempted to sell them. The buyer they contacted was an undercover agent attached to the Art Crime Team. In 2010, Kurt Lidtke pleaded guilty to conspiracy to transport stolen property in interstate commerce and was sentenced to four years in prison and three years of supervised release. Jerry Hugh Christy was sentenced to 10 years in prison. *See Press Release, U.S. Attorney's Office, Western District of Washington, Former Seattle Art Dealer Sentenced to Prison for Art Theft Conspiracy Former Gallery Owner Worked with Burglar to Target and Steal Expensive Art* (Feb. 11, 2011), <https://www.fbi.gov/seattle/press-releases/2011/se021111a.htm>.

Another art world insider betrayed the trust of his former employer in stealing dozens of works on paper. James Meyer, former studio assistant to Jasper Johns, a major American painter, targeted the artist for theft. Meyer worked for Johns for over 25 years and was responsible for maintaining a file containing drawings by Johns, not yet completed, and not authorized to be placed in the art market. During his tenure as Johns' employee, Meyer removed over 80 individual pieces of art from the studio file and from elsewhere in Johns' studio in Connecticut. In an elaborate scheme to market the works, Meyer created fictitious inventory numbers, inserted fake pages in the ledger of registered pieces in John's studio, and provided notarized certifications stating each piece was authentic and that Meyer was the rightful owner of the piece. Ultimately, a gallery in Manhattan, where the artworks were transported, sold 37 works of art on Meyer's behalf for a total of approximately \$10 million. Meyer pled guilty to one count of interstate transportation of stolen goods. He was sentenced in April 2015 to 18 months in prison, two years of supervised release, and forfeiture of \$3,992,500. The court also ordered restitution in the amount of \$13,455,719. *See Press Release, U.S. Attorney's Office, Southern District of New York, Former Studio Assistant to Jasper Johns Sentenced in Manhattan Federal Court to 18 Months in Prison for Scheme to Sell Millions of Dollars of Stolen Johns Works* (Apr. 23, 2015), <https://www.fbi.gov/newyork/press-releases/2015/former-studio-assistant-to-jasper-johns-sentenced-in-manhattan-federal-court-to-18-months-in-prison-for-scheme-to-sell-millions-of-dollars-of-stolen-johns-works>.

Each year, the FBI recovers and returns stolen artwork to its owner, even in cases where the theft occurred many years previously. This includes objects like the *Portrait of a Young Man* by Krzysztof Lubieniecki, stolen from the National Museum of Poland. This Polish national treasure was believed to have been looted by the Nazis in World War II. It was later discovered in Austria by a U.S. service member, who brought it back to the United States. Years later, unwitting purchasers in Columbus, Ohio, purchased the artwork. The family in Columbus willingly agreed to turn over the painting to Polish authorities once it had been identified as the painting from the Polish National Museum. The FBI facilitated the process. Sixty years or more after the theft, the *Portrait of a Young Man* was returned to Poland. *See Press Release, Public Affairs Specialist Todd Lindgren, FBI Cincinnati, FBI Announces Return of Painting Believed Looted by Nazis During WWII* (Sept. 28, 2015), <https://www.fbi.gov/cincinnati/press-releases/2015/fbi-announces-return-of-painting-believed-looted-by-nazis-during-wwii>.

Because this was an inventoried piece from a national collection, the process of identification and recovery was relatively straightforward. However, in other cases of artwork stolen or looted during World War II, the litigation can be complicated and the process of adjudication very lengthy.

Cultural property also includes valuable musical instruments. In June 2015, the 1734 Ames Stradivarius, valued at \$5 million, was returned to the heirs of the owner, Roman Totenberg. Totenberg was a distinguished violinist and professor of music at the Longy School of Music in Cambridge, Massachusetts. Following a concert in May 1980, the Ames Stradivarius was stolen, along with two valuable antique bows. In June 2015, an individual who had received the violin from a relative brought it to New York for appraisal. The appraiser contacted the FBI, having recognized the violin as the one stolen from Totenberg in 1980. The Ames Stradivarius has very distinctive markings, as well as an internal label that made positive identification possible. Because Roman Totenberg died in 2012, the FBI contacted his heirs and, with the U.S. Attorney's Office in the Southern District of New York, arranged to have the violin returned to the Totenberg family. *See* Press Release, U.S. Attorney's Office, Southern District of New York, Manhattan U.S. Attorney and FBI Announce Return of Stolen Stradivarius Violin to Heirs of Musician Roman Totenberg (Sept. 28, 2015), <https://www.fbi.gov/newyork/press-releases/2015/manhattan-u.s.-attorney-and-fbi-announce-return-of-stolen-stradivarius-violin-to-heirs-of-musician-roman-totenberg>.

Archaeological artifacts stolen from other countries and transported to the United States for sale are also a recurring problem. The Art Crime Team works closely with the Office of International Affairs, Legal Attaches in overseas embassies, and representatives of foreign countries when a claim is made identifying stolen artifacts in the United States. In 2014, the Art Crime Team in New York recovered a set of first to third century AD tombstones originating on the western coast of Turkey. The artifacts were stolen from the Republic of Turkey and were brought to the FBI's attention by Turkish authorities when the items appeared for sale on the Internet. Turkish authorities had listed the sculptures with Interpol's Stolen Works of Art database. In this instance, the dealer voluntarily turned over the artifacts for repatriation to Turkey, and the FBI facilitated the exchange. *See Photo Gallery: FBI Returns Ancient Sculptures to Turkey*, FBI.GOV (Feb. 29, 2016), https://www.fbi.gov/news/news_blog/fbi-returns-ancient-sculptures-to-turkey/photo-gallery-fbi-returns-ancient-sculptures-to-turkey.

In another antiquities case, the FBI worked closely with law enforcement in Ecuador to recover pre-Columbian artifacts and convict the individual who proposed selling the illicit artifacts in the United States. The matter originated when an email was sent to the International Council of Museums (ICOM) in Paris, France, soliciting the sale of some 600 pre-Columbian artifacts from Ecuador. Officials at ICOM contacted Interpol in France. Interpol then contacted the Ecuadorian National Police, who in turn contacted the FBI. The FBI in Miami then began an undercover operation utilizing the Art Crime Team. During the operation, undercover agents communicated with the defendants and, with the assistance of an expert in the field, confirmed that the articles being solicited were authentic pre-Columbian artifacts. The Ecuadorian authorities also seized approximately 600 artifacts from the same collection in Ecuador. On July 20, 2006, Edward Nakache, Susan Aviles, and Cecilia Marcillo-Aviles were arrested in Miami for the illegal importation of pre-Columbian artifacts into the United States, in violation of **18 U.S.C. Sections 545 and 2315**. In 2008, Cecilia Marcillo-Aviles pleaded guilty and was sentenced to time served. *See* David Tarler, *Enforcement Actions*, in YEARBOOK OF CULTURAL PROPERTY LAW 2008 151–153 (Sherry Hutt, ed., 2008).

III. Theft of Major Artwork Act, 18 U.S.C. § 668 (1994)

Enacted in the wake of the Isabella Stewart Gardner Museum theft in 1990, the Theft of Major Artwork Act makes it a federal offense to steal or knowingly dispose of a cultural object valued at more than \$5000 and over 100 years old, or valued at \$100,000 if under 100 years old, that was stolen from a museum. It also increases the statute of limitations to 25 years and does not require that the stolen object

cross state or international borders. In the last 10 years, this statute has been applied to thefts from a range of institutions, including the American Numismatic Association Money Museum in Colorado, the Beinecke Rare Books and Manuscripts Library at Yale University, and the Maryland State Historical Society.

In thefts from museums, the perpetrator is often an insider. Wyatt Yeager was the collections manager at the American Numismatic Association (ANA) Money Museum in Colorado Springs, Colorado, when he stole close to \$1 million in coins in 2007. He later sold those coins at auctions in the United States and overseas. Yeager entered into a plea agreement in 2012 and was sentenced to 27 months in federal prison and two years of supervised release. He was ordered to pay \$948,505 to the ANA in restitution. *See* Press Release, U.S. Attorney's Office, District of Delaware, California Man Enters Plea in Nearly \$1,000,000 Theft, (Jan. 12, 2012), <https://www.fbi.gov/denver/press-releases/2012/california-man-enters-plea-in-nearly-1-000-000-theft>.

Edward Forbes Smiley, III and Barry Landau were insiders of another sort. Both were dealers in archival rarities who also conducted extensive research in museums, archives, historical societies, and libraries. An astute librarian discovered Smiley after he had dropped an X-acto knife on the library floor in the rare documents room of the Beinecke Rare Books and Manuscripts Library at Yale University. After extensive investigation, Smiley pleaded guilty to stealing 97 rare maps from collections all over the world. In September 2006, he was sentenced to 42 months in prison and ordered to pay nearly \$2 million in restitution. *See Stolen Treasures: The Case of the Missing Maps*, FBI.GOV (Sept. 28, 2006), <https://www.fbi.gov/news/stories/2006/september/maps092806>.

Barry Landau and his colleague, Jason Savedoff, were caught in similar circumstances. Between 2010 and 2011, the pair visited and stole rare archival materials from museums, including the Maryland Historical Society, the Historical Society of Pennsylvania, the Connecticut Historical Society, the University of Vermont, the New York Historical Society, and the Franklin D. Roosevelt Presidential Library. They used specially modified clothing with concealed pockets to remove the items from the museums. They also removed catalogue cards or altered finding aids to obscure the thefts and later removed museum markings from the stolen documents. In July 2011, curators at the Maryland Historical Society became suspicious of Landau and Savedoff. The curators called the police, who discovered that 79 documents had been hidden inside a computer bag located in one of the museum lockers. Savedoff had the key to the locker. After a search of Barry Landau's apartment in New York, over 4,000 of the 10,000 documents were identified as stolen. In June 2012, Landau was sentenced to seven years in prison, followed by three years of supervised release, for conspiracy and theft of historical documents from museums in Maryland, Pennsylvania, New York, and Connecticut, and for selling selected documents for profit. Landau was ordered to pay restitution totaling \$46,525 to three dealers who unwittingly purchased stolen documents from him and to forfeit all the documents recovered during the searches of his New York apartment. Savedoff was sentenced to a year and a day in prison followed by two years of supervised release for conspiracy and theft of historical documents. *See*, Press Release, U.S. Attorney's Office, District of Maryland, *Barry Landau Sentenced to Seven Years in Prison for Stealing Valuable Historical Documents* (June 27, 2012), <https://www.fbi.gov/baltimore/press-releases/2012/barry-landau-sentenced-to-seven-years-in-prison-for-stealing-valuable-historical-documents> ; Press Release, U.S. Attorney's Office, District of Maryland, *Barry Landau Conspirator Sentenced to Prison in Scheme to Steal Valuable Historical Documents* (Nov. 9, 2012), <https://www.fbi.gov/baltimore/press-releases/2012/barry-landau-conspirator-sentenced-to-prison-in-scheme-to-steal-valuable-historical-documents>.

IV. Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa–470mm (1979) and Native American Graves Protection and Repatriation Act, 18 U.S.C. § 1170 (a)-(b) (1990)

Unlike many other nations, the United States does not have a comprehensive cultural patrimony law covering all aspects of the disposition of archaeological objects or other cultural property in the United States. Federal laws cover a limited subset of cultural property, primarily those items that emanate from federal land or from Native American graves. The objective of the Archaeological Resources Protection Act (ARPA) is to provide more effective law enforcement to protect public archeological sites. Primary threats include the unauthorized excavation and theft (looting) of cultural objects and human remains. It is often applied together with the Native American Graves Protection and Repatriation Act (NAGPRA). NAGPRA details the rights of Native American descendants, Indian tribes, and Native Hawaiian organizations with regard to the treatment, repatriation, and disposition of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony, with which they can show a relationship of lineal descent or cultural affiliation. Most of the NAGPRA statute relates to archaeological collections in federal museums and other federally funded institutions. Section 4 is relevant to federal law enforcement in that it stipulates that illegal trafficking in human remains and cultural items may result in criminal penalties. Because of the focus on federal land, Bureau of Land Management, Forest Service, and National Park Service agents often investigate violations.

In 2009, FBI and Bureau of Land Management agents, joined by the U.S. Marshals and local and state law enforcement partners, simultaneously arrested defendants and executed search warrants in Utah. This followed a more than two-year undercover operation targeting a network of individuals allegedly involved in the sale, purchase, and exchange of artifacts illegally taken from public or Indian lands in the Four Corners region of the country. Twelve indictments charged 24 defendants with violations of ARPA and NAGPRA. Arrest warrants were issued for 23 of the 24 individuals charged as a part of the investigation. The case involved 256 artifacts, totaling \$335,685, from archaeological sites in Utah, Colorado, and New Mexico. The illegally obtained relics included decorated Anasazi pottery, an assortment of burial and ceremonial masks, a buffalo headdress, and ancient sandals known to be associated with Native American burials. This investigation represents the nation's largest investigation of archaeological and cultural artifact thefts. The cases came to trial in 2011, and every defendant pleaded guilty. However, there was a substantial backlash to the arrests. *See* Andrew Ramonas, *Hatch Rebukes Holder for Indian Artifact Raid*, (Jan. 5, 2016), <http://www.mainjustice.com/2009/06/17/hatch-rebukes-holder-for-indian-artifact-raid/>. While Native American representatives expressed strong support for the case, the Judge presiding at the sentencing of one of the defendants bypassed the sentencing guidelines for a lesser, non-custodial sentence, in a clear reflection of local feeling on the matter. *See* Patty Henetz, *Redds dodge prison in artifact sentencing*, THE SALT LAKE TRIBUNE, Sept. 16, 2009, http://archive.sltrib.com/story.php?ref=/news/ci_13350722.

More recently, on August 5, 2015, Mark M. Beatty, 56, of Wellston, Ohio, pleaded guilty in U.S. District Court to violating NAGPRA by purchasing human remains of Native Americans. *See* U.S. Attorney's Office, Southern District of Ohio, *Jackson County Man Pleads Guilty to Illegally Purchasing Native American Human Remains*, (Jan. 4, 2016), <https://www.fbi.gov/cincinnati/press-releases/2015/jackson-county-man-pleads-guilty-to-illegally-purchasing-native-american-human-remains>. Mr. Beatty purchased Native American remains from diggers who had been seen digging in a rock shelter in Salt Creek Valley in Jackson County, Ohio. The remains were identified by a physical anthropologist and will be repatriated for burial by federally recognized tribes associated with the remains. In a plea agreement, Mr. Beatty agreed to three years of probation, including three months of house arrest, a \$3,500 fine, and restitution of \$1,000, which is to be paid to the Miami Tribe of Oklahoma and will be used for the reburial of the remains.

V. Fraud by mail and fraud by wire, radio or television, 18 U.S.C. §§ 1342 and 1343

Art fraud in the United States is as extensive and damaging as art theft, if not more so. Fake art circulating in the market place devalues the artist's authentic work and defrauds the buyer. Fraud and forgery affect every level of the art world and every place where there is a market for art. Whether a \$1000 fake print or a \$10 million fake oil painting, the modus operandi tends to be the same: create fake artwork, add a false signature, produce false provenance documents, and make up a plausible story. Prints are particularly vulnerable to fraud because high-end photocopiers can replicate original prints with great efficiency and very low cost. Oil paintings and sculpture are somewhat more complex to fake. However, copying masterpieces in museums or private collections is an accepted method of learning to be an artist. There is nothing illegal in a copy or replica until it is passed off as authentic or deliberately misidentified in an attempt to defraud.

At the upper echelons of the market is Glafira Rosales. Rosales was a part-time art dealer who sold more than 60 never-before-exhibited and previously unknown works of art that she claimed were by some of the most famous artists of the 20th century: Jackson Pollock, Mark Rothko, and Robert Motherwell among them. She sold the works to two prominent Manhattan art galleries for approximately \$33.2 million. The galleries, in turn, sold the works to victims of Rosales' crime for more than \$80 million. The works were created by a painter in Queens, NY. In some instances, the painter signed the purported artist's name to the works, such as Jackson Pollock, but in other cases, Rosales' co-conspirator applied the false signatures. Rosales and her co-conspirator gave the works the false patina of age after receiving the works from the painter. They also created a history that involved a Swiss collector who wished to remain anonymous and a Spanish collector with similar concerns. Additionally, Rosales filed false tax returns to mask the fabrication of these clients. Glafira Rosales pleaded guilty to participating in a scheme to sell more than 60 fake works of modern art to two New York art galleries. Rosales also pled guilty to conspiracy to sell the fake works, conspiracy to commit money laundering, money laundering, and several tax crimes related to the fake art scheme. Three co-conspirators, including the painter, were indicted in April 2014, and two of them are waiting to be extradited to the United States. *See* U.S. Attorney's Office, Southern District of New York, *Art Dealer Pleads Guilty in Manhattan Federal Court to \$80 Million Fake Art Scam, Money Laundering, and Tax Charges*, (Jan. 6, 2016), <https://www.fbi.gov/newyork/press-releases/2013/art-dealer-pleads-guilty-in-manhattan-federal-court-to-80-million-fake-art-scam-money-laundering-and-tax-charges>; *Three Defendants Charged in Manhattan Federal Court in Connection with \$33 Million Art Fraud Scheme*, (Jan. 6, 2016), <https://www.fbi.gov/newyork/press-releases/2014/three-defendants-charged-in-manhattan-federal-court-in-connection-with-33-million-art-fraud-scheme>.

At the mass-market level, cable television programs provide a sales platform for fake art that can reach thousands of potential victims. Between 2002 and 2006, Fine Art Treasures, based in La Canada, California, sold artwork, primarily prints purported to be by Picasso, Chagall, Dali, and others, on cable television. They claimed these works of art had been found at "estate liquidations all over the world." In fact, Kristine Eubanks and her husband, Gerald Sullivan, sold fake and forged art that they had bought from suppliers, as well as forgeries they had printed themselves and signed on behalf of the artists. In addition, Eubanks and others also rigged the bidding for the auction process by arranging for fake bids to be announced on the program to falsely drive up prices for the art they sold to the public. They also provided fake certificates of authenticity and false appraisals in support of the scam. Fine Art Treasures brought in over \$20 million from more than 10,000 victims across the country. Federal authorities seized approximately \$3.8 million from Eubanks' bank accounts in order to offer restitution to the thousands of victims. Eubanks pled guilty to conspiracy to commit mail fraud, wire fraud, and interstate transportation of stolen property, and received a sentence of 84 months. Gerald Sullivan was sentenced to four years in prison. The on-air auctioneer, James Mobley, was sentenced to 60 months in prison. *See* U.S. Attorney's Office, Central District of California, *La Cañada Woman Sentenced to Seven Years in Prison for Selling*

Millions of Dollars of Fake Art Through Nationwide TV Art Auction Program, (2016), <https://www.fbi.gov/losangeles/press-releases/2010/la040610.htm>; *Third Defendant in \$20 Million Scam That Sold Fake Art Nationwide Via TV Auctions Sentenced to Federal Prison*, (Jan. 7, 2015), <https://www.fbi.gov/losangeles/press-releases/2010/la102610.htm>.

VI. Emerging threats

In February 2015, the United Nations Security Council unanimously passed [Resolution 2199](#), which obligates member states to take steps to prevent terrorist groups in Iraq and Syria from receiving donations and from benefiting from trade in oil, antiquities, and hostages. In August 2015, the FBI alerted art collectors and dealers to be particularly careful trading Near Eastern antiquities, warning that artifacts plundered by terrorist organizations such as ISIL are entering the marketplace. The FBI received credible reports that U.S. persons have been offered cultural property that appears to have been recently removed from Syria and Iraq. The following advice was offered on the FBI Web site:

- Please be cautious when purchasing items from this region. Keep in mind that antiquities from Iraq remain subject to Office of Foreign Assets Control sanctions under the Iraq Stabilization and Insurgency Sanctions Regulations (31 C.F.R. part 576).
- Purchasing an object looted and/or sold by the Islamic State may provide financial support to a terrorist organization and could be prosecuted under 18 U.S.C. § 233A.
- Robust due diligence is necessary when purchasing any Syrian or Iraqi antiquities or other cultural property in the U.S. or when purchasing elsewhere using U.S. funds.

In addition to requesting robust due diligence, the FBI requested cooperation from individuals and institutions involved in the trade, and professional and academic communities in keeping the market free from looted objects that might fund ISIL activities. See, *ISIL and Antiquities Trafficking: FBI Warns Dealers, Collectors About Terrorist Loot*, (Jan. 7, 2016), <https://www.fbi.gov/news/stories/2015/august/isil-and-antiquities-trafficking>. ❖

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Cultural Carnage: Considering the Destruction of Antiquities Through the Lens of International Laws Governing War Crimes

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“The first step in liquidating a people is to erase its memory. Destroy its books, its culture, its history.” Milan Kundera, *THE BOOK OF LAUGHTER AND FORGETTING*

I. Introduction

In recent months, the world has collectively cringed while watching ISIL militants destroy some of the most treasured artifacts and landmarks in the Middle East. In February 2015, ISIL posted a video showing men destroying ancient sculptures in the Mosul Museum in Iraq, *see* Eric Gibson, *The Destruction of Cultural Heritage Should be a War Crime*, *WALL STREET JOURNAL* (Mar. 2, 2015), <http://www.wsj.com/articles/the-destruction-of-cultural-heritage-should-be-a-war-crime-1425073230>, and in August 2015, it was confirmed that ISIL militants used explosives to destroy the famous Temple of Bel and the Baalshamin Temple in Palmyra, Syria. *See* News Release, *Director-General of UNESCO Irina Bokova Firmly Condemns the Destruction of Palmyra's Ancient Temple of Baalshamin, Syria*, UNESCO (Aug. 24, 2015), <http://en.unesco.org/news/director-general-irina-bokova-firmly-condemns-destruction-palmyra-s-ancient-temple-baalshamin>. This article explores such acts, not as isolated instances of vandalism, but rather a form of systematic cultural cleansing, rising to the level of serious international crimes.

II. Destruction, past and present

The large-scale, systematic destruction of prized art, artifacts, and architecture can be seen throughout history, most notably during times of conflict, mass terror, and genocide. During World War II, the Nazis famously appropriated and destroyed thousands of works of art and cultural artifacts through the organized, systematic looting of Jewish communities. *See* Jared Keller, *Why ISIS's Destruction of Ancient Art is More Than a War Crime*, *THE DAILY DOT* (Mar. 17, 2015), <http://www.dailydot.com/opinion/isis-war-crimes-genocide-ancient-art/>. In the 1970s, the Khmer Rouge regime destroyed temples and forbade any form of cultural expression during the conflict in Cambodia. *Id.*

In the early 1990s, attacks on cultural and religious landmarks were common during the wars in the former Yugoslavia. *See* Alex Whiting, *The First Case for the ICC Prosecutor: Attacks on Cultural Heritage*, *JUST SECURITY* (Sept. 29, 2015), <https://www.justsecurity.org/26453/mali-icc-attacks-cultural-heritage/>. In 1991, the Old Town of Dubrovnik was shelled by the Yugoslav People's Army, resulting in the leveling of numerous historic monuments and institutions dedicated to religion and the arts, *see* Press

Release, *Appeals Judgement in the Case the Prosecutor v. Miodrag Jokic*, UNITED NATIONS (Aug. 30, 2005), <http://www.icty.org/en/press/appeals-judgement-case-prosecutor-v-miodrag-jokic>, and in 1993, the Mostar Bridge, an archeological symbol of unity, was reduced to rubble. See M. Keba M'Baye, *Final report of the United Nations Commission of Experts established pursuant to security council resolution 780 (1992), Annex XI*, UNITED NATIONS SECURITY COUNCIL (Dec. 28, 1994), <http://www.phdn.org/archives/www.ess.uwe.ac.uk/comexpert/ANX/XI.htm>. During the Bosnian War, symbols of Muslim culture were destroyed, including the Ferhad Pasha mosque in Banja Luka, see Peter Maass, *Cultural Property and Historical Monuments*, CRIMES OF WAR (2011), <http://www.crimesofwar.org/a-z-guide/cultural-property-and-historical-monuments/>, and throughout the entirety of the war, Serbian forces endeavored to eradicate all signs of Muslim culture from the region by destroying mosques, libraries, and other culturally significant sites. See Jared Keller, *Why ISIS's Destruction of Ancient Art is More Than a War Crime*, THE DAILY DOT (Mar. 17, 2015), <http://www.dailydot.com/opinion/isis-war-crimes-genocide-ancient-art/>.

More recently, in 2001, members of the Taliban destroyed Buddhist statues in the Bamiyan Valley in Afghanistan. See Alex Whiting, *The First Case for the ICC Prosecutor: Attacks on Cultural Heritage*, JUST SECURITY (Sept. 29, 2015), <https://www.justsecurity.org/26453/mali-icc-attacks-cultural-heritage/>. And during a 10-day period in 2012, members of Ansar Dine, a militant Islamist group associated with al-Qaeda in the Islamic Maghreb, reportedly directed attacks against religious buildings and historical monuments in Timbuktu, Mali. *Id.*

Presently, ISIL's destruction of cultural artifacts in Iraq and Syria has been systematic and widespread. As mentioned above, the first significant attack that garnered worldwide attention was the March 2015 destruction of Assyrian statues and other artifacts in the museum in Mosul, Iraq. Militants then razed and ransacked culturally significant sites at Nineveh, Nimrud, and Hatra. See Alexander A. Bauer, *The Destruction of Heritage in Syria and Iraq and Its Implications* (2015), <http://journals.cambridge.org/action/displayFulltext?type=1&fid=9673385&jid=JCP&volumeId=22&issueId=01&aid=9673380>. Smaller objects that were not destroyed were likely trafficked and sold on the black market, creating an illicit funding source and revenue stream for the terrorist organization. *Id.* As recently as August 2015, the Baalshamin Temple and the Temple of Bel in Palmyra, Syria were demolished. The Baalshamin Temple was built nearly 2,000 years ago and was one of the best preserved buildings in Palmyra, part of a larger site of monumental ruins in one of the "most important cultural centres of the ancient world." See News Release, *Director-General of UNESCO Irina Bokova Firmly Condemns the Destruction of Palmyra's Ancient Temple of Baalshamin, Syria*, UNESCO (Aug. 24, 2015), <http://whc.unesco.org/en/news/1339/>. Months earlier, the group destroyed numerous ancient statues and blew up historic tombs in the same ancient city, see Liam Stack, *ISIS Blows Up Ancient Temple at Syria's Palmyra Ruins*, THE NEW YORK TIMES (Aug. 23, 2015), http://www.nytimes.com/2015/08/24/world/middleeast/islamic-state-blows-up-ancient-temple-at-syrias-palmyra-ruins.html?_r=0, and during the same siege, an 83-year-old antiquities scholar, Khalid al-Asaad, was brutally beheaded when he refused to reveal the location of some of Palmyra's most valued treasures that were moved to safety shortly before ISIL's arrival. See Joanna Paraszczuk, *To Love Palmyra's 'Every Artifact and Every Stone'*, THE ATLANTIC (Aug. 24, 2015), <http://www.theatlantic.com/international/archive/2015/08/palmyra-isis-khalid-al-asaad-beheading-isis/402148/>.

III. Cultural cleansing: More than mere vandalism

The above-referenced historical and present-day examples of widespread destruction of cultural pieces and sites represent something more than mere vandalism or collateral consequences of conflict. Rather, this destruction is part of a strategy of cultural cleansing. Cultural cleansing is defined as the "deliberate and systematic destruction of a targeted group and their cultural heritage, with the intention of eliminating not only a people, but all physical evidence of them." See *Cultural Cleansing*, ANTIQUITIES

COALITION (Feb. 29, 2016), <http://theantiquitiescoalition.org/problems-and-solutions/cultural-cleansing/>. The aim is to “destroy identities, tear apart social fabrics, and fuel hatred.” See Irina Bokova, *Fighting Cultural Cleansing: Harnessing the Law to Preserve Cultural Heritage*, 36 HARV. INT’L REV. 4 (Aug. 24, 2015), <http://hir.harvard.edu/fighting-cultural-cleansing-harnessing-the-law-to-preserve-cultural-heritage/>.

In each of these historical and present-day contexts, extreme acts of violence were, and are, used in pursuit of ethnic cleansing or genocide—the goal is not only to eradicate individuals, but to eliminate an entire group. The UN Convention on the Prevention and Punishment of the Crime of Genocide, adopted in 1948, defines genocide as “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” See United Nations, Convention on the Prevention and Punishment of the Crime of Genocide, (Dec. 9, 1948), <https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf>. The systematic destruction of cultural artifacts is, and has been, one of many tools used to dominate, terrorize, and eradicate by eliminating a group’s collective memory, identity, and history. See ROBERT BEVAN, *THE DESTRUCTION OF MEMORY*, 8 (2006).

Ethnic cleansing seeks to subjugate entire populations, stripping them of their cultural and social individuality. The goal is total control and domination over every aspect of a population, to include their history and culture. See Jared Keller, *Why ISIS’s Destruction of Ancient Art is More Than a War Crime*, THE DAILY DOT (Mar. 17, 2015), <http://www.dailydot.com/opinion/isis-war-crimes-genocide-ancient-art/>. In this context, acts of cultural destruction work hand in hand with other tactics, such as torture and killings, as extremist regimes “attack anything that can sustain diversity, critical thinking, and freedom of opinion,” in order to destabilize, manipulate, and destroy. See Irina Bokova, *Fighting Cultural Cleansing: Harnessing the Law to Preserve Cultural Heritage*, 36 HARV. INT’L REV. 4 (Summer 2015), <http://hir.harvard.edu/fighting-cultural-cleansing-harnessing-the-law-to-preserve-cultural-heritage/>.

While the value of artifacts cannot be weighed against the value of human life, history shows us that crimes constituting cultural cleansing are inseparable from atrocity crimes against people and communities. See Jared Keller, *Why ISIS’s Destruction of Ancient Art is More Than a War Crime*, THE DAILY DOT (Mar. 17, 2015), <http://www.dailydot.com/opinion/isis-war-crimes-genocide-ancient-art/>. The connection between the crime of genocide and cultural attacks was recognized by the International Criminal Tribunal for the Former Yugoslavia, which noted, “where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.” See *Prosecutor v. Krstic*, Case No: IT-98-33-T, Judgment, ¶ 580, Int’l Crim. Trib. for the Former Yugoslavia (Aug. 2, 2001), <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>.

Such destruction is enormously symbolic, as noted by Haider Oraibi, Director of the Iraqi National Museum in Baghdad, who stated, “They’re just statues, but for us, they’re living things. We came from them, we are part of them. That is our culture and our belief.” He said that when he was told of the attack on Mosul’s museum, he broke down in tears because “it felt like someone wanted to kill you, like a murder.” See Bill Neely and Cheryl Simpson, *National Museum of Iraq Director Discusses ISIS Destruction of Relics*, NBC NEWS (June 29, 2015), <http://www.nbcnews.com/storyline/isis-terror/national-museum-iraq-director-discusses-isis-destruction-relics-n383706>. Cultural cleansing seeks to deny particular groups both their past and their future, as eloquently stated by Croatian writer Slavenka Drakulic. In speaking of the destruction of the Mostar Bridge, Drakulic wrote, “We expect people to die; we count on our own lives to end. The destruction of a monument to civilization is something else. The bridge in all its beauty and grace was built to outlive us; it was an attempt to grasp eternity. It transcends our individual destiny. A dead woman is one of us—but the bridge is all of us forever.” See ROBERT BEVAN, *THE DESTRUCTION OF MEMORY*, 8 (2006).

IV. International law, crimes against humanity, and war crimes

The United Nations (UN) recognizes cultural cleansing as a risk factor for impending crimes against humanity, genocide, and war crimes. *See Framework of Analysis for Atrocity Crimes: A Tool for Prevention*, United Nations (2014), http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf. Not only a risk factor, cultural cleansing is an atrocity crime in itself, as evidenced by its inclusion in numerous international treaties, conventions, regulations, and resolutions. Accordingly, following the destruction of numerous cultural heritage sites in Iraq, UN Secretary-General Ban Ki-moon noted, “the deliberate destruction of our common cultural heritage constitutes a war crime and represents an attack on humanity as a whole.” *See Press Release, Calling Attacks “a War Crime,” Secretary-General Strongly Condemns Destruction of Cultural Heritage Sites in Iraq*, United Nations (Mar. 6, 2015), <http://www.un.org/press/en/2015/sgsm16570.doc.htm>.

The Hague Convention of 1907 (otherwise known as the Hague Regulations) recognized the importance of cultural objects and landmarks. Article 56 states, “All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.” *See Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, Oct. 18, 1907, http://avalon.law.yale.edu/20th_century/hague04.asp. The Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in 1948, recognizes cultural heritage as a fundamental human right, stating in Article 27, “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” *See United Nations, The Universal Declaration of Human Rights* (Dec. 10, 1948), <http://www.un.org/en/universal-declaration-human-rights/index.html>.

The Geneva Conventions established the standards of international law for humanitarian treatment in times of war. According to Article 50 of the 1949 Geneva Convention I, Article 51 of the 1949 Geneva Convention II, and Article 147 of the 1949 Geneva Convention IV, “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” are grave breaches. *See Geneva Conventions I, II, and IV* (Aug. 12, 1945), <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>.

In response to the cultural cleansing committed by the Nazis, the Convention for the Protection of Cultural Property in the Event of Armed Conflict was adopted in 1954, providing a definition of cultural property and establishing obligations for the protection of cultural heritage by the parties. The definition of cultural property encompasses “moveable or immovable property of great importance,” to include monuments, architecture, art, manuscripts, books, museums, and libraries. The Convention recognizes that cultural property has suffered grave damage during past armed conflicts and remains in increasing danger of further destruction. It states that damage to cultural property of any people means “damage to the cultural heritage of all mankind,” and considers that the preservation of cultural heritage is “of great importance.” *See United Nations Educational, Scientific and Cultural Organization (UNESCO), Convention for the Protection of Cultural Property in the Event of Armed Conflict*, (May 14, 1954), http://portal.unesco.org/en/ev.phpURL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html.

In 1970, UNESCO concluded that “cultural property constitutes one of the basic elements of civilization and national culture,” and that “its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.” *See UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, (Nov. 14, 1970), http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html. Similarly, in 1972, UNESCO created a system of cooperation among nations to protect the world’s cultural heritage, noting that the destruction of any item of cultural

heritage is harmful, and that existing international conventions demonstrate the importance of safeguarding items of cultural heritage. *See* UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, (Nov. 16, 1972), <http://whc.unesco.org/en/conventiontext/>.

The Rome Statute of the International Criminal Court was adopted in 1998 and established the International Criminal Court (ICC), an international tribunal in The Hague, with jurisdiction over crimes of genocide, crimes against humanity, and war crimes. Pursuant to the Rome Statute, the deliberate destruction of items of cultural heritage is considered a war crime. *See* Rome Statute of the International Criminal Court, (July 17, 1998), <http://legal.un.org/icc/statute/romefra.htm>. (Note: The United States is not a party to the Rome Statute.). The Preamble recognizes that “all peoples are united by common bonds, their cultures pieced together in a shared heritage.” *Id.* The relevant portions of the Rome Statute are as follows:

Article 8:

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
...
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
...
 - (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (xvi) Pillaging a town or place, even when taken by assault;
 - (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
...
 - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) Pillaging a town or place, even when taken by assault.

Id.

In the aftermath of the Yugoslav Wars, the Second Protocol to the Hague Convention of 1954 was signed, establishing greater protections for cultural property. Additionally, the Second Protocol compelled member states to adopt measures to facilitate criminal prosecutions of attacks on items of cultural heritage. *See* UNESCO, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, (Mar. 26, 1999), http://portal.unesco.org/en/ev.php-URL_ID=15207 &URL_DO=DO_TOPIC&URL_SECTION=201.html. (Note: The United States is not a party to the Second Protocol.).

In 2003, in response to the destruction of the Buddhas of Bamiyan in Afghanistan, UNESCO issued a Declaration stating that, “cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights. *See* UNESCO, Declaration Concerning the Intentional Destruction of Cultural Heritage, (Oct. 17, 2003), http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html. Finally, on February 12, 2015, the United Nations Security Council unanimously adopted Resolution 2199, which makes all trade with Syrian antiquities removed from the country since March 15, 2011, illegal and confirms an earlier similar prohibition concerning cultural objects exported from Iraq. *See* United Nations Security Council, Resolution 2199, (Feb. 12, 2015), <http://www.un.org/press/en/2015/sc11775.doc.htm>.

In addition to the ICC, other international criminal tribunals recognize the destruction of cultural heritage as a crime. The Charter of the International Military Tribunal, which presided over the Nuremberg Trials, listed the plunder of public and private property, as well as the wanton destruction of cities, towns, or villages, as war crimes. *See* Charter of the International Military Tribunal, Nuremberg Trial Proceedings Vol. 1, (Aug. 8, 1945), <http://avalon.law.yale.edu/imt/imtconst.asp#art6>. Article 3(d) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) listed the “seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science” as a violation of the laws or customs of war. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, (May 25, 1993), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf. The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia established the power to charge suspects responsible for the destruction of cultural property in Cambodia between April 17, 1975, and January 6, 1979. *See* Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, (Oct. 27, 2004) (amended), http://www.eccc.gov.kh/sites/default/files/legaldocuments/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

War criminals have successfully been prosecuted by international criminal courts, in part, for their destruction of cultural heritage items and sites. The Nuremberg Trials after World War II was the first time individuals were held accountable for cultural war crimes—several Nazi officials were sentenced to death for numerous violations, which included the destruction of cultural property. *See* Peter Maass, *Cultural Property and Historical Monuments*, CRIMES OF WAR (2011), <http://www.crimesofwar.org/a-z-guide/cultural-property-and-historical-monuments/>. Specifically, Count 3(e) of the Nuremberg Indictment included numerous examples of the plunder of public and private property, consisting of art pieces, cultural valuables, and ancient texts. *See* International Military Tribunal, Nuremberg Trial Proceedings, Indictment: Count Three, (Oct. 6, 1945), <http://avalon.law.yale.edu/imt/count3.asp>. In the ICTY, two commanders of the Yugoslav People’s Army were convicted of war crimes, to include the destruction or willful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments, and works of art and science, which occurred during the shelling of the Old Town of Dubrovnik. *See* Press Release, *Appeals Judgement in the Case the Prosecutor v. Miodrag Jokic*, UNITED NATIONS (Aug. 30, 2005), <http://www.icty.org/en/press/appeals-judgement-case-prosecutor-v-miodrag-jokic>; Press Release, *Pavle Strugar Case Concludes*, UNITED NATIONS (Sept. 20, 2006), <http://www.icty.org/en/press/pavle-strugar-case-concludes>.

Presently, the case against Ahmad Al Faqi Al Mahdi is pending in the ICC. Al Faqi is charged with intentionally directing attacks against buildings dedicated to religion and/or historical monuments in Timbuktu, Mali, in 2012. See Press Release, *Situation in Mali: Ahmad Al Faqi Al Mahdi surrendered to the ICC on charges of war crimes regarding the destruction of historical and religious monuments in Timbuktu*, INTERNATIONAL CRIMINAL COURT (Sept. 26, 2015), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1154.aspx. This case represents the first time an international criminal court has prosecuted a suspected war criminal solely for his attacks on cultural property.

V. Conclusion

The destruction and looting of cultural heritage sites, as the world has most recently witnessed in Iraq and Syria, has resulted in the “loss of cultural legacies of universal importance.” See *Threats to Cultural Heritage in Iraq and Syria*, U.S. Department of State (Sept. 23, 2014), <http://www.state.gov/r/pa/prs/ps/2014/09/232028.htm>. History tells us that the widespread, systematic destruction of antiquities, cultural landmarks, and other heritage items is often part of a larger campaign of ethnic cleansing and is considered an atrocity in its own right. Such acts can be clear violations of customary international laws governing crimes of genocide, crimes against humanity, and war crimes. These acts represent an attack on the fundamental human rights of the populations affected and an attack on humanity as a whole. ❖

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The Repatriation Process for Judicially Forfeited Cultural Property

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Forfeiture is a legal process by which any right, title, or interest in certain property is terminated, and clean title passes to the United States. When the property being forfeited is cultural property, the Government’s goal in pursuing forfeiture generally is to extract the property from unclean hands and remit it to its last legal owner, whether that party is an individual or a foreign country. If cultural property

is *administratively* forfeited, the agency handling forfeiture will review any petitions for remission of the property. However, if the property was *judicially* forfeited in a civil or criminal proceeding, the decision to convey title to that property to a petitioner is delegated to the Chief of the Department of Justice’s Asset Forfeiture and Money Laundering Section (AFMLS). 28 C.F.R. § 9.1(b)(2) (2015) (delegating Attorney General’s statutory authority to the Chief of AFMLS).

The AFMLS petition-and-remission process is not widely known; it takes place out-of-court and is primarily conducted through correspondence between the Department of Justice, Government agencies, and victims. It does not involve any hearings, and the final decision is within the discretion of AFMLS. This article is intended to shed some light on this process, especially as it applies to judicially forfeited cultural property.

I. Overview of the AFMLS petition and remission process

Any party seeking the remission of judicially forfeited property must send a sworn petition to the U.S. Attorney in the district where the property was forfeited, explaining why AFMLS should transfer the property to the petitioner. *Id.* § 9.4(e). The U.S. Attorney forwards the petition to the seizing agency to investigate the merits of the request. Following its investigation, the agency sends the U.S. Attorney a report containing its findings and a recommendation to grant or deny the petition. The U.S. Attorney then forwards a package to AFMLS containing the petition, the seizing agency’s report and recommendation, and its own recommendation as to how AFMLS should rule. *Id.* § 9.4(f). AFMLS then makes its decision based on the papers received and sends out letters advising the petitioners whether their petitions were granted or denied.

II. Why must a “true owner” submit a petition for the property?

When property is forfeited, the ownership rights of parties who consider themselves to be “true owners” are terminated, and the United States becomes the owner of the property. A natural question to ask about this situation is: why would an owner stand by while its property is being forfeited? There are several scenarios in which a true owner might not assert its interest in the property until after the forfeiture is complete.

First, it is important to note that not all forfeitures are the same. Each forfeiture action must be based on the specific forfeiture statute applicable to the underlying federal offense. If the forfeiture action in question involves a customs violation (e.g., smuggling) and is brought under a forfeiture provision in Title 19 of the United States Code, the owner cannot challenge the forfeiture on the grounds that it is an innocent owner. While the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) does establish innocent ownership as a defense to forfeiture, there is no similar provision under Title 19, and forfeiture cases brought under Title 19 are specifically excluded from CAFRA. *See United States v. Davis*, 648 F.3d 84, 94 (2d Cir. 2011) (“LeMarche”) (holding that forfeiture actions brought under Title 19 fall under CAFRA’s “customs carve-out” and are, therefore, not subject to the innocent owner defense in § 983(d)); *United States v. Broadening-Info Enterprises, Inc.*, 462 F. App’x 93 (2d Cir. 2012) (“Hannibal”) (same) (citing *Davis*, 648 F.3d at 94). This result is consistent with case law that treats property that enters the country illegally as “classic contraband.” The appropriate remedy for contraband is to remove it from the stream of commerce. *United States v. An Antique Platter of Gold*, 184 F.3d 131, 140 (2d Cir. 1999) (affirming forfeiture of a smuggled gold platter, or “phiale,” pursuant to the forfeiture provision of 18 U.S.C. § 545, as remedial, not punitive). Therefore, in a case involving Title 19 or another CAFRA “carve-out,” challenging the forfeiture on the grounds of ownership alone would be futile.

Second, the interested party may choose not to file a claim in the judicial proceeding to avoid litigation expenses. In this scenario, the owner would rely solely on the petition-and-remission process to vindicate its interest. Victims who are considering not filing a claim may ask the assigned Assistant United States Attorney (AUSA) to comment on the likely outcome of a future petition. AUSAs should not

make any representations or predictions about how the Chief of AFMLS will exercise his or her discretion, or about their own future recommendation to AFMLS. In certain cases, the AUSA can seek a non-binding advisory opinion from AFMLS.

Finally, the owner may simply have missed its opportunity to file a timely claim and challenge the forfeiture action. Due process requires that the Government give notice of forfeiture actions to any known potential claimants, and to publish notice in a manner that will reach unknown potential claimants. The current practice is to give general notice to unknown potential claimants through a Government Web site, www.forfeiture.gov. Each type of notice informs potential claimants of their deadline to file a claim.

III. How do potential victims learn of the opportunity to file a petition?

The AUSA handling the forfeiture matter, in cooperation with the investigating agency, contacts potential victims and advises them of the opportunity to file a petition for remission. [28 C.F.R. § 9.4\(a\) \(2015\)](#). The notice to victims includes some of the information that victims will need to complete the petition, such as the name of the official who will rule on the petition, the mailing and street address of the officials to whom petitions should be sent, the name of the agency seizing the property, the agency asset identifier number, and the district court docket number. *Id.* Where the potential petitioner is a foreign country, line prosecutors do not communicate with the foreign government directly, but relay information through the investigating agency or the International Section of AFMLS.

IV. What form must the petition to AFMLS take?

There is no required form or format for filing a petition. To facilitate the return of completed petitions, AUSAs can send victims a model petition (one is currently available on DOJ's public Web site). AUSAs would do well to keep in mind that they may be dealing with victims who are not well-versed in American legal processes. Thus, the more that AUSAs can demystify the petition-and-remission process for potential victims, the more efficiently victims will be able to complete and return their petitions. In some cases, the Government already has in its possession certain evidence that the victim would use to prove ownership, such as translations of foreign patrimony laws, expert opinions on origin, or records reflecting title or ownership. Often this evidence was previously provided by the victim itself and may have even been described in a charging instrument, complaint, or affidavit. To facilitate the submission of the petition, the Government can provide a copy of these filings along with a blank petition that is tailored to the case. A tailored petition could, for example, ask the petitioner to address or adopt factual allegations in attached court filings, certify specific records previously provided to the Government, and/or fill in any specific gaps in the record.

V. What happens after AFMLS makes its decision?

Decisions on petitions for remission are within the discretion of AFMLS and are not reviewable. When AFMLS decides to deny a petition, a denial letter is sent to the petitioner advising the petitioner that it has 10 days to seek reconsideration. A request for reconsideration will be reviewed by a different AFMLS official than the one who made the initial ruling. [28 C.F.R. § 9.1\(k\) \(2015\)](#). A letter notifying a petitioner that its petition has been granted will advise the petitioner to contact the seizing agency to arrange for the execution of a hold harmless agreement and transfer of the property.

VI. What is a repatriation ceremony?

Depending on the nature or significance of the cultural property being remitted to a petitioner, the seizing agency may arrange for a repatriation ceremony at which the property will officially be conveyed to the petitioner. When the petitioner is a foreign country, high-level officials from both the United States and the petitioning country attending the ceremony often speak about the significance of the property being returned, the story behind the forfeiture, and the work by the Department of Justice and the seizing

agency that resulted in the forfeiture and repatriation. The United States Attorney from the district that handled the forfeiture is often invited to participate as well. During the program, representatives of the United States and the petitioner sign ceremonial certificates to formally transfer the property. ❖

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