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PROTECTING AMERICA'S CULTURAL AND HISTORICAL PATRIMONY

James J. Fishman*
Susan Metzger**

I. INTRODUCTION

In November 1975, a person identified only as a "European collector" purchased for \$310,000 a white marble bust of Benjamin Franklin by Jean-Antoine Houdon.¹ The bust, sculpted in Paris in 1779 when Franklin was Ambassador to France, had been in the United States since 1785.² The "European collector" outbid an American who had hoped to offer the bust as a bicentennial gift to the White House.

At the same time in England, a small bronze relief of the Virgin and Child by Donatello, rediscovered after 200 years and considered the most important Italian 15th century sculpture still in a private collection, was prevented from leaving that country in the possession of a New York art dealer.³ The Donatello was denied an export license by a Reviewing Committee for the Export of Works of Art. In England, any foreign purchaser of art work valued at £4000 or more must apply for an export license. If the sale is protested, it must be considered by the Review Board which allows three months for a public collector to purchase the work.⁴

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1. Kleiman, *A Bust of Franklin is Sold for \$310,000*, N.Y. Times, Nov. 30, 1975, at 20, col. 1.

2. The 21-inch tall bust was one of two made of Franklin in Paris by Houdon. The other, completed a year earlier and considered to be inferior, was presented to the Metropolitan Museum of Art in 1872. The bust, which once belonged to New York Governor DeWitt Clinton and to a New York Mayor, Abraham S. Hewitt, and had been in the possession of Geraldine Rockefeller Dodge (who had purchased it for \$5,500 in 1939), was bought at Sotheby Parke Bernet. *Id.*

3. Glueck, *15th Century Donatello Denied Exit by Britain*, N.Y. Times, Nov. 29, 1975, at 20, col. 1. The bronze relief, a round plate, was purchased for \$150,000 by Eugene V. Drew. It reappeared in 1965 when it was given to Elizabeth Hastings by her stepfather Lord Fitzwilliams. She did not know it was by Donatello until it was so attributed by the Victoria and Albert Museum. The piece was unique in that it had a negative impression on the back corresponding to the subject on the front, enabling multiple castings to be made from it. The only Donatello in the United States is the Straw Madonna, a marble relief, in the collection of the Boston Museum of Fine Arts.

4. The Donatello was purchased by the Victoria and Albert Museum. For a description of the British legislation see note 21 *infra* and accompanying text.

Had the United States adopted controls regulating the legal export of certain art works similar to Great Britain's, the Franklin bust might still be in this country. The lack of U.S. export controls has been applauded by advocates of free trade and of the international market in art, as well as by those supporting the exchange of cultural material.⁵ Clearly, any regulation of the export of art must carefully balance the interests of the promotion of international trade against the need to protect the nation's provenance. Until recently, capital-rich, but relatively art-poor nations like the United States needed only to concern themselves with restricting the import of illegally exported works from abroad.

However, as other areas of the world, such as the Middle East, become importers of art works, the United States should focus upon regulating the export of those few works of art important to the nation's historical or cultural patrimony. This Article suggests the procedures which the authors believe would effectively regulate the legal export of art works and be consistent with other foreign trade policies, while not unduly restricting free trade nor discouraging cultural exchange.

Of particular concern is a definition of what cultural property should be protected under the proposed legislation, and a demarcation of the extent and form of control which the Government should exercise over the export of such property. An outline of the sparse unilateral regulations existing in the United States, contrasted with the more extensive controls of foreign states, will suggest approaches for the development of a viable regulatory system for this country.

Art reflects a nation's level of self-respect and the way in which its people view themselves and their past. The cultural heritage of a nation, as embodied in archaeological artifacts and ancient treasures (sometimes referred to as a nation's "patrimony"), stimulates tourism, encourages scholarship, and contributes to the intellectual

5. F. FELDMAN & S. WEIL, ART WORKS: LAW, POLICY, PRACTICE 527 (1974); Coggins, *The Maya Scandal: How Thieves Strip Sites of Past Cultures*, SMITHSONIAN, Oct. 1970, at 14; Note, *The Legal Response to the Illicit Movement of Cultural Property*, 5 LAW & POL. INT'L BUS. 932, 936 (1973) [hereinafter cited as *Legal Response*]; Merryman, *The Protection of Artistic National Patrimony Against Pillaging and Theft*, in LAW AND THE VISUAL ARTS 153 (L. DuBoff & M. DuBoff eds. 1974); Woods, *A Museum Director's Views on Regulation and De-Regulation*, in LAW AND THE VISUAL ARTS 291 (L. DuBoff & M. DuBoff eds. 1974); Comment, *Legal Approaches to the Trade in Stolen Antiquities*, 2 SYR. J. INT'L L. & COM. 51, 53 (1974); Interview with Ted Kaplan, counsel at Sotheby Parke Bernet, in New York City, Feb. 3, 1976, Interview with Penny Bardel, Metropolitan Museum of Art, in New York City, Feb. 3, 1976.

life of a nation.⁶ It is in the interest of every nation to preserve its "patrimony," but, at the same time, there is a compelling drive among art dealers, private collectors, and museums to collect the art of other nations.⁷ Art has become a source of investment and speculation as well as a status symbol. As a commodity, art has reflected the general flow of commodities from poor nations to rich. Capital-rich nations, such as the United States, have profited from the free flow of art and capital.⁸

II. FOREIGN LEGISLATION

Different jurisdictions have used various approaches for protecting works of art important to their cultural heritage. The following analysis will examine what properties are controlled under each law, the manner in which the property is protected, and the extent to which the export and sale of works of art are permitted. The division of these laws and regulations into "expropriation" and "preemption" legislation provides a convenient and informative means of distinguishing them, although overlapping features often exist. "Expropriation" means that exportation is totally prohibited; "preemption" means that the state is given the opportunity to acquire certain objects sought to be exported. Generally, legislation which is too restrictive of the export of art works leads to increased smuggling, while permissive statutes can be difficult to enforce.⁹

A. Expropriation Laws

1. AUSTRIA

Austria prohibits the exportation and sale of objects of historical, artistic, or cultural interest unless created by living artists or by artists who have been dead for less than 20 years. The state will undertake any measure of registration or supervision to stop the export of objects of exceptional value, permitting the export of objects of art only on rare occasions. Control is not restricted to works

6. *Legal Response*, *supra* note 5, at 935.

7. *Id.* at 933-34.

8. *Id.* at 936; Coggins, *supra* note 5, at 14.

9. Blumenthal, *The World's Best Traveled Art: African Sculpture*, AFRICAN REPORTS, Jan.-Feb. 1974, at 4; Hamilton, *Museum Acquisition: The Case for Self-Regulation*, in LAW AND THE VISUAL ARTS 180 (L. DuBoff & M. DuBoff eds. 1974); Meyer, *The Disposable Past*, in LAW AND THE VISUAL ARTS 339 (L. DuBoff & M. DuBoff eds. 1974); Carley, *Archaeological Objects Smuggled at Brisk Rates as Their Prices Soar*, Wall St. J., June 2, 1970, at 25, col. 1.

of national interest, to objects within the control of the government, or in the public domain. Regulation extends to sales within the country and penalties for violations are strict.¹⁰

2. FRANCE

Cultural property in France is classified and listed on an official inventory of historical monuments. This inventory of all historical buildings and art treasures was commenced in 1965, and is not likely to be completed for several decades.¹¹ Historic monuments include immovable objects of historic or artistic interest, and moveable objects which were originally attached to immovable structures of historic, artistic, or scientific interest.¹² Exportation of classified objects is forbidden, and the state may expropriate any classified property. For non-classified works, including archaeological material, art objects, and furniture dating before 1900, and fine art objects except contemporary works whose artist is still alive or which were created after 1920, the French government may refuse permission to export and require that the object remain within the country. In the alternative, within six months of application for an export permit, the state may acquire any object for national collections.¹³ Re-exportation of objects imported into France within five years of their entry is authorized without permit. Fortuitously discovered cultural property—the rediscovered Donatello, for instance—must be reported immediately to the mayor of the nearest commune.¹⁴ The state has the right of preemption of all fortuitously discovered cultural property. The French system of export control is very restrictive, and more rigid than we would suggest.

3. HUNGARY

Hungarian Decree No. 9 of 1963 on the Protection of Museum Pieces requires registration by an official inventory of all material, documents, and monuments of outstanding importance to the ar-

10. Law Prohibiting Exportation and Sale of Objects of Historical, Artistic, or Cultural Interest (1918, modified 1923, 1958) (Aus.); Licenses for the Sale of Moveable Objects (1921) (Aus.); discussed in B. BURNHAM, *HANDBOOK OF NATIONAL LEGISLATION: THE PROTECTION OF CULTURAL PROPERTY* 34-35 (1974).

11. Gordon, *The UNESCO Convention on the Illicit Movement of Art Treasures*, 12 *HARV. INT'L L.J.* 537, 544 (1971).

12. Law of December 31, 1913 on Historic Monuments (modified by laws of 1921, 1927, 1943, 1951, and Decree of 1971) (Fr.)

13. B. BURNHAM, *supra* note 10, at 74.

14. *Id.*

chaeological, historical, natural, artistic, ethnographic, scientific, economic, or technical heritage of the country, or to its economic, social, and cultural development. Museum pieces in both public and private possession are protected by the state and may be used by it. Exportation is prohibited, except temporarily for exchange, and then only on exceptional occasions when supervised by a competent museum. Even works of contemporary artists require a permit for export. The sale, as well as exportation of objects of cultural interest is directed by the state. Only duplicate objects stamped "copy" may be exported without a permit.¹⁵

4. INDIA

Under the 1972 Antiques and Art Treasures Act, the central government has blanket authority to declare any work of art to be an art treasure provided the artist is no longer alive. The government maintains the right of compulsory acquisition of any art treasure in order to conserve it in a public place, and reserves the only authority to export them. Similar rights of control govern "antiquities," which are specifically defined.¹⁶

5. JAPAN

Japan has one of the most comprehensive sets of regulations and controls over art work. Cultural properties are divided into four categories: "tangible cultural properties," "intangible cultural properties," "folk culture," and "monuments." Public and privately owned properties are under the protection of the state, and can only be transferred or modified as authorized by the government.

Important cultural properties are registered as national treasures. Proper protection of national treasures must be guaranteed by the owner, while exportation is prohibited except for cultural exchange purposes. A permit is required in order to export all objects not designated as "treasures." All sales must be approved 30 days in advance.¹⁷

15. Decree No. 9 of 1963 on the Protection of Museum Pieces (Hung.); Decree No. 2/1965/I.8/M/M for the execution of the Law of 1963 (Hung.); discussed in B. BURNHAM, *supra* note 10, at 88-89.

16. Antiquities and Art Treasures Act of 1972 (India); discussed in B. BURNHAM, *supra* note 10, at 89.

17. Law No. 214 of 1950 for the Protection of Cultural Properties (Japan); discussed in B. BURNHAM, *supra* note 10, at 98-99.

6. TURKEY

Article 50 of the Turkish constitution "assures the protection of cultural property and of historic monuments." Cultural property includes all works and products of the arts, sciences, literature, religions, industries of all ancient peoples who lived in Turkey, and fragments of such objects. Also included in the definition of cultural property are moveable and immoveable antiquities and monuments. All cultural property is ultimately the property of the state, which maintains absolute rights of expropriation and preemption over all antiquities and monuments. Exportation of antiquities is forbidden except in the case of exportation of previously imported objects.¹⁸ The strictness of the Turkish legislation is an invitation for smuggling.

B. Preemption Laws

1. ITALY

The Italian statutes give the state the option to purchase all cultural property sought to be exported from the country within two months of the proposed shipment. All cultural objects may be preempted, except those imported within the past five years. Additionally, all property which is not preempted requires a permit for export.

Cultural property within the scope of the Italian regulations includes almost all moveable and immoveable objects of artistic, archaeological, or ethnographic interest to the country. Other cultural property is also controlled by statute if an "important collection or series of objects which by tradition, renown or particular ambient [sic] character are considered of historic or artistic interest." Excluded from this definition of cultural property are the works of living artists and objects less than 50 years old.¹⁹

Within Italy, the government assumes the responsibility of protecting all cultural property, and must authorize its demolition, removal, modification, or restoration. Immoveable and "exceptionally important" moveable cultural property is registered on an official inventory. The alienation of such classified private collections is prohibited where the conservation of the collection is endangered

18. Antiquities Law No. 1710 of 1973 (Tur.); discussed in B. BURNHAM, *supra* note 10, at 146.

19. See Law No. 1089 of June 1, 1939, [1939] Rac. Uff. 3403 (Italy) which protects objects of artistic and historic interest.

or the "public's interest" is at risk. Any registered cultural property may be expropriated by the government for public use.²⁰

2. GREAT BRITAIN

Perhaps the most liberal, and yet effective regulations of the export of art work, exist in Great Britain. An order of the Export Licensing Branch of the Department of Trade and Industry and the Reviewing Committee on the Export of Works of Art of the Department of Education and Science mandates the issuance of a license before a work of art or an antique is exported.

Two types of licenses may be issued under British law: the Open General License, and the Specific License. The Open General License permits the export of any antique, if its value is less than £4000, to any destination other than Rhodesia. Antiques are defined as articles manufactured or produced more than 100 years before the date of exportation, but manuscripts, documents, archives, or photographs are not included. Specific Licenses are required for antiques not covered by the Open General License. Specific Licenses are also provided for the export of original manuscripts, documents, archives, and photographic positives and negatives more than 70 years old, except for four instances in which a Bulk License may be obtained instead.²¹

Antiques which were not imported within the last 50 years and which require a Specific License for export are specially scrutinized by the Reviewing Committee on the Export of Art, which may refuse to issue the license and may purchase the item for national collections. All archaeological material is also subject to special scrutiny regardless of value. Objects deemed of "national importance" by the Committee are usually purchased by the government.²²

The decision whether or not to refuse an export license for objects of "national importance" depends on three criteria established by the Reviewing Committee: (a) whether the object is so closely connected with British history and national life that its departure would be a misfortune; (b) whether it is of outstanding aesthetic importance; (c) whether it is of outstanding significance for the

20. *Id.*; Royal Decree No. 363 of Jan. 30, 1913 (Italy); Regulations for the Execution of the Laws of June 20, 1909 (No. 364) and of June 23, 1912 (No. 688) (Italy), covering antiquities and the fine arts; discussed in B. BURNHAM, *supra* note 10, at 96-97. For a more extensive treatment, see Merryman, *supra* note 5, at 158-59.

21. F. FELDMAN & S. WEIL, *supra* note 5, at 574-76.

22. *Id.* at 576.

study of some particular branch of art, learning, or history.²³

Encompassed within the purview of the British regulations are all objects of art, regardless of origin. The potential impact of the regulations is eased by the requirement that an offer be made by the government to purchase, for a national collection, any object which is denied a license. If no offer is made within three months of the license denial, the object may be freely exported. Objects imported within the past 50 years are not reviewable by the Committee at all.

Critics of the British system have said that the license requirement encourages smuggling and discourages free enterprise. The intricate procedures involved in obtaining a license are said to result in long delays and to cause foreign collectors to abstain from bidding at auctions.²⁴ Notwithstanding these contentions, the British system does attempt to retain important art works without the expense of an inventory system or the curtailment of the sale of property.

The object of recommendations concerning the export requirements, made to the Committee, has not been to relax the export restrictions, but rather to provide greater incentives to those who have works of art to share them with the public or to make money available for the purchase of objects deemed to be of "national importance." Two additional suggestions made to the Reviewing Committee have been to establish a special fund which would be administered by the Committee and a member of the Treasury, and to give tax concessions to those persons who sell art to national galleries rather than overseas.²⁵

III. UNITED STATES LEGISLATION

Statutes have been enacted by the Congress to preserve, restore, and maintain the "historic and cultural environment of the nation."²⁶ However, the scope of legislative control is limited to those structures and objects of historic, architectural, or archaeological significance which are located on lands owned or controlled by the Government or which were acquired by the Government by gift

23. *Id.* at 577.

24. Editorial, *The Export of Works of Art*, 106 THE BURLINGTON MAGAZINE 545 (1964).

25. See Editorial, *Treasures for the Nations*, 113 THE BURLINGTON MAGAZINE 175 (1971), for an editorial emphasizing that works of art are more than the "playthings of the rich."

26. Exec. Order No. 11,593, 3 C.F.R. 154 (1971). This Executive Order serves to further the purposes and policies of the following four statutes: National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (1970); National Historic Preservation Act of 1966, 16 U.S.C. §§ 470, 470b, 470c-470n (1970); Historic Sites Act of 1936, 16 U.S.C. §§ 461 *et seq.* (1970); Antiquities Act of 1906, 16 U.S.C. §§ 431 *et seq.* (1970).

or through purchase.²⁷ Executive Order No. 11593, Protection and Enhancement of the Cultural Environment, provides for the creation of an inventory system to catalogue all protected cultural objects and to prohibit the transfer, sale, or alteration of the property without the consent of the Advisory Council on Historic Preservation.²⁸

The purposes of legislation relating to the preservation of art work, as provided by their language, are: conserving the "national patrimony," insuring that the "spirit and direction of the Nation are founded upon and reflected in its historical past,"²⁹ and such legislation seeks "to give a sense of orientation to the American people."³⁰ However, the statutes are by implication limited to works of art either created by American artists or concerning American topics, and existing statutes are restricted to those works under Government control. The legislation does not cover all art work of cultural interest or value to the United States. Examples of objects within the scope of existing legislation include the Statute of Liberty, presidential residences, or objects owned by the Smithsonian Institution.

Most recent Congressional efforts to regulate the international movement of art works have sought to curtail the importation of art illegally exported from a second country. In 1972, legislation was adopted requiring that an American importer obtain an export certificate from the country of origin for pre-Columbian monumental or architectural sculpture or mural art.³¹ This statute attempts to control the smuggling and pillaging of Mexican art treasures, which have ravaged important archaeological sites in the past decade.³² In effect, it implements a bilateral treaty between the United States and Mexico which was signed and ratified in July 1970.³³ Legislation

27. Zelle, *Acquisitions: Saving Whose Heritage?*, MUSEUM NEWS, April 21, 1971, at 20.

28. Exec. Order No. 11,593, 3 C.F.R. 154, 155-56 (1971).

29. National Historic Preservation Act of 1966, 16 U.S.C. § 470(a) (1970).

30. *Id.* § 470(b).

31. Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091 *et seq.* (Supp. II, 1972). *See also* 19 C.F.R. §§ 12.105-09 (1976).

32. HOUSE COMM. ON WAYS AND MEANS, REPORT ON IMPORTATION OF PRE-COLUMBIAN SCULPTURE AND MURALS, H.R. REP. NO. 824, 92d Cong., 2d Sess. (1972); Nafziger, *Controlling the Northward Flow of Mexican Antiquities*, 7 LAWYER OF THE AMERICAS 68 (1975); *Legal Response*, *supra* note 5, at 939; Comment, *New Legal Tools to Curb the Illicit Traffic in Pre-Columbian Antiquities*, 12 COLUM. J. TRANSNAT'L L. 316 (1973).

33. Treaty of Cooperation with the United Mexican States providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, [1971] 1 U.S.T. 494, T.I.A.S. No. 7088 [hereinafter cited as Treaty of Cooperation]; *see also* SENATE COMM. ON FOREIGN RELATIONS, RECOVERY AND RETURN OF STOLEN ARCHAEOLOGICAL, HISTORICAL AND CULTURAL PROPERTIES, S. EXEC. REP. NO. 1, 92d Cong., 1st Sess. 1 (1971).

in this area has been introduced in response to the limited effectiveness of federal laws protecting stolen property,³⁴ judicial action by the Office of the Attorney General under the U.S.-Mexican treaty, and the civil laws of foreign governments.

Aside from the minimal federal control over sites and objects of historical import that are owned by the Government, and the requirement of an export certificate to curtail the smuggling of pre-Columbian and Mexican art, there are no U.S. laws preventing the export of important works of art owned by museums, dealers, or private collectors.

IV. MULTILATERAL APPROACHES

The first international legal attempts to protect cultural property were limited to multilateral agreements that "made cultural objects 'off limits' in times of war, and that denied the victor the right to claim the loser's cultural treasures as his spoils."³⁵ Peacetime agreements have been addressed to the problems of the illicit flow of art in response to smuggling and the pillaging of archaeological zones.³⁶ A recent agreement, the 1970 UNESCO Convention for the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention),³⁷ attempts to curtail the illegal trade of property within the entire cultural spectrum.³⁸

34. 18 U.S.C. §§ 2314-15 (1970); Nafziger, *supra* note 32, at 70-74.

35. *Legal Response*, *supra* note 5, at 938; Convention for the Protection of Cultural Property in the Event of Armed Conflict, done May 14, 1954, 249 U.N.T.S. 215 (effective Aug. 7, 1956); Convention with Other Powers Respecting the Laws and Customs of War on Land, Oct. 18, 1907, annex art. 27, 36 Stat. 2277 (1909), T.S. No. 539.

36. Treaty of Cooperation, *supra* note 33. *But see* Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 11 INT'L LEGAL MAT'LS 1358 (1972), regarding antiquities, historic monuments, and archaeological remains. *See generally* Alpert, *The Role of UNESCO in the Protection of Artistic National Patrimony Against Pillage and Theft*, in LAW AND THE VISUAL ARTS 173-75 (L. DuBoff & M. DuBoff eds. 1974).

37. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 10 INT'L LEGAL MAT'LS 289 (1971) [hereinafter cited as UNESCO Convention]; F. FELDMAN & S. WEIL, *supra* note 5, at 523-35.

38. UNESCO Convention, *supra* note 37, art. 1, provides:

For the purposes of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

(b) property relating to history, including the history of science and technology and

Unfortunately, the 1970 UNESCO Convention has had only a limited effect. As long as property has not been stolen from public institutions, it can be legally imported and need not be returned by the importing country. Only museums are prohibited from acquiring illegally exported property stolen from public or private sources.³⁹ The United States Congress has not as yet enacted legislation implementing this agreement.⁴⁰

A new UNESCO proposal, drafted in Paris in August 1975, the Exchange of Original Objects and Specimens Among Institutions in Differing Countries, is directed towards the protection and advancement of the legitimate exchange of cultural property.⁴¹ The draft affirms that there is a need for each people to have a better knowl-

military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

(f) objects of ethnological interest;

(g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) original works of statuary art and sculpture in any material;

(iii) original engravings, prints and lithographs;

(iv) original artistic assemblages and montages in any material;

(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

(i) postage, revenue and similar stamps, singly or in collections;

(j) archives, including sound, photographic and cinematographic archives;

(k) articles of furniture more than one hundred years old and old musical instruments.

Article 4 specifically includes articles not made in the state within the definition of "cultural property." Criticism of Article 1 maintains that it is overly broad, unmanageable, and, at times, inappropriate. Gordon, *supra* note 11, at 551.

39. *Legal Response, supra* note 5, at 958.

40. The United States submitted an Alternate Draft to the UNESCO Convention. The papers are available at the Office of the Legal Advisor, U.S. Dep't of State. See also *Legal Response, supra* note 5, at 958. It was determined that the Convention would not be self-executing or retroactive. The Senate Foreign Relations Committee, however, approved of the Convention, SENATE COMM. ON FOREIGN RELATIONS, CONVENTION ON OWNERSHIP OF CULTURAL PROPERTY, S. EXEC. REP. NO. 29, 92d Cong., 2d Sess. 8-18 (1972), and the Senate ratified the Convention on August 11, 1972, 118 CONG. REC. 27925 (1972). A bill was introduced to implement the Convention on November 9, 1973. S. 2677, 93d Cong., 1st Sess. (1973); discussed in F. FELDMAN & S. WEIL, *supra* note 5, at 536-53.

41. Preliminary Report Recommendations on the Exchange of Original Objects and Specimens Among Institutions in Differing Countries, U.N. Doc. SHC/MD/27 (1975).

edge of its own cultural heritage and that of its neighbors. The draft assumes that cultural property belongs to the national community holding it and to mankind as a whole. Hence, the draft suggests a modification of export laws, customs duties, and import taxes that burden the development of international exchanges.⁴²

The draft attempts to counterbalance the effect of protective measures with provisions which would facilitate the lawful and public acquisition of cultural property, and would provide for documentation enabling the full value of the property to be appreciated. It reflects fears that protective measures that are too strict would raise the price of cultural objects on the free market, would generate an illicit trade to provide reduced prices, and would create a danger that sources of objects would be systematically concealed.⁴³ The draft recommends the following to encourage international exchange: (1) the transfer of ownership or derestriction of cultural property belonging to a public body or cultural institution; (2) the definitive or temporary import or export of cultural property; and (3) the acquisition of cultural property in co-ownership by cultural institutions belonging to different nations.⁴⁴

The concept of co-ownership encourages the possibility of reduced competition among major cultural institutions, and formulates in legal terms a basic ethical idea, namely, that cultural property is part of the heritage of the international community.⁴⁵ Anticipated problems in co-ownership proposals for reciprocal and simultaneous loans include the duration of use, the responsibilities for transportation costs, and the precise statement of the rights and responsibilities of use during periods of ownership.⁴⁶ To alleviate such problems, a centralized file to "pool" all offers and requests for changes, arrangements for financial assistance, and insurance provisions is included in the draft.⁴⁷ Exhaustive documentation of all cultural property to facilitate education and mutual understanding is also suggested.⁴⁸ Multilateral approaches may be more effective in promoting international cultural exchanges and uplifting the practices of some museums, than in regulating private collectors and dealers.

42. *Id.* at 7, ¶ 29.

43. *Id.* at 5, ¶ 17.

44. *Id.* at Annex, § II, ¶ 49.

45. *Id.* at 7, ¶ 32.

46. *Id.* at 7, ¶ 30.

47. *Id.* at 7, ¶ ¶ 34, 40, and Annex, § II.

48. *Id.* at 7, ¶ 36.

V. APPROACHES TO THE REGULATION OF WORKS OF ART

Any attempt to regulate the legal export of works of art must be flexible; regulation must not be so restrictive as to encourage smuggling or to destroy the international movement of art works. On the other hand, it should not be so permissive as to vitiate its purpose. Several approaches could be used. Incentives to keep works of art within the United States already exist in the form of tax benefits. There are limited tax advantages to persons making *inter vivos* transfers of art work to charitable organizations.⁴⁹ An estate tax charitable deduction of up to the fair market value of the property at the date of death is available to persons bequeathing works of art to a public charity or to a qualified private foundation.⁵⁰

However, tax benefits do not provide adequate protection. Inflation and the expanding international market for art combine to encourage collectors to sell objects of cultural value for the highest price. In times of pressing economic concern, the appeal of cultural wealth and charitable donation falls victim to a more basic need for immediate cash.⁵¹ Nor would tax incentives have an effect upon museums and other not-for-profit organizations that are already tax-exempt, for they would not experience the benefits or burdens of changes in tax policy.

The authors would reject any approach that would utilize a national registry, as in France or Japan. Such a system would be expensive, administratively impossible, and would probably never reach completion. A preemptive system similar to that of Great Britain and Italy is attractive, if it is neither too restrictive of the international movement of art nor so cumbersome as to make its administration impossible.

VI. THE ADMINISTRATION OF EXPORT REGULATION

The international art trade should be treated consistently with other issues of foreign trade policy. Opponents of any export control

49. For example, charitable contributions to an exempt organization are allowed as deductions for up to 10 percent of an individual's adjusted gross income. INT. REV. CODE OF 1954, § 170(b)(1)(A)(i-vii). However, contributions may be subject to depreciation recapture, which will reduce the amount of the deduction. INT. REV. CODE OF 1954, §§ 170(e), 1221(3). See generally F. FELDMAN & S. WEIL, *supra* note 5, at 787-802.

50. INT. REV. CODE OF 1954, § 2055(a)(2). No deductions are allowed if the organization fails to qualify for tax-exempt status. INT. REV. CODE OF 1954, §§ 501(c), 507, 508(d).

51. Meyer, *supra* note 9. The author fears that art may be "mindlessly squandered" if left solely to the mercies of the market.

of art work have stressed the need for free trade. However, doctrines of free trade in international commerce are more prominent in economic history books than in economic history. With the exception of cultural exchanges (which should not be affected by export regulations), the international movement of art works is a business—a big business. A large variety of products, materials, commodities, and technology are subject to broad export regulation through tariffs, licenses, bilateral and multilateral agreements, and export controls.⁵² Art and items important to our cultural heritage are as important to the well-being of the nation as are weapons, and the art trade should be regulated in the same manner.

A. *The Export Administration Act*

The Export Administration Act prohibits the unrestricted export of materials, information, and technology if they have a significant military impact or might adversely affect the national security or economy of the United States.⁵³ In addition,

[i]t is the policy of the United States to use export controls (A) to the extent necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand, (B) to the extent necessary to further significantly the foreign policy of the United States, and to fulfill its international responsibilities, and (C) to the extent necessary to exercise vigilance over exports from the standpoint of their significance to the national security of the United States.⁵⁴

While export regulation has generally been utilized to regulate matters important to national defense, such legislation could be amended to include the protection of property of particular significance to the historical and cultural patrimony of the American people.

The Export Administration Act is administered by the Secretary of Commerce,⁵⁵ who reviews all previous lists of materials, supplies, or technical data the exportation of which was prohibited. He also acts as a liaison with the business community affected. The

52. Equal Export Opportunity Act of 1972, 50 U.S.C. app. § 2401 (Supp. II, 1972), Export Administration Amendments of 1974, 50 U.S.C. app. § 2401 (Supp. IV, 1974), *amending* Export Administration Act of 1969, 50 U.S.C. app. § 2401 (1970).

53. Export Administration Act of 1969, 50 U.S.C. app. § 2402(1) (1970).

54. Export Administration Amendments of 1974, 50 U.S.C. app. § 2402(2) (Supp. IV, 1974), *amending* Export Administration Act of 1969, 50 U.S.C. app. § 2402(2) (1970).

55. Export Administration Amendments of 1974, 50 U.S.C. app. § 2403(b)(2) (Supp. IV, 1974), *amending* Export Administration Act of 1969, 50 U.S.C. app. § 2403(a) (1970).

President then determines which articles, materials, supplies, or technical data shall be regulated.⁵⁶

Particularly germane to the regulation of cultural exports is Section 2403(d), whereby "[t]he President may delegate the power, authority, and discretion conferred upon him by this Act to such departments, agencies, or officials of the Government as he may deem appropriate."⁵⁷ The Act specifically provides for review of the request by the Secretary of Defense in matters relating to national security.⁵⁸

Under existing legislation, the President might delegate export control review power to the Chairperson of the National Endowment for the Arts (NEA) who would receive specific advice from an Art Export Advisory Panel. To determine overall export policy, an Export Administration Review Board has been established under the chairmanship of the Secretary of Commerce, who determines the agenda for Export Administration Review Board meetings.⁵⁹ The Secretary of Commerce refers to the Board particular export license matters involving questions of national security and other major policy issues as he chooses.

Even if art export matters were decided by the Secretary of Commerce, under Section 2404(a) of the Act other agencies would be expected to provide input into the control and monitoring of exports in a particular area.⁶⁰ Regulations setting up standards or criteria are determined by the Secretary of Commerce. Moreover, the Act provides that a Technical Advisory Committee be established at the request of representatives of a substantial segment of any industry which produces articles or materials that are subject to export controls or are being considered for such controls because of their significance to national security.⁶¹ Additionally, the Secre-

56. Equal Export Opportunity Act of 1972, 50 U.S.C. app. § 2403(b)(1) (Supp. II, 1972), *amending* Export Administration Act of 1969, 50 U.S.C. app. § 2403(b) (1970).

57. Export Administration Act of 1969, 50 U.S.C. app. § 2403(d) (1970) (redesignated § 2403(3) by the Export Administration Amendments of 1974, 50 U.S.C. app. § 2403 (Supp. IV, 1974).

58. Export Administration Amendments of 1974, 50 U.S.C. app. § 2403(h) (Supp. IV, 1974).

59. Exec. Order No. 11,533, 3 C.F.R. 134 (1970). Other members of the Board now include the Secretaries of Defense and State. The Board may invite the heads of government agencies other than the departments represented by the Board's members to participate in the activities of the Board when matters of interest to such agencies are under consideration.

60. Export Administration Amendments of 1974, 50 U.S.C. app. § 2404(a) (Supp. IV, 1974), *amending* Export Administration Act of 1969, 50 U.S.C. app. § 2404(a) (1970).

61. Equal Export Opportunity Act of 1972, 50 U.S.C. app. § 2404(c)(1) (Supp. II, 1972).

tary of Commerce can appoint a Technical Advisory Committee for the purpose of advising and assisting the Secretary of Commerce and any other department to which the President has delegated the power with respect to carrying out export controls.⁶²

B. Definition of Cultural Property

An appropriately broad and flexible definition of "cultural property" has already been considered by the United States Government in reviewing the 1970 UNESCO Convention. The Convention defines "cultural property" to include property of archaeological, prehistorical, historical, literary, artistic, or scientific value and encompasses rare collections of flora and fauna, as well as cultural property originating in foreign countries.⁶³

Any regulation of works of art should include the following kinds of items: all archaeological material; antiques more than 100 years old valued over \$50,000; manuscripts, books, documents, archives, and other items of special significance to American history or culture, without limitation on age; other items less than 100 years old but having a special historic, cultural, or aesthetic importance to the national heritage and having a value of over \$50,000; and any other item brought to sale with a market value over \$100,000.⁶⁴ Export licenses should be required for any items in the above categories. We have not only included antiques, usually defined as articles manufactured or produced more than 100 years before exportation, nor have we only included works of art of deceased artists. Art, patterns of art collecting, and history change so rapidly that such a limitation might not reflect the importance of certain works.

C. Procedures

An individual desiring to export a work of art which fits under one of the above categories would have to apply to an Art Export Advisory Council for an export license. Generally, the procedures would be those contained in the Export Administration Act. The President would delegate to the NEA the administration of the Art Export Advisory Council. While the export license might issue from the Department of Commerce, the decision whether to grant or deny would first be made by the Art Advisory Council under NEA aegis.

62. Equal Export Opportunity Act of 1972, 50 U.S.C. app. § 2402(c)(2) (Supp. II, 1972).

63. See UNESCO Convention, *supra* note 38, for the text of the provision.

64. The market value would be determined by the total value of a set of objects.

The Art Export Advisory Council would be composed of representatives from the NEA and the Smithsonian Institution, experts in art and history, representatives from galleries and museums, and persons from the general public. In reaching its decision whether or not to approve an export license, the Art Export Advisory Council would consider the following criteria:

1. Is the object so closely connected with American history, literature, art, science, or cultural life that its departure would be a significant loss to the nation's cultural heritage?
2. Is the object of outstanding aesthetic importance to the understanding of a period of American art or to the work of an American artist?
3. Is the object particularly significant for the study of a particular branch of American learning, art, or history?

While the criteria are similar to those in the British regulations, they would apply specifically to American works of art or items so closely related to the history or culture of the United States as to be American in all but origin. The criteria should be interpreted strictly. The \$50,000 requirement would eliminate most items from the export license requirement.

After an application for an export license, not later than 30 days after the application, the Art Export Advisory Council must give its opinion as to whether such a license should be granted.⁶⁵ If an export license is denied, a museum or other public body within the United States would have the opportunity to purchase the particular item at the same price at which the object had changed hands. If after 60 days no domestic "public" purchaser was found, the export license would then be freely granted. The total delay for the export license would be only 90 days.

Congress should authorize the establishment of a two-part endowment. The first part, approximately \$10 million, would allow the Smithsonian Institution to purchase items up to that amount. The second part of the endowment, a much larger amount, would create a revolving loan fund which would make low interest loans to museums or other public bodies for the purchase of such items. Many museums might not be able to raise sufficient funds within 60 days, but they might subsequently be able to raise money

65. Under the Export Administration Amendments an application for an export license must be approved or denied within 90 days of the application. Export Administration Amendments of 1974, 50 U.S.C. app. § 2403(g) (Supp. IV, 1974).

through a public collection. An even more favorable course of action would be for a consortium of museums to borrow funds to purchase the item, which would guarantee the item wider exposure.

As most international transactions would be contingent upon the granting of an export license, the burden would be upon the seller of the object to seek permission. Failure to do so would result in the penalties provided for in the Export Administration Act.⁶⁶ Presently, anyone who knowingly violates a provision of the Export Administration Act or any regulation, order, or license issued thereunder, is fined not more than \$10,000 or imprisoned not more than one year, or both. For second or subsequent offenses the offender shall be fined not more than three times the value of the export involved or \$20,000, whichever is greater, or imprisoned not more than five years, or both.

VII. CONCLUSION

Under our suggestion the Franklin bust would not initially be granted an export license. One can surmise that funds could easily be raised for such a work of art, if the purpose were for donation to the White House. The bronze relief by Donatello, however, if it were presently in the United States, would not, under our standards, be denied an export license. Even though works by Donatello, the greatest and most widely influential Florentine sculptor of the early Renaissance, are almost unknown in this country, the Donatello would not have any particular importance to American heritage, culture, or art.

In 1973, Jackson Pollock's *Blue Poles* was sold to an Australian museum for \$2 million. At the time, a number of people protested the loss of such an important painting.⁶⁷ In the case of a living artist or an artist whose work is less than 50 years old we would suggest a presumption in favor of granting an export license. Criteria to be considered in the case of Pollock's *Blue Poles*, and in the case of contemporary works of art or art works less than 50 years old would be: (1) the importance of the work in relation to the artist's output as a whole or to a particular school of art; (2) the existence of examples from this period of the artist's work, or of his total output, available in the country; (3) the number of pieces of his art and

66. Export Administration Act of 1969, 50 U.S.C. app. § 2405 (1970).

67. Gordon, *America's Art Heritage, Going, Going, Gone?*, N.Y. Times, Nov. 7, 1973, § 2, at 33, col. 1.

particularly of this important period of work in other museums; and (4) the extent of the damage to the American cultural provenance that would be caused by the export of such a piece of art. We submit that under these criteria the Jackson Pollock could be exported; but this decision, like all the decisions in this area, would be made on a case-by-case basis by individuals qualified to make the requisite historical, cultural, or aesthetic judgment.

An interesting problem would be posed by the works of a living artist. Assume that Pablo Picasso had been an American citizen or had lived and worked in this country for most of his life. Assume further that he executed the famous *Guernica*, the memorial to the Spanish town bombed by the Germans during the Spanish Civil War, in this country, and had given it on loan to the Museum of Modern Art. Then assume he changed his mind 40 years later and decided to either sell it abroad or donate it to the post-Franco government of Spain. This would be a difficult case, but we would deny the export license. If one considers that art and culture are as important to the nation's well-being and patrimony as weapons, this result is not too harsh.

Art belongs to the nation as a whole and is not the "mere property" of the owner. If a piece of art or an historical document were so important that its loss would be a loss to the nation, then even the creator of that work of art could not permit his desires to harm the nation's cultural patrimony. An analogous case is an individual who invents a new form of laser or other scientific invention which could be utilized for warfare. That individual, even though it was his own creation, could not sell this technology to say, the government of the German Democratic Republic.

There will be many objections to this proposal. The primary one will be that it will hinder free trade and international commerce in art. This is untrue. Export regulation may delay some sales, but the maximum delay would only be 90 days, and in any case this legislation would affect only a very few items. We also doubt that there will be any long-term effect on the prices of works of art. Foreign purchasers will not be scared away from bidding on American works of art, because so few items will be affected. Moreover, as the application for the license occurs after the sale, it may even raise prices. The higher the price, the more difficult it will be to raise funds to be able to donate the object to a public collection.

As in other areas of administrative law, as case law develops it will be known prior to an auction what kinds of items are likely to be denied export licenses. We would suggest a system somewhat

similar to that involving revenue rulings by the Internal Revenue Service, whereby advisory rulings would be available prior to placing an item on the market. Thus, a potential seller would know whether a particular art work would probably be denied an export license. The items we consider eligible for denial of a license are so rare and so precious that there will always be a market for them. The administration of this legislation will doubtlessly cause problems. Art dealers desire to protect all their interests. On the one hand they argue that free trade must not be impaired, an argument every exporter makes. On the other hand they argue that art is special. Again, we believe that art is a business and should be treated consistently with other international commercial transactions.

The administration of the Act must be done with both expertise and efficiency. The administrative burdens may at first cause difficulties. However, case law and advisory rulings will accumulate over time, making the process administratively manageable. The authors believe that the statutory regulation of the export of particularly important works of art and cultural history, if carefully drafted, can provide a workable system to protect America's cultural heritage. Any impediments to international trade are outweighed by the benefits to all Americans.