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LOTHAR VON FALKENHAUSEN

Trying to Do the Right Thing to Protect the World's Cultural Heritage: One Committee Member's Tale

Introduction

This paper is about my work as a member of the Cultural Property Advisory Committee. My background as a professor of Chinese archaeology at UCLA has presented me the opportunity to serve the US Government in such a capacity. Since I am, for present purposes, a government employee, this paper has had to be vetted by the State Department's Public Affairs Team.¹ As an academic I am not used to this kind of control, but the Department of State's policies and procedures require a review. Hence my remarks are no doubt affected by self-censorship, if not by outright censorship. But it should also be stressed that I have written this paper in my private capacity, not as an official government spokesperson; the views presented herein are my own and not necessarily those of the U.S. Department of State or the U.S. Government. I believe that what I shall have to say is relevant to the agenda of Transnational American Studies, because the work of the Committee represents one way in which the U.S. government is working conscientiously to build cultural capital ("soft power") abroad.

¹ Following academic convention, it behooves me to take this opportunity to express my gratitude to those anonymous individuals who, in the course of the vetting process, provided me with information and criticism that contributed to the accuracy of this paper.

What the Committee Does

The Cultural Property Advisory Committee is part of a system of advisory committees in the executive branch of the US government. Its members are appointed directly by the President of the United States. As you may read on the Committee's website,

The Committee's role is to advise the president (or his designee) on appropriate U.S. action in response to requests from State Parties for assistance in protecting their cultural heritage, pursuant to Article 9 of the 1970 UNESCO Convention.²

This refers to the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Export and Transfer of Ownership of Cultural Property*. The United States became a party to this convention in 1983 with the passing of the Convention on Cultural Property Implementation Act.³ Article 9 of the Convention states:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.⁴

² Web. <<http://eca.state.gov/cultural-heritage-center/cultural-property-protection/process-and-purpose/cultural-property-advisory>>.

³ I.e., 19 USC 2601 et seq., or Public Law 97-446, slightly modified by Executive Order 12555. The texts of these documents are easily found on the web. Web. <<http://eca.state.gov/cultural-heritage-center/international-cultural-property-protection/process-and-purpose/laws#sthash.vq7y4P6i.dpuf>>.

⁴ Web. <<http://www.unesco.org/new/en/culture/themes/illegal-trafficking-of-cultural-property/1970-convention/text-of-the-convention/>>.

The United States enacts these provisions of the Convention through bilateral agreements—memoranda of understanding—with signatory countries at their request. The United States has so far concluded such agreements with seventeen nations: Belize, Bolivia, Bulgaria, Cambodia, Canada, the People's Republic of China, Colombia, Cyprus, Egypt, El Salvador, Greece, Guatemala, Honduras, Italy, Mali, Nicaragua, and Peru. (Rather than an agreement, emergency action remains in place on behalf of Iraq, pursuant to special Congressional action.) This, you will say, is only a very small part of the world; but with many countries—Germany, for example—there seems to be little need for such an agreement as there is no looting of archaeological sites resulting in the outflow of their cultural heritage to the United States.⁵ (For the same reason, presumably, there is no need for a legal mechanism for the United States to initiate a re-request for a bilateral agreement under the UNESCO Convention with any other country.) In other cases—including countries with ancient civilizations whose remains are avidly sought after by collectors in the US, such as India, Iran, Israel, Mexico, Nigeria, Syria, Thailand, Turkey—the governments in question for various reasons have not yet requested such an agreement, but they may yet do so in the future.

It is the job of the Cultural Property Advisory Committee to review and offer advice on each request made for such a bilateral agreement. When the agreements come up for extension after five years, the Committee must comprehensively revisit them. This means reviewing and making findings, again, pursuant to the same statutory determinations applied in reviewing the original request, particularly that conditions still exist that place a nation's cultural heritage in jeopardy from pillage and illicit trafficking. This is also an opportunity for recommending improvements in the form of amendments to the agreement. Furthermore, for each agreement the Committee conducts an interim review midway through its term of validity. Thus, even with the relatively small number of countries with which such agreements have been concluded so far, the Committee has its work cut out for itself. If the number of

⁵ Note that Germany did not ratify the UNESCO convention until 2007, almost a quarter-century after the United States.

countries were to increase significantly in the future, the Committee's current way of operation would become unsustainable.

One great advantage of the current system is that each agreement is tailored to the specific needs of the partner country, as well as to the specific nature of the antiquities market in the United States with respect to each individual country. There are no boilerplate agreements here. A great deal of information is assembled and considered for every case. For me as a Committee member, participation in this process has been a tremendous opportunity to learn about the current situation of cultural-heritage protection in countries outside my own area of specialization.

A disadvantage is, obviously, the great administrative effort required. Logistics and data collection for the Committee are handled by the Cultural Heritage Office under the State Department's Bureau of Educational and Cultural Affairs.⁶ The Office has a dedicated staff with PhD degrees in archaeology, anthropology, and historic preservation. Although the Cultural Heritage Office also has other tasks relating to heritage preservation unconnected with the Committee, the professional staff members spend a considerable time conducting extensive research and analysis in support of all the Committee's deliberations. Each time a bilateral agreement is proposed or comes up for renewal, one of them travels to the country in question—sometimes more than once—to gather information, conduct interviews, and visit museums and sites. Thus, the Committee's deliberations are comprehensively researched, informed by first-hand observations brought to the table by each member, and augmented by comment provided by outside interested parties. I am not aware of any other country that handles its engagements under Article 9 of the UNESCO Convention so conscientiously and so thoroughly.

Although our Committee is appointed by the President, we do not interact with him directly. Based on our findings, the Committee compiles a report that is transmitted to the Assistant Secretary of State for Educational and Cultural Affairs, who acts as the "designated decision-maker" for the kinds of agreements we are concerned with. Whether our recommendations will be adopted is completely beyond our control. We

⁶ The erstwhile Cultural Heritage Center was upgraded to the status of an Office in 2014.

are merely informed by staff when a bilateral agreement we have reviewed and recommended has been concluded or extended. The public record shows that the U. S. Department of State takes the Committee's recommendations very seriously.

How I Got on It

I have no idea who originally brought up my name as a possible candidate for this committee. All I know that on January 18, 2012, I received an email from the Presidential Personnel Office of the White House. During a telephone call soon afterward, a young member of the staff of the Personnel Office—no, it wasn't President Obama himself!—asked me extremely politely whether I would be willing to serve. This came as a complete surprise. Of course I said yes—aside from the fact that I was genuinely interested, one does not refuse such an honor.

To the best of my knowledge, mine was not a political appointment.

I am a registered Democrat, but I am not active in politics (I have been an American citizen only since 2004), and my monetary contributions to political causes have been minimal. In fact, I don't know what the criteria for my selection were, nor whether there were any other candidates. Perhaps my membership in the American Academy of Arts and Sciences had something to do with it, though the Academy is a private organization and not linked to the US government. Perhaps it was thought that someone with China expertise would be useful, given that the bilateral agreement with China was coming up for renewal (it was in fact renewed in 2013). Of course, like probably every archaeologist, I have been aware of the 1970 UNESCO Convention throughout my career—but I am certainly no expert on cultural-heritage preservation policy. Unlike some members of the archaeological profession (including some of my colleagues on the Committee), I have never taken a vocal stance, let alone published, on this complex and politically-charged topic. Of course, I have my opinions on these matters, but they are not extreme. Perhaps, not being a notorious firebrand was a point in my favor.

As a member of the Committee, I became a Special Government Employee of the State Department. This entailed getting security and ethics clearances. The vetting process took several months. The ethics

clearance in particular involved filling out extensive paperwork about my finances to ensure there was no financial conflict of interest. The security clearance required information about my contacts and activities abroad. Moreover, I was interviewed—by telephone and in person—to establish whether I had any connections to foreign intelligence or to organizations aiming to overthrow the government of the United States. The fact that I do not hold dual citizenship seemed to remove some potential complications. Throughout these proceedings—which were made more difficult by the fact that in 2012 I spent five months as a visiting professor in China, necessitating for one major interview to take place at the US Embassy in Beijing—I was very impressed with the courtesy and professionalism of everyone I interacted with. The White House Personnel Office, in particular, was very helpful, and there were people both there and at the State Department whom I could call whenever I was not completely sure about how to fill out the paperwork. At times it felt like a general confession; but I had no “skeletons in the closet,” and the clearance came through in good time.

The President announced his intent to appoint me on May 9, and my Commission of Appointment was signed on May 30, 2012. I received it in the mail later that summer, after my return from China. The document is printed on heavy-bond paper at the Bureau of Engraving and Printing in Washington. It contains a standard text set in an elegant eighteenth-century *Italic* type, with blanks filled in by a professional calligrapher in black ink with letters closely matching the type (these are underlined on the document and rendered thus in the transcription below). The text reads as follows:

Barack Obama

President of the United States of America

To all who shall see these presents, Greeting:

Know ye, that reposing special trust and confidence in the Integrity and Ability of Lothar von Falkenhausen, of California, I do appoint him a Member of the Cultural Property Advisory Committee for a term expiring April 25, 2014, and do authorize and empower him to execute and fulfil the duties of that Office according to law, and to have and to hold the said Office, with all the powers, privileges, and emoluments thereunto of right appertaining, unto him the said Lothar von Falkenhausen, subject to the conditions prescribed by law.

In testimony whereof, I have caused these Letters to be made Patent and the Seal of the United States to be hereunto affixed.

Done at the City of Washington this thirtieth day of May, in the year of our Lord two thousand twelve and of the Independence of the United States of America the two hundred and thirty-sixth.

By the President: [signed] Barack Obama

Secretary of State: [signed] Hillary Rodham Clinton

The paper seal showing the coat of arms of the United States is indeed affixed on the lower left. President Obama has signed with a black sharpie, Secretary of State Clinton with a blue felt-tip pen.

The cardboard tube the document came in (sent, interestingly, by UPS and not through the Federal Government's own United States Postal Service) is addressed to “The Honorable Lothar von Falkenhausen, A Member of the Cultural Property Advisory Committee.” I was quite surprised to be addressed as “The Honorable”—having cut my German title of nobility from my legal name when I became an American citizen, I had not expected ever again to be addressed as “Hochwohlgeboren,” and be it in another language. But Wikipedia informs one that this form of address—which in Great Britain is reserved to the very highest levels of the aristocracy—is in fact accorded in the United States to members of presidential committees, among other dignitaries in our democratic government.⁷ Of course, it is never used in daily life, and it would be very bad form for me to use it in referring to myself. I mention it here merely as a curiosity.

All these procedures and formalities may be quite unimportant, but as an anthropologist I cannot help finding them fascinating. I have permitted myself to digress on them here in the belief that they exemplify aspects of United States governmental practice that are perhaps not very widely known, even among practitioners of Transnational American Studies.

What We Do When We Meet in Washington

Normally, the appointment to the Cultural Property Advisory Committee is for a term of three years, though for some reason my initial appoint-

⁷ Web. <http://en.wikipedia.org/wiki/The_Honorable#United_States>.

ment was only for two years. Appointments are renewable. Technically, my status as a member of the committee has been in limbo since April 25, 2014, and I have not yet been officially reappointed (at least I have not been so notified). I understand that this is a common situation; according to the applicable statute, the committee members continue to serve normally until they are either reappointed or replaced.

There are usually three meetings a year—Winter, Spring, and Fall. Each takes up approximately three days. When you include travel time and the time needed to read the voluminous dossiers sent to us by the Cultural Heritage Office staff, this amounts to about a week's work each time, or three weeks per year—a not inconsiderable commitment for someone holding a full-time job. Our work is not remunerated, although the State Department picks up the cost of travel, accommodation, and meals every time we go to Washington. For eleven committee members converging from all parts of the United States, the costs add up. To be sure, some members have to miss a meeting occasionally; as long as six are present, we have a quorum. In consideration of the State Department staff who are in attendance, our meetings take place during normal working hours, 8.30 am through 5 pm; we do not hold overnight sessions. When not bogged down with UCLA-related work, I have used my evenings in Washington to connect with friends in the area or to attend concerts at the Kennedy Center, which is very near the hotel where we are staying. There is usually little time for sightseeing, unless we opt to stay on at our own expense.

The Committee is composed of eleven members. Its composition is stipulated by the Convention on Cultural Property Implementation Act. They represent four constituencies thought to be “stakeholders” in this field. Some of them are well-published authorities. Since our names are a matter of public record, I have felt free to enumerate them below; their publications insofar as relevant to the work of the Committee are listed in the footnotes.

- Two members represent the interests of museums: Nina M. Archabal, former head of the Minnesota Historical Society; and Katharine L. Reid, former director of the Cleveland Museum.
- Three members are expert in “archaeology, anthropology, ethnology, or related fields.” Rosemary A. Joyce, a prominent Mesoamerican archaeologist from the University of California

at Berkeley; Nancy C. Wilkie, professor of Classics, Anthropology and the Liberal Arts, emerita, at Carleton College in Minnesota, and former head of the Archaeological Institute of America;⁸ and myself.

- Three members are expert in the international sale of cultural property: Jane A. Levine, a lawyer for Sotheby's, the international auction house; as well as two well-established private dealers in antiquities and ethnographic objects, James W. Willis and Thomas Murray, both based in Northern California; and

- Three members represent the interests of the general public: Barbara Bluhm Kaul, a philanthropist and collector from Chicago; Marta A. de la Torre, a Miami-based cultural-heritage preservation specialist who used to work for the Getty Conservation Institute in Los Angeles;⁹ and the chair of the committee, Patty Gerstenblith, a law professor at De Paul University in Chicago and director of its Center for Art, Museum, and Cultural Heritage Law.¹⁰

⁸ Nancy Wilkie. “Governmental Agencies and the Protection of Cultural Property in Times of War.” *Antiquities Under Siege: Cultural Heritage Protection After the Iraq War*. Ed. Lawrence Rothfield. Walnut Creek, CA: Alta Mira Press, 2008; idem, “Public Opinion Regarding Cultural Property,” *Cardozo Arts and Entertainment* 19 (2001): 97–104; “Moynihan’s Mischief,” *Archaeology* 56.6 (2000): 10.

⁹ Marta A. de la Torre, ed. *The Conservation of Archaeological Sites in the Mediterranean Region: An International Conference, 6–12 May 1995*. Los Angeles: Getty Conservation Institute, 1997; idem, ed. *Assessing the Values of Cultural Heritage: Research Report*. Los Angeles: Getty Conservation Institute, 2002; idem, ed. *Heritage Values in Site Management: Four Case Studies*. Los Angeles: Getty Conservation Institute, 2003.

¹⁰ Patty Gerstenblith. *Art, Cultural Heritage and the Law*. 3rd ed. Durham: Carolina University Press, 2012; idem, “Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past.” *Chicago Journal of International Law* 8.1 (2007): 167–195; idem, “Schultz and Barakat: Universal Recognition of National Ownership of Antiquities.” *Art Antiquity and Law* 14 (2009): 21–48; idem, “Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward,” *Cardozo Public Law, Policy & Ethics Journal* 7.3 (2009): 677–708.

I do not know why there are only two museum representatives as opposed to three in each of the other three categories—though of course it is advantageous to have an odd number of people for the sake of getting clear a majority when we proceed to a vote. In any case, this is what is stipulated by the statute.

Do we represent the make-up of the American people? Hardly. The Committee is predominantly female (eight out of eleven), Caucasian, and highly educated (at least eight of us hold advanced academic degrees). It is also considerably older than the average of the population: at fifty-seven, I am one of the two youngest members—and some of us are in their eighties. But we work together quite well as a group.

According to the statute, an officer of the federal government—in our case, the head of the Cultural Heritage Office—must always be present during meetings of a presidential committee. Moreover, a State Department attorney is always on hand to advise on any legal matter that may come up. Our deliberations are confidential and held in closed session, as provided by law.

The Committee holds open sessions at which outside interested parties may provide oral comments about the bilateral agreement currently under consideration. Anyone who wishes to speak must register ahead of time by a certain deadline, and there is a strictly enforced time limit. Members of the Committee are free to ask follow-up questions. The general public may also submit written comments online which the committee is able to read ahead of its meeting. They range in length from pithy email messages to lengthy position papers painstakingly compiled by museums or cognizant specialists. The University of Pennsylvania Museum, in particular, has been highly effective in its support of proposed bilateral agreements; on the opposite side, coin-collectors' clubs have been relentless in opposing any attempts to regulate the trade in antiques. In the interest of due process, committee members are not allowed to solicit (or discourage) such comments; all comments come in response to a public notice published in the *Federal Register*.

There are occasions when the Committee may meet with representatives—diplomatic or professional—of the country whose agreement is under consideration. Given that government to government information is exchanged in such circumstances, such meetings are closed. The Committee's main deliberations go on during lengthy closed

sessions. The process is quite formalized, because for each bilateral agreement, findings related to four determinations must first be made.

- (A) that the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party;
- (B) that the State Party has taken measures consistent with the Convention to protect its cultural patrimony;
- (C) that-
 - (i) the application of the import restrictions set forth in section 307 [of the Convention on Cultural Property Implementation Act] with respect to archaeological or ethnological material of the State Party, if applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by those nations (whether or not State Parties) individually having a significant import trade in such material, would be of substantial benefit in deterring a serious situation of pillage, and
 - (ii) remedies less drastic than the application of the restrictions set forth in such section are not available; and
- (D) that the application of the import restrictions set forth in section 307 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.¹¹

Based on the dossiers (reinforced by powerpoint presentations presented by the hard-working Cultural Heritage Office staff members during the closed-session meetings), the oral statements from the public, and our discussions with representatives of the country in question, we discuss each of these points in depth. Our discussions can easily take up two days per agreement, and they are often exhausting.

If we recommend in favor of a given bilateral agreement, we then proceed to the second part of our deliberations, in which we propose specific recommendations, sometimes quite detailed, of what the agreement should contain. We also have to discuss the "List of Designated Objects" specifying the kinds of objects that may not be imported from a given country.

What specifically goes on in the committee meetings I am not allowed to tell you. But you can probably imagine some of it yourselves

¹¹ 19 USC 2601 section 2602 a (1).

from the circumstantial information I have provided. Just this much: Everybody is there to advocate for his/her constituency—museums, academics, the antiques trade, and the general public. As a consequence, everyone obviously has his/her point of view, but we do listen to each other, and we are united in the goal to do the right thing. Our ability to come together on this point is helped by the fact that the public discourse on cultural heritage in the United States has come a long way. Even the most diehard advocates of free trade in antiquities no longer advocate in favor of looting archaeological sites; no self-respecting museum these days will dare collect looted objects or accept them as gifts; and few academics today deny that private collecting, when done responsibly, can be legitimate. Such generally held attitudes are also shared by the Committee members, making it possible to make recommendations everyone can accept as reasonable. Hence our discussions are characterized by what can sadly no longer be found in the US Congress these days: an atmosphere of intellectual openness and mutual respect. Fellow Committee members have on occasion reminded me that this is not a matter of course, but the result of hard-won efforts; apparently, things were somewhat different in the past.

The Impact of Our Work

Whether the Committee's efforts have any impact on what happens in the world "out there" is a most difficult question to answer. The Committee must explicitly deliberate the question whether a bilateral agreement with a given country has made a difference in preventing the looting of that country's cultural heritage every time the agreement comes up for renewal. The ongoing research by Cultural Heritage Office staff provides information that enables the Committee to ascertain whether incremental progress has been made. Some countries—Italy, Greece, and Cambodia, for instance—have been able to use their bilateral agreements to bring about the repatriation of recently looted cultural treasures. Moreover, the US State Department can make various kinds of training and other support available to the countries with which bilateral agreements exist. And given the emphasis on cooperation and interchange under Determination D, the bilateral agreements can be useful in encouraging partner countries to engage in cooperation with

scholars and institutions in the United States. The effects are quite palpable in some cases.

In my opinion, however, the main importance of the Committee's work in implementing the UNESCO convention, at least right now, is a moral and symbolic one. As an archaeologist, I am concerned mainly with the preservation of archaeological sites; for the loss of historical information that occurs when objects are ripped out of the ground without proper recording is incalculable and irreversible. Tragically, in spite of the high-minded intentions of the UNESCO declaration of 1970, the pillage of archaeological sites all over the world has greatly worsened in the more than four decades since it was promulgated. In some countries—including, alas, in China, where I work—it has reached catastrophic proportions, unprecedented at any previous time in history—and in spite of serious efforts on the part of the authorities to quell it. And even though the main economic and cultural motives for such goings-on must sometimes—e.g., in the case of China—be sought in the affected countries themselves, the United States is undeniably a major market for illegally imported antiquities from all over the world.

In this situation, for the United States government to take a stance, and to establish a legal framework that makes it possible to mitigate at least some of the damage done, sends the right signal. Doing so announces to the rest of the world that the United States is concerned with the protection of cultural heritage worldwide and does not, as a country, condone (let alone encourage) looting. The goodwill thereby generated abroad contributes manifestly to the "soft power" and prestige that the United States enjoys abroad. In a time of mounting political tensions, the "cultural capital" thus accumulated arguably more than outweighs the resources and administrative efforts required.

Concluding Reflections

The institutions and practices I have described are part of America's self-presentation in the international arena today and therefore pertain to the purview of American Studies abroad. Since our Committee is presidentially-appointed, one naturally wonders about President Obama's connection to the work that we do. Some of my acquaintances, when hearing about my service with the Committee, imagine that we actually

meet with the President and want me to tell them what he is like in person. As I have already explained, that's not how it works. In my more than two years on the Committee, the highest-ranking government official our Committee has met with in Washington was the Assistant Secretary of State, Eyan Ryan. All I have of the President is his signature on the above-cited document. During the Advent season of my first year on the Committee, I received an email addressed to State Department employees notifying me of the opportunity to sign up for a visit to the White House to view the Christmas decorations; but the invitation informed me that "the President and Mrs. Obama will be not be at home" on that day. Making a special trip from Los Angeles for such an occasion was obviously out of the question.

What Obama's personal views on cultural-heritage preservation are I do not know. Arguably, in fact, his views are irrelevant to what the Committee does. The statutory framework under which we do our work was established during the time when the president was Ronald Reagan, and it has not been modified since. As Committee members, we stand apart from, if not above, party politics; the command structure in which we operate has the effect of safeguarding our autonomy at the same time as shielding us from the State Department's day-to-day policymaking. Some of us were appointed by Obama, some by George W. Bush, some even earlier. And some of us will still be there under Obama's successors.

The overall continuity of US policy—especially of its foreign policy, the domain of the State Department—is often commented upon; it is, of course, a result of the staying power of the government's professional bureaucracy, but it is also considered to be a hallmark of a mature democracy. Some are frustrated by the limited possibilities for change, while some are comforted by the smoothing out of extremes that is engendered by the system's built-in inertia. Be that as it may, the Committee is certainly part of the existing institutional structure through which the Obama administration has had to govern. The Committee currently works for President Obama, but its work—determined by the five-year cycles of the various bilateral agreements—goes on independently of who is in power. As its members, we have no power whatsoever—not, arguably, should we, considering that we are appointed and not democratically elected. But we do have influence—an influence that emanates from our professional expertise and perhaps, to some extent,

from our good reputations (the "integrity and ability" mentioned in our appointment documents). I would like to think it a good thing that there is a place for our input in the system. Independently yet interdependently, our Committee is part of American democracy in action.