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Fax: (202) 224-6331
Senator Orrin Hatch
104 Hart Office Building
Washington, D.C. 20510

Fax: (202) 228-2717
Senator Ron Wyden
221 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators Hatch and Wyden,

RE: S. 3449 ("Terrorism Art Antiquity Revenue Prevention Act of 2016") and H.R. 2285 ("Prevent Trafficking in Cultural Property Act")

I am writing on behalf of: (1) the Ancient Coin Collectors Guild; (2) The Industry Council for Tangible Assets; (3) the International Association of Professional Numismatists; and (4) the Professional Numismatists Guild with regard to the above legislation. Together, these organizations represent the interests of untold numbers of serious coin collectors in the United States as well as thousands of law abiding small businesses that trade in historical coins both here and abroad. S. 3449 was introduced recently and was also referred to Senate Finance. H.R. 2285 passed the House and has been referred to Senate Finance.

We would request both pieces of legislation be put on hold until such time as the concerns of collectors, museums and trade are addressed. S. 3449 is of particular concern because it would make it a crime overnight to possess millions of coins and other cultural artifacts that have been legally traded for decades. Obviously, this would not only have a drastic negative impact the numismatic, antiquities and ethnographic trade and collectors, but museums as well. Our concerns with H.R. 2258 are more modest and should hopefully be able to be addressed by report language if the bill comes up for vote during the upcoming "lame duck" session.

Both pieces of legislation have been justified by looting by ISIS in Syria and Iraq, but ***will impact all trade in archaeological and ethnological artifacts from any culture.*** Congress has already passed the "Protect and Preserve International Cultural Property Act" into law to address the specific concern of ISIS looting. Moreover, since that bill was passed, serious questions have arisen about the justifications for all this legislation. First, it has become

increasingly apparent that claims that ISIS has made "hundreds of millions" or even "billions" of dollars from looting rely on "outdated information, misrepresented statistics, and discredited figures." *See House Homeland Security Committee Releases Report on ISIS Financing*, Gates of Nineveh Blog (Oct. 14, 2016), available at https://gatesofnineveh.wordpress.com/2016/10/14/house-homeland-security-committee-releases-report-on-isis-financing/ (last visited October 26, 2016). Second, given the recent successes of the Syrian military and its Russian, Iranian and Lebanese allies on the battlefield, it has become increasingly apparent that any artifacts seized and repatriated under U.S. law will now likely be ultimately returned not to a new Democratic Syria but rather to the very same Assad regime that is itself responsible for looting, and the intentional destruction of Syria's cultural heritage as well as death and destruction on a massive scale.

S. 3449

This bill is of particular concern because it drastically expands current criminal law in such a way that could overnight make millions of coins and other cultural artifacts illegal to own. Obviously, this would not only have a drastic negative impact the numismatic, antiquities and ethnographic trade and collectors, but museums as well.

Case law developed over the past forty years has construed the current National Stolen Property Act ("NSPA") to make it illegal to possess, sell, or transport artifacts valued over $5,000.00 considered stolen based on a clear foreign "national patrimony" law that is consistently applied in that country. In contrast, S. 3449 lowers the bar dramatically. Section 2 of the proposed law makes it a crime to possess, sell or transport any artifact valued over $50.00 "that has been removed or excavated in violation of local law."

While all the above numismatic organizations counsel their members against dealing in coins and artifacts reasonably suspected to be the direct products of illicit excavations,[1] the major problems with these provisions are three-fold. First and foremost, because the NSPA makes it illegal to "possess" stolen artifacts, expanding the definition of "stolen" could make "possessing" artifacts that have been traded for years on the open market "illegal" overnight. The fact is that there are many artifacts sold quite openly that were "removed or excavated in violation of local law" decades ago at a time when authorities in source countries like Egypt, Italy and Greece did not actively enforce such laws.[2] These materials remain legal to own under the current NSPA either because of their low monetary values or precisely because the government could not prove the existence of a national patrimony law that was enforced in the source country at the time the object left that country. Second, as it is, the government has already pursued weak claims on behalf of authoritarian governments like that of Egypt confident that the threat of criminal liability and the high cost of legal services will discourage most collectors, museums and trade

[1] For example, IAPN members promise, "To guarantee that good title accompanies all items sold, and never knowingly to deal in any item stolen from a public or private collection or reasonably suspected to be the direct product of an illicit excavation, and to conduct business in accordance with the laws of the countries in which they do business."

[2] There remains a large legal internal market for ancient coins in Italy, Bulgaria and China. It appears many of such coins available in internal markets in Bulgaria and China are recent finds.

members from contesting any forfeiture action. Lowering the bar further will only encourage that unwelcome trend. Finally, passing the proposed law may very well render the Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601 *et seq.* ("CPIA"), its "concerted international response requirement" and the self-help requirements it imposes on source countries seeking U.S. assistance obsolete. Senate Finance should, therefore, ask itself whether amending the NSPA to provide for repatriations based on ill-defined foreign laws will seriously undercut longstanding U.S. policy enshrined in CPIA meant to ensure that United States preserves its "independent judgment" "in these complex matters." (S. Rep. No 97-524, at 6.)

The trade and collectors also have some practical concerns about a proposed database of "cultural property of Iraq or Syria." (Sec. 3.) First, how is "cultural property of Iraq or Syria" to be defined? Depending on that definition, the database could potentially include hundreds of millions of artifacts. Under the circumstances, money may be better spent documenting materials in museum collections and archaeological store rooms so that it can be tracked if stolen. Moreover, experience from preparing such databases can then be used to determine whether a far more ambitious database of such cultural property in private hands can be developed without becoming a boondoggle for all concerned.

H.R. 2258

H.R. 2258 seeks to ramp up enforcement of cultural property laws. While the undersigned numismatic organizations do not oppose this bill, what concerns them is that present enforcement efforts ignore constraints found in existing law meant to narrowly focus restrictions and protect against improper detention, seizure and forfeiture of cultural goods. Accordingly, we hope the Senate can help ensure that any required "updates" of existing directives, regulations, rules, and memoranda of understanding (Sec. 4 (2)) accurately reflect Congress' directions rather than placing a premium on administrative convenience.

Our major concern relates to the construction and enforcement of the CPIA. The plain meaning of the CPIA requires the government to establish that coins and other artifacts "were first discovered within" and "subject to the export control" of a State Party for which restrictions are granted *before they may be subject to seizure and forfeiture.* Import restrictions only apply to "designated archaeological material" under 19 U.S.C. § 2606. This "designated archaeological material" is that "covered by an agreement" and "listed" under Section 2604. 19 U.S.C. § 2601 (7). Section 2604 states that CBP and/or the Treasury Department "may list this such material by type or other appropriate classification, but each listing made under this section *shall be* sufficiently specific and precise to insure that (1) the import restrictions under Section 2606 are applied *only to* the archaeological ... material covered by the agreement... ; and (2) fair notice is given to importers . . . as to what material is subject to such restrictions." 19 U.S.C. § 2604 (emphasis added).

Indeed, Congress thought these requirements to be so crucial that Congress also altered the usual burden of proof in customs cases to assign it to the government in forfeiture actions brought under the CPIA. Stefan D. Cassella, Asset Forfeiture Law in the United States § 11-2 (iii) at 456 n. 16 (Juris 2013). In any such forfeiture action, 19 U.S.C. § 2610 places the burden

squarely on the government to establish that any "designated archaeological material" was "listed in accordance with Section 2604." As set forth above, Section 2604 in turn requires CBP and/or the Treasury Department to ensure "the import restrictions" "are applied *only* to the archaeological and ethnological material covered by the agreement," i.e., that they were "first discovered in" and "subject to the export control" of China or Cyprus. 19 U.S.C. § 2601 (2) (emphasis added).

Accordingly, to make out a *prima facie* case for forfeiture under the CPIA, the government must establish that an object of archaeological interest: (1) is of a type that appears on the designated list; (2) was first discovered within and subject to the export control of the UNESCO State Party for which restrictions were granted; and (3) that it was illegally removed from the State Party after those restrictions were granted.[3]

Despite this plain meaning, the relevant CBP regulation, 19 C.F.R. §12.104, on its face conflicts with these CPIA provisions that only authorize import restrictions on objects of archaeological interest "first discovered within" and "subject to the export control" of a specific UNESCO State Party. *See Ancient Coin Collectors Guild v. U.S. Customs and Border Protection,* 801 F. Supp. 2d 383, 407 n. 25 (D. Md. 2011) ("Congress only authorized the imposition of import restrictions on objects that were 'first discovered within, and [are] subject to the export control by the State Party.' Under the regulations, that requirement seems to apply only to the importation of a 'fragment or part' of an object of archaeological or ethnological interest. This appears to have been an oversight in the drafting, or codification, of the original regulations in 1985, and has persisted in the C.F.R. ever since."), *aff'd,* 698 F.3d 171 (4th Cir. 2012).[4] Moreover, this confusion carries over to a document directed at the public, entitled

[3] This view is in accord not only with the plain meaning of the CPIA, but also the State Department's own understanding of the burden of proof at the time passage of the CPIA was being discussed:

> Now, if I may pass for a moment to the question of procedures and burdens of proof, which is the area of one of the great improvements in the bill…. The Government must show both that it [the artifact] fits in the proscribed category and that it comes from the country making the agreement. So the burden of proof of provenance is on the Government…. This means in a significant number of cases it will not be possible to require an object's return.
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> . . . .
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> The only country that would have the right to claim such an object under the bill is the country where it was first discovered. It would have to be established that the object was removed from the country of origin after the date of the regulation.

Statement of Deputy State Department Legal Adviser, Mark Feldman in *Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,* 4 Syracuse J. Int'l L. & Com. 97 1976-1977 at 129-130.

[4] The numismatic community had hoped it could rely on the courts to "say what the law is," *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803), but unfortunately, that has not been the case. Rather, despite concerns expressed to a U.S. District and a Federal Appeals Court and that import restrictions on common, historical coins of the sort lawfully traded here and abroad are contrary to statutory intent and CPAC's past recommendations, State and CBP have nonetheless also successfully argued that the matter is not subject to judicial review. Thus, while the statutory intent may be clear, it would be a mistake to assume that collectors—even where they have the funding and intestinal fortitude necessary to fight the matter in court—can rely on the judiciary to ensure compliance with the statute. Rather, as the Fourth Circuit Court of Appeals stated in affirming the dismissal of a declaratory judgment action aiming to strike down or modify regulations imposing import restrictions on coins, Congress must assert itself

What Every Member of the Trade Community Should Know About: Works of Art, Collector's Pieces, Antiques, and Other Cultural Property 17-18 (U.S. Customs and Border Protection May 2006). That document also suggests that archaeological objects may be "designated," detained, seized and forfeited without regard to their find spot.

Based on this regulation, CBP has conflated where coins are minted with where they are found.[5] Furthermore, the government's views about how a forfeiture action under the CPIA should proceed puts a premium on expediency. As long as the government has "probable cause" to believe that a coin is of a type on a designated list, it may not only be detained and seized, but forfeited if the importer does not present the "satisfactory evidence" described in 19 U.S.C. § 2606, i.e. either export documentation or declarations under oath showing that a restricted object of archaeological interest was out of the country for which restrictions were granted before the date of the restrictions.

Given these concerns, we propose that the following report language be inserted into the legislative history of this bill:

> U.S. Customs and Border Protection (CBP) shall only seize cultural goods subject to import restrictions under the Convention on Cultural Property Act, 19 U.S.C. § 2601 et seq. that were first discovered within and hence were subject to export control by the specific UNESCO State Party for which such import restrictions were granted. These cultural goods must also be illegally removed from that State Party after the date U.S. import restrictions went into force.

We trust that the requested report language will help ensure that CBP complies with the law rather than merely acting based on administrative convenience.

Please feel free to contact me if you have any questions. We have already briefly discussed this legislation with Majority staff but would welcome the opportunity to discuss our concerns further.

Sincerely,

/s/

Peter K. Tompa

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to ensure that its statutory intent is honored. 698 F.3d at 184 (inviting Congressional oversight over compliance with the CPIA).

[5] This is factually inaccurate. Ancient coins circulated far from where they were minted, first as items of commerce, and since the Renaissance as collectibles. For example, ancient Roman coins are regularly found as far West as Spain and North Africa and as far East as present day Sri Lanka (as part of the spice trade). In short, they were the "$100 bills" of their day.

On behalf of:

The Ancient Coin Collectors Guild of Gainesville, MO
(http://www.accg.us/home.aspx)

The Industry Council for Tangible Assets of Annapolis, MD
(http://www.ictaonline.org/)

The International Association of Professional Numismatists
(http://www.iapn-coins.org/)

The Professional Numismatists Guild of Temecula, CA
(http://www.pngdealers.org/)