

## **When Ideologues Take Over the Administrative State: Punishing Ivory Owners Rather Than Saving Elephants**

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The Advisory Council on Wildlife Trafficking recently met again in Washington, D.C. as the administration prepares to turn millions of Americans into criminals and destroy potentially billions of dollars in property by administrative fiat. Yet doing so would likely result in more elephant killings. The campaign appears to be driven by ideological rather than ecological fervor.

Poaching has increased over the last decade, putting African elephants at risk. Additional global cooperation is necessary to save them.

But America is not the problem. Wrote economist Brendan Moyle in a new study for the Ivory Education Institute: "the increase in poaching has bypassed the U.S. market completely." Instead, the increased "raw ivory exports ... are heading mostly to East Asia and not to North America."

Most ivory in America is legal. Coming from long dead elephants, its sale does not endanger wildlife today. Before the international ban was agreed to in 1989 millions or tens of millions of objects either made of ivory or accented by small amounts of ivory entered the U.S.

There are pianos, guitars, and violin bows. Jewelry, canes, and chess sets. Gun stocks, knife handles, and card holders. Letter openers, book marks, and fans. Netsukes, statues, and beer steins. Crosses, balls, and seals. Clocks, pool cues, and poker chips. Furniture, musical instruments, and more. Some of these objectives are decorative masterpieces and historical treasures. They sit in museums, collections, and shops. They are traded by antique dealers and auction houses and at flea markets. They are repaired by carvers and restorers.

There are two obvious strategies to fight poaching. The first is to fight poaching. That is, target the bad guys, those illegally killing elephants and selling illicit ivory. Enhance the ability of African governments to protect wildlife, increase the benefits of protecting elephants to local residents, break up smuggling operations, and target dealers in poached ivory. The U.S. government long used this strategy.

The second approach is to play politics. That is, penalize the good guys, those trading in legal older ivory. Doing so wouldn't protect any elephants. It wouldn't prevent additional illicit ivory

smuggling. It wouldn't stop people from buying items made from illicit ivory. But it would drive up enforcement statistics and punish ivory owners.

Unfortunately, the administration has decided to do the second.

In February the Fish and Wildlife Service announced a ban on the commercial import of antique ivory, heretofore allowed with appropriate documentation by the Convention on International Trade in Endangered Species (CITES). That means Americans, and only Americans, cannot buy an ivory item, no matter how old. The policy will not reduce the number of antiques sold or stop any particular items from being sold. The change simply ensures that no American will be able to own ivories coming from other countries.

At the same time the White House announced its intention to prohibit "the import, export, or resale within the United States of elephant ivory except in a very limited number of circumstances." In fact, FWS lamented that "Under current laws, we are not able to impose a complete elephant ivory ban." Nevertheless, the agency described its actions as "our first step to implement a nearly complete ban on commercial elephant ivory trade." The Service added: "we believe that the administrative actions available to us would result in a near complete ban."

FWS plans to prohibit the sale of any antique (100 year-old) ivory the age of which the owner cannot "demonstrate" with "documented evidence." Even with "documented evidence" old though non-antique ivories could not be sold across state lines. Since 17th century carvers were not in the habit of providing certificates of authenticity, virtually no ivory owner has such documentation, which Washington never before required. This would essentially end ivory sales in America.

Even if the documentation rule was more reasonable, the inter/intra-state distinction makes no sense. A Steinway piano with ivory keys produced in 1920 is little different from one made in 1900. Many antique ivory pieces have been repaired with newer, but still old, ivory. The residence of someone with a million dollar netsuke collection shouldn't be a factor in his or her ability to sell it.

The argument for the rule is that it would make life easier for FWS. Just ban everything and the illegal trade will disappear. The demand for ivory will collapse. Poachers will quit. Elephants will flourish.

None of this is true.

First, until politics changed the policy this year, FWS successfully targeted real criminals. For instance, CITES reported a high level of effective enforcement in America. In a 2008 study elephant researcher Daniel Stiles and conservationist Esmond Martin concluded: "The USA has a good record for seizures in accordance with CITES and US regulation concerning ivory and other wildlife trade at its borders compared with other countries." In September 2012 the agency explained that from 1989 to 2007, U.S. seizures accounted for about 30 percent of those around the world. More recently, FWS touted its investigations into New York and Philadelphia dealers in smuggled ivory.

Second, the fact the law may be difficult to enforce is no excuse for treating those who followed the law and played by the rules as criminals. Yes, it might be impossible to distinguish a trinket made in 1989 from one made in 1990. And there are fakers in ivory as there are forgers in painting. However, there are important differences between most newer and older ivories. European-style carving died out decades ago. Genuine antiques differ in color, wear, style, stain, subject, and more. Indeed, dealers and collectors have to learn the difference since older items are worth immeasurably more. FWS should turn to collectors and dealers, who would be happy to assist agents in distinguishing new and old.

Third, flooding the market with illegal old ivory would make it harder to eliminate illegal poached ivory. Illicit ivory now accounts for a tiny share of ivories in America. Increasing the number of illegal ivory objects subject to seizure by 20-fold or more would make it far harder to find and seize the few new ivories that endanger elephants. Indeed, criminal gangs experienced in illegal markets would flourish in a larger illegal marketplace filled with amateurs.

Merging the illegal and legal markets would create greater economic incentives for the illicit trade. Today, argued Moyle, who specializes in the ivory market, the availability of legal ivories helps reduce demand and prices for illegal items. Moreover, any collector desperate to get something back on his or her investment in items today worth thousands or tens of thousands of dollars would be tempted to turn to those with experience on the other side of the law. Nor would the ban be self-enforcing. FWS would have to shift personnel and other resources to track down everyone from active antique dealers to retired collectors. And do so without the assistance of bona fide collectors, dealers, and carvers, who would be unlikely to cooperate in sending heretofore innocent people to jail.

Fourth, Americans are not driving the demand for poached ivory. In 2008 Stiles and Martin declared: "the USA has the second largest ivory market in the world, after China-Hong Kong. The illegal proportion of it, however, is much smaller than any country in Asia and most countries in Africa. The USA ivory market poses a minimal threat to elephants." In September 2012 FWS admitted the same: "we do not believe that there is a significant illegal ivory trade into this country." The Obama administration then proclaimed itself most concerned about the public and especially travelers who "often unwittingly purchase and import ivory products."

Concluded Stiles, a member of the IUCN/SSC African Elephant Specialist Group, in March: "Most of the ivory sold in the U.S. is legal recycled ivory or genuine antiques." His 2008 study found that neither the amount seized nor price of raw ivory had been increasing appreciably despite world trends. Coming to a similar conclusion was Moyle, who noted: "The size of the U.S. ivory market is a reflection of its historical size and not current poaching levels." Moreover, the U.S. "is simply not important for the global criminal conspiracies trafficking ivory." The primary threats to elephants come from large shipments of raw ivory, yet "since 2008 all of these seizures have been destined for Asia." Indeed, Moyle found, this large-scale smuggling has "nothing to do with the U.S. market for antiques."

China is by far the largest market for illegal ivory. Explained the report on the "Status of African Elephant Populations and Levels of Illegal Killing and the Illegal Trade in Ivory" issued by three international organizations, elephant killing "trends are strongly related to patterns in consumer

spending in that country. This relationship does not hold for other traditional destination markets for ivory (Europe, USA or Japan)." Illicit shipment of poached ivory most importantly flows to China and secondarily to Thailand. The price for raw ivory in China has been estimated at six times that in America. Ivory seizures suggest organized criminal activity "and often involve Asian-run, Africa-based sourcing of ivory," explained the study.

Some American prohibitionists contend that punishing Americans would lead China to act against poaching. However, the denizens of Zhongnanhai are eminently pragmatic. They will act in their perceived interest alone. They certainly won't harm their own people because the U.S. government incomprehensibly treats antique collectors and dealers like criminals. These days Beijing is particularly disinclined to follow America's lead on almost any issue.

Banning all ivory sales in an attempt to stop poached ivory sales is a bit like outlawing all alcohol sales to prevent any purchases by minors. We saw how well Prohibition worked: The illegal market expanded dramatically, enriching criminals, who enjoyed greater incentives to trade with anyone and everyone. The government was forced to massively increase enforcement resources and focus on preventing consumption that previously had been legal. Prohibition made sense only if you believed alcohol consumption should be banned as intrinsically evil.

So it is with ivory.

A number of activists have argued that simply owning an ivory object is morally wrong -- it doesn't matter when it was created. Thus, anyone possessing ivory deserves to lose the object's value. For them the issue is ideological, with little concern for the actual impact of the policy on humans or elephants.

Yet our ancestors' wrongs are a poor guide to practice today: should every building constructed with slave labor, including the White House, be torn down? An 18th century ivory cane is an object, neither moral nor immoral. There is nothing wrong with buying it, whatever its nature centuries ago. Moreover, some ivory carries no moral stigma at all because it was obtained from elephants which died naturally or were culled -- killed because the habitat would not support them. (Some African countries today host growing herds.) The harm caused by today's illicit ivory trade is what makes that practice wrong today, which is why new ivory should be treated different than old.

FWS assured Americans that "personal possession of legally acquired items containing elephant ivory will remain legal." Admittedly, Maoist-style "Elephant Guards" are unlikely to soon break into people's homes to destroy ivory objects. But why not government confiscation if ivory owners are considered to be evil? Not too long ago it would have seemed impossible that Washington would even consider turning millions of people into criminals for selling a pervasive legal product, encompassing millions of items worth billions of dollars.

In fact, the assault on the rule of law should scare even those who do not own any ivory. The Constitution limited government property seizures and required Congress to enact substantial policy changes. Increasingly, however, regulations are subverting the nation's law-making process, with unelected and largely unaccountable bureaucrats issuing 30 times as many rules as

laws approved by Congress. Jonathan Turley of George Washington Law School warned that: "Our carefully constructed system of checks and balances is being negated by the rise of a fourth branch, an administrative state of sprawling departments and agencies that govern with increasing autonomy and decreasing transparency."

So it is with FWS, which would essentially steal people's property at the behest of activist ideologues by changing a few words in the Federal Register. This would avoid any legislative debate which, though imperfect, would involve all stakeholders in a search for a more effective policy causing less harm. So America moves from a rule of law to a rule of men.

Elephants require protection. That means targeting poachers and illicit ivory dealers. Improving the incentive and ability of African governments to preserve wildlife. Enlisting those involved in the legal ivory market as allies, not turning them into adversaries. And taking into the account what FWS in May termed the "fairness to individuals who have complied with the law in their acquisition of CITES-listed specimens." The agency went on to strike a very different balance than it did with the ivory trade: "We do not believe it is necessary for ensuring the conservation and sustainable use of the species to retroactively apply" rules to "specimens that were legally imported prior to the imposition of these restrictions."

Americans should work together to save elephants. With policies that actually address the problem by creating better incentives and better deploying resources. And which respect people's basic constitutional rights and liberties. The proposed ivory ban fails on all these counts.

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