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Obama Administration Treats Antique Collectors And Dealers As Criminals: New Ivory Rules Also Put Elephants At Increased Risk

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The Obama administration is preparing to treat virtually every antique collector, dealer, and auctioneer in America--and anyone else who happens to own a piece of ivory--as a criminal. In the name of saving elephants, the administration is effectively banning the sale of any object containing any ivory, even if legally acquired decades ago. Doing so will weaken conservation efforts by expanding the ivory black market, diverting enforcement resources away from true contraband ivory, and enriching those engaged in the illegal ivory trade.

In Africa poachers are killing elephants for their tusks. Ill-equipped and under-financed African governments are unable to stop the slaughter. Western industrialized states have responded by pushing sales restrictions. Under the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES) only ivory from before 1989 can be sold. Official certification is required for international shipment. Special CITES approval is necessary for even governments to market post-1989 ivory.

Unfortunately, ivory prohibition has not protected the animals. By far the greatest demand for new ivory comes from Asia, though some smuggling occurs elsewhere, including the West. However, most ivory in America arrived legally many years ago. A beautiful material easily worked by skilled craftsmen, ivory has provided jewelry, pool cues, piano keys, canes, clocks, toys, musical instruments, card cases, beer steins, balls, seals, fans, gun stocks, chess sets, crosses, netsukes, sculptures, poker chips, figurines, die, handles, and a myriad of other decorative objects. These items have made their way into public museums, private collections, dealer inventories, and auction showrooms across America.

The elephants which provided the ivory for these items are long dead. The owners have acted responsibly and legally, following the rules as they invested hundreds, thousands, or tens of thousands of dollars in objects d'art. Most collectors and dealers don't traffic in poached ivory.

Until now the rules were simple and sensible. Ivory imported legally, that is, prior to 1989 or after 1989 with CITES certification that international standards were met, could be sold. Older ivory usually can be identified by coloring, stains, style, wear, quality, subject, and more. Some features can be faked, but most of the older work simply isn't replicated today.

Moreover, the burden of proof fell on the government, which had to prove that you violated the law. That standard is inconvenient for zealous prosecutors. But that's the way America normally handles both criminal and civil offenses.

However, last year the administration formed an interagency task force and an Advisory Council on Wildlife Trafficking. The latter lacked any representative of the thousands of responsible Americans who own legal ivory. Collectors and dealers are numerous, but not well-organized. Existing associations have limited memberships and narrowly focused activities.

The Advisory Council recommended prohibition. In mid-February the administration issued its new policy, which was as close as possible to a total ban without being a total ban. (The new administration policy also applies to rhinoceros.)

In practice, virtually every collector, dealer, auctioneer, and other person--who may simply have picked up or inherited some ivory--in America is banned from selling ivory items, even if acquired legally, owned for decades, and worth hundreds or thousands of dollars. Indeed, the collective value of that property runs into the tens or even hundreds of millions of dollars. Every flea market, junk shop, estate sale, antique store, auction showroom, and antique show is at risk of raids, confiscations, and prosecutions. And not one additional elephant is likely to survive as a result.

As an administrative pronouncement, rather than legislative enactment, the rules could change. However, the guidance from the U.S. Fish and Wildlife Service indicates that the federal government will target almost anyone attempting to buy or sell ivory of any sort.

First, no imports are allowed, not even antiques. Until now the latter could be brought to America with a CITES certificate and border check. After all, no one is likely to mistake an early 18th century ivory chess set or beer stein as made of modern ivory. Nor does it matter in which country, say Britain or America, an old piece of ivory resides. Now U.S. collectors are cut off from the rest of the world, for no purpose.

Second, all exports are banned, except antiques (defined as over a century old) in what the Fish and Wildlife Service says are "exceptional circumstances, as permitted under" the Endangered Species Act. Exactly what that means is unclear, though museums are exempt. At best the administration appears to be raising the administrative and cost burdens of exporting to countries which already limit ivory imports to items with appropriate CITES documentation. Nothing will be gained by raising the expense and inconvenience to Americans.

Or the new rule may restrict the sale of items currently allowed, thereby hindering people in disposing of their legal collections. Yet creating a new Ivory Curtain that prevents someone from selling his or her antique ivory canes to someone in, say, Germany will save no elephants.

Third, interstate transactions are prohibited, except for antiques. And, explained Fish and Wildlife: "Sellers of antiques in interstate commerce must prove through documented evidence that items qualify as bona fide antiques." Unfortunately, such evidence rarely exists: the Victorians, among many others, did not routinely fill out notarized statements attesting to the age of their ivory possessions, and no paperwork ever was required for legal purchases in America.

The cost of procuring a formal CITES certificate is likely to be prohibitive for items of modest value. Thus, the sale of almost all ivory across state lines is effectively banned even if the items were purchased across state lines. Unclear is whether one can even move one's ivory collectibles to another state and later sell them.

Fourth, intrastate commerce, said the agency, is "prohibited unless seller can demonstrate item was lawfully imported prior to" 1990, when the international ban took effect. But how does someone "demonstrate" when, say, a gift from his or her parents was imported? If the new burden of proof is not satisfied, then the item is not marketable even though acquired and owned legally--and until now saleable legally. (Proposals for state bans also are circulating, including in New York.)

In short, the administration plans to enact practical national prohibition.

The interstate restriction is uniquely perverse. Antique shows and the internet have created a vibrant national market. Forcing dealers to divide their stock and segment items which cannot be sold over state lines will be chaotic and expensive. Moreover, not all states are created equal. Collectors and dealers tend to be concentrated in major states. The administration rule prevents people in low-population states, say Wyoming, from retiring as collectors. Instead, they will be forced to die with their old ivory-keyed pianos and ivory-handled knives.

Even more problematic is the attempt by executive fiat to shift the burden of proof for violating the law. I have a simple and cheap ivory chess set which I purchased in England while my family lived there more than 40 years ago. Alas, I have no proof of its age. How can I "demonstrate" its provenance in order to avoid confiscation and prosecution? Shouldn't I enjoy due process before the government destroys the value of property I legally acquired?

The administration rule unfairly penalizes thousands of collectors, dealers, and other Americans. They followed the law. They spent money in reliance on the rules. And now the government has declared their collections and inventories to be essentially worthless. Only those with money--and the most valuable ivory pieces--will be able to attempt to comply. If you possess a \$20,000 carving, you have an incentive to jump through the administrative and financial hoops to get a CITES certificate. If you possess \$20,000 worth of average ivory netsukes, most worth perhaps \$100 or \$200, then your holdings are effectively valueless.

Why is the administration treating so many Americans as criminals? Fish and Wildlife claimed: "we believe that a nearly complete ban on commercial elephant ivory and rhino horn trade is the best way to ensure that U.S. markets do not contribute to the decline of these species in the wild." But America's many legal items legally imported decades or centuries ago and legally owned for years are not fueling poaching today.

The administration complained of the difficulty in distinguishing ivory imported legally and illegally. No doubt, banning everything offers seeming ease of enforcement, but such a policy fails to distinguish between guilt and innocence.

Moreover, most old ivory, given its manifold unique characteristics, is distinguishable from new work. Modern illegal ivory is mostly for items destined for the dominant Asian market; European carving

disappeared decades ago. Some objects end up in America, but far fewer than in Asia. Indeed, the black market price of illegal raw ivory in the U.S. is one-fourth that in China.

The illegal ivory supply also is small compared to that of legal ivory. Rather than ban the latter in an attempt to limit the former, the government should concentrate on aiding African countries in protecting their elephants, better interdicting illegal imports, and identifying sellers who specialize in new ivory. Punish law-breaking poachers, not law-abiding collectors.

In fact, targeting owners of legal ivory will perversely undermine such enforcement efforts. Criminalizing most ivory sales in America will vastly expand the ivory black market and significantly dilute enforcement resources.

First, as formerly legal items, which pose no threat to elephants, fill the pool of illegal ivory sales, the government will find it harder to locate new contraband ivory--which actually encourages poaching. Collectors and dealers are not likely to supinely accept an arbitrary federal diktat destroying the value of their holdings. Instead, faced with legalized theft of their property, many will understandably go over to the dark side. And there they will find ample opportunities to buy and sell ivory goods.

Ivory commerce will continue, only disguised aboveground and more often shifted underground. There will be increased sales of "faux ivory," "grained," "bone," "Chinese bone," and "plastic" items of surprising artistic appeal. Ebay will become a prime sales forum, with accurate descriptions, detailed photos, and frank conversations shifted off-line. Collector organizations will become more important as private sales networks. More objects will privately pass among dealers and collectors, never reaching public view.

The interstate ban, too, will be flouted. Absent roadblocks at state boundaries, ivory collectibles will continue to transit the nation for sale. Brokers will be hired to buy and sell, to ensure items appear not to cross state lines. Owners also may risk taking items to other nations without similar restrictions.

Moreover, invoices will be created, if necessary, to demonstrate that transactions remain intrastate. Faux age will be documented. Even CITES certificates affirming an item's antique status--which until now have been irrelevant for collectors and dealers not shipping internationally--may be faked.

Some collectors and dealers will even turn to sellers of new illegal ivory. Those already participating in the illegal market are obvious, if distasteful, commercial conduits for items newly made illegal. The additional business will expand the networks and increase the profits of those dealing with poachers. Which will only encourage the killing of more elephants.

Finally, overtaxed federal Fish and Wildlife agents may prefer to go after the easy targets, such as the local antique flea market, rather than secretive and well-financed smugglers. The White House said it did not intend to prosecute people selling "trinkets," but does that mean \$50 or \$500? Moreover, the agency does not want the new rules to appear to be a dead letter.

The occasional arrest in such cases won't end the ivory trade, but will generate sufficient uncertainty to shift even more the value of newly outlawed ivory from owners to professional traffickers. Forget using your lifetime investment to fund your retirement. Further, every dollar spent and person deployed by Washington to grab a chess set brought back from Japan by an Army veteran 60 years ago will be taken

from investigations of criminals like the two Manhattan jewelers caught in 2012 with \$2 million worth of new ivory merchandise.

The de facto ban likely will encourage Fifth Amendment litigation. The government's policy, imposed by administrative fiat, could be considered a government taking. In practice, Washington is banning all sales for the great majority of individuals. The potentially huge losses imposed on so many Americans across the nation may force the Supreme Court to reconsider endangered species rules more often applied to very limited markets, such as for eagle feathers.

The administration is engaging in the worst sort of moral vanity, punishing blameless Americans so prohibitionists can feel better despite their own policy failures. Those purporting to do good are intent on doing it at someone, anyone else's expense.

The administration should withdraw its standards for a substantial rethink. Moreover, Congress should overturn this unfair attack on thousands of law-abiding Americans. Legislators should block the arbitrary rules, defund unfair enforcement practices, cut agency staff if necessary, and set statutory standards to protect those who own legal ivory. The rule of law should apply to all Americans, including collectors, dealers, and auctioneers.

The mass killing of elephants is tragic. But demand for new ivory, not items legally imported decades or centuries ago, fuels the trade. Governments should penalize poachers and their seller allies--not responsible collectors and dealers who have followed the rules.

Indeed, the administration's new regulations are worse than unfair. They are counterproductive. They will expand the illegal ivory market, divert enforcement resources, and push owners of legal ivory into the illegal trade. Which means more elephants are likely to die. Surely that is not the legacy desired by President Obama.