

Testimony of Agnes Peresztegi
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Before the Senate Judiciary Committee Subcommittees on
The Constitution
&
Oversight, Agency Action, Federal Rights and Federal Courts
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Chairman Cornyn, Ranking Member Durbin, Chairman Cruz, Ranking Member Coons, Senator Schumer, Senator Blumenthal, Members of the Committee. I would like to join the other members of the panel in thanking you for the opportunity to testify in support of S.2763, “The Holocaust Expropriated Art Recovery Act of 2016.”

The United States has been committed to assist with the restitution of Nazi era confiscated artwork for over 70 years, and I commend you for introducing a bill that is the next step to uphold that commitment in the spirit of the Washington Conference Principles.

In a January 2016 decision, the D.C. Circuit found that clarification was still needed regarding Holocaust era property looting. In *Simon v. Republic of Hungary*, the court went as far as to state that the illicit taking of art during the Holocaust, “did more than effectuate genocide or serve as a means of carrying out genocide. Rather, we see the expropriation *as themselves genocide*.”¹

Just like the prosecution of genocide should never be barred by statute of limitations, in the same manner works of art and valued property taken during a campaign of genocide should be deemed as forever tainted. These works of art need to be restituted without further delay to their rightful owners. No one has the right to benefit from the crimes committed as part and parcel of the horrifying campaign to eliminate the Jews of Europe.

In this specific case, the passage of time, does not have any of its healing attributes. On the contrary, the passage of time imposes on our leaders the obligation to take measures not only to correct, to the extent possible, the crimes of the past, but also to send a clear message to future generations that certain events cannot just be forgotten. I wish to thank Senators Cornyn, Cruz, Schumer and Blumenthal for their leadership on this issue and their recent

¹ *Simon*, 812 F.3d at 142.

work with respect to The Holocaust Expropriated Art Recovery Act of 2016 (HEAR Act).

Since the establishment of the Washington Conference Principles, current possessors of Nazi era confiscated artworks have repeatedly attempted to mischaracterize applicable U.S. policy, although this policy has been clear and consistent for over 70 years². It is important that in working to address concerns raised by others that the HEAR Act retain the main elements of this policy. A bill aimed at insuring claimants to have access to justice should not become a vehicle to federally protect those who have been fighting all along to keep these cases out of the courts.

1. Nazi era confiscated art should be returned to the rightful owner, lack of knowledge or good faith acquisition should not defeat restitution.
2. Nazi era confiscated art, or Holocaust era looted art, or all of the other terms generally used to describe the cultural annihilation of Jews during a campaign of genocide, means all types of property loss by people persecuted during the Nazi era, regardless of the geographical location.³

The Committee should consider that the HEAR Act would not achieve its purpose of enabling claimants to come forward if it eliminates one type of procedural obstacle in order to replace it with another. To cite some concerns: narrowing the definition of looted art, shifting the burden of proof unnecessarily in some instances to the claimant; and generally adding or confirming other procedural obstacles. Cases related to Holocaust looted art, should only be adjudicated on the merits. For a case based on a genocide campaign to fail because of a mere procedural technicality would be an insult to the memory of the millions of people who lost their lives and property during one of the darkest periods in human history.

² For example, Military Law 59, applicable to the US military zone in Germany after WWII unequivocally states: "It shall be the purpose of this Law to effect to the largest extent possible the speedy restitution of identifiable property ... to persons who were wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism." and "Property shall be restored to its former owner or to his successor ... in accordance with the provisions of this Law even though the interests of other persons who had no knowledge of the wrongful taking must be subordinated. Provisions of law for the protection of purchasers in good faith, which would defeat restitution, shall be disregarded." (Article 2.)

³ It should not matter whether the loss occurred (i) by a Nazi soldier taking the art from a Jewish family's apartment, (ii) by the Einsatzstab Reichsleiter Rosenberg (ERR), the Nazi art looting unit, systematically robbing French collectors, (iii) whether the art was sold to pay the so-called flight-tax, or (vi) was forcefully auctioned off, or (v) whether a Jewish persecutee has sold the art below market value while fleeing for his life.

Any and all types of dispossession are covered.

The cases where the owner sold the work for consideration during the period of Nazi persecution should also be adjudicated on the merits. A court should have to determine whether such a sale was truly voluntary and not coerced in any way, and that a market price was offered and the consideration was received in a freely disposable way.

Statute of limitations and laches are intended to abort the adjudication of “stale” claims. These procedural doctrines were not designed to deal with the greatest art theft in history. One of the main justifications for statute of limitations and laches concerns the unfair burden of imposing on the current possessor the obligation to conserve evidence of legitimate ownership for many decades. In the case of Nazi era looted art, the burden is on the claimant to produce evidence of legitimate ownership that may be decades old, a task dramatically complicated by the fact that the original owner often disappeared along with the proof of ownership. Provenance research was almost impossible right after liberation, but today there is much more information available.⁴

In the United States, statute of limitations and laches are procedural bars to having the case heard on the merits, which hopefully will be made more equitable by the HEAR Act,⁵ at least for a period of time. To be clear, the HEAR Act will not create a new cause of action and is not retroactive in nature. All civil claims or causes of action, which have been finally adjudicated are outside of the scope of the current bill. However, those claims that have not been adjudicated, should now be heard on their merits only. For example, take the cases where under applicable state law, statute of limitations has already passed before the end of World War II. Is it really reasonable to deny a restitution case because the victim failed to file a case while he or she were enslaved in a Nazi death camp?

Some states have statute of limitations rules that are more favorable to claimants. The HEAR Act should not operate to extinguish claims that are valid under the laws of these States. I therefore urge the Senators to ensure that this is also reflected in the final version of the Act.

⁴ Collecting proof of ownership was very difficult if not outright impossible right after World War II. Archives were not easily accessible, no information was digitized, inter-library loans took several months if not years, travel was difficult and expensive; over all the costs of doing research were prohibitive. Today, there are digital databases, which can be accessed from one’s desk, there is google translate to navigate through even foreign language sites. Not to mention the now accessible archives in Eastern Europe, just NARA has declassified hundreds of thousands of pages of relevant documents, and today, even local libraries can provide access to official artist catalogues.

⁵ Unlike the United States where statute of limitations only creates a procedural obstacle, in most European jurisdictions, statute of limitations is prescriptive and cannot be amended once it had expired. In order to overcome this problem, many European countries chose to establish alternative forums to address restitution claims. This was made possible by the fact that most museums are government owned. The difference is that in Europe, once the statute of limitations expires, the possessor becomes the owner, and the former owner loses the title. These alternative forums issue recommendations to government entities to retribute works of art despite the fact that title has vested on the museum that possesses them. The U.S. however, has always had a policy that as a matter of law no one can ever get legitimate title on stolen property, while there is no central government body that can direct museums to act in certain ways, i.e. to waive statute of limitations and laches as a defense. In the United States, an artwork, even if its recovery is barred by statute of limitations or laches, will never become the rightful property of the current possessor, and will always be tainted.

The purpose of the HEAR Act is to enable additional claimants to come forward but not at the expense of barring existing claims.

Under the proposed Act claimants will have 6 years from the time of actual knowledge of the identity and location of the claimed artwork to commence action. However, it is important to mention that knowledge cannot be construed as possessed by all family members if not all family members actually have the knowledge. It is not the fault of the descendants of Holocaust survivors not to be close to each other. Families, who, but for the Holocaust, would have lived their lives in close proximity to each other, were decimated and dispersed around the world. Therefore, it is important that the right to benefit from the HEAR Act is allocated to individual claimants and not to groups of heirs, who may not even know about each other's existence.

The six-year rule comes after decade long discussions on the practical aspects of restitution among museums, art professionals and claimant representatives. It is long enough to facilitate negotiation and the amicable resolution of restitution claims. It should also propel museums to complete the provenance research of their holdings and to actively engage in the restitution of Nazi era looted artworks.

Before the Prague Conference, a review⁶ of the different countries' implementation of the Washington Conference Principles was compiled, and unfortunately, the United States was not listed among the countries that made major progress towards such implementation. By enacting the HEART Act, the United States will confirm its unwavering support of restituting Nazi era confiscated art to its rightful owners and will be rightly viewed as a country that made major progress towards implementing the Washington Conference Principles on Nazi-Confiscated Art.

I thank the Committee for this opportunity to share my experience and knowledge in support of the HEAR Act today. I hope to serve as a resource to the Committee as you consider this legislation, and I hope we can all celebrate the 20th anniversary of the Washington Conference together with the passage of the HEAR Act.

⁶ In June 2009, at the Prague Conference on Holocaust Era Looted Assets the Claims Conference and the WJRO presented a World-Wide Preliminary Overview on the implementation of the Washington Conference Principles. Under that review, the United States was classified as a country that made substantial, but not major progress towards implementing the Washington Conference Principles on Nazi-Confiscated Art.
<http://www.claimscon.org/forms/prague/looted-art.pdf>