

THE GREATEST ART HEIST OF ALL TIME: EXPLAINING AMERICAN MUSEUM OWNERSHIP OF BOLSHEVIK-LOOTED ART

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I. INTRODUCTION

Visitors of the Neue Galerie in New York have been able to view the famous, gold portrait of *Adele Bloch-Bauer* by Gustav Klimt since 2006.¹ However, the portrait was not always housed there. Nazis stole the painting following the Anschluss and showcased it in the Vienna Austrian Gallery.² Nearly a century would pass before the painting was returned to its rightful owner.³ Unfortunately, the Klimt painting represents a minority of returned artworks, with a majority of pieces remaining separated from their original owners or their heirs.⁴ Such pieces are often subject to considerable controversy and numerous lawsuits.⁵ Notable examples of controversial art pieces include the jewels of the Russian Imperial collection showcased in the National Gallery, *Madame Cezanne in the Conservatory* showcased in the

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1. Adam Kirsch, *Red Plunder*, CITY J. (Dec. 24, 2008), <https://www.city-journal.org/html/red-plunder-9536.html>.

2. *Id.*

3. *Republic of Austria v. Altmann*, 541 U.S. 677, 681 (2004). During World War II, the Nazis seized six of Maria Altmann's (the plaintiff in this case) uncle's artwork. *Id.* at 682. One of those artworks was the portrait of *Adele Bloch-Bauer*. *Id.* at 682 n.2. Before the paintings were confiscated, Maria Altmann was named the owner of the paintings through a will. *Id.* at 681–82. Instead of giving the paintings to Maria, the Nazis took the paintings and placed them in the Vienna Austrian Gallery. *Id.* at 682. When Maria Altmann won the paintings back, she willingly sold them to the Neue Galerie in New York. Kirsch, *supra* note 1.

4. Kelly Ann Falconer, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U. PA. J. INT'L ECON. L. 383, 384 (2000).

5. Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes*, 73 BROOK. L. REV. 155, 155 (2007).

Metropolitan Museum of Art (“the Met”), and *The Night Café* showcased at Yale University (“Yale”).⁶ Like *Adele Bloch-Bauer*, these art pieces were taken during a time of conflict and political turmoil. In 1917, the Bolshevik regime⁷ confiscated much of the Russian Empire’s private art collections, including the jewels of the Russian Imperial collection, *Madame Cezanne in the Conservatory*, and *The Night Café*.⁸ While the United States has returned multiple Nazi-looted artworks,⁹ like the *Adele Bloch-Bauer* portrait, the United States has yet to return any Bolshevik-looted art¹⁰ to its rightful heirs.

“Despite internationally accepted rules” against the theft of art and cultural property, pillaging an enemy’s prized assets during wartime is often viewed as a symbol of victory.¹¹ Art theft and looting during war remains a centuries-old controversy, with even the Old Testament of the Hebrew Bible containing such references.¹² Looting of artwork also occurred during the reign of Alexander the Great when grave robbers looted tombs of pharaohs.¹³ Even the New World has witnessed cases of art and cultural artifact looting, including that of Hernan Cortes and his lust for Aztec gold¹⁴ and Francisco Pizarro’s journey of plunder through the Incan Empire.¹⁵

6. See *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 141 (2d Cir. 2012); Yale Univ. v. Konowaloff, 5 F. Supp. 3d 237, 238 (D. Conn. 2014); see also Kirsch, *supra* note 1.

7. In 1917, the Bolsheviks became the controlling political party in the provisional government following the Russian Revolution. Kevin Prewitt, *The Wisdom of the Precedents: The Act of State Doctrine’s Role in Protecting the Cultural Heritage of the United States*, 80 UMKC L. REV. 855, 856 (2012). In 1922, the Bolshevik victory in the Russian Civil War established their control over the newly created Soviet Union. *USSR Established*, HISTORY (Nov. 24, 2009), <https://www.history.com/this-day-in-history/ussr-established>. Reference to Soviet officers and the Soviet government in this Article inherently connects to Bolshevik actors because the Bolshevik party controlled all aspects of the Soviet Union’s government after the Bolsheviks came into power.

8. *Id.*; see also Kirsch, *supra* note 1.

9. For the purposes of this Article, Nazi-looted art is defined as art that was looted, stolen, and seized by the Nazi regime during World War II.

10. For the purposes of this Article, Bolshevik-looted art is defined as art that was looted, stolen, and seized by the Bolsheviks during the Russian Revolution of 1917.

11. Jennifer Anglim Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 20 CHAP. L. REV. 1, 4 (2017). These international rules date back to Roman times. *Id.*

12. Owen Jarus, *Biblical Battles: 12 Ancient Wars Lifted from the Bible*, LIVE SCI. (July 24, 2017), <https://www.livescience.com/59911-ancient-biblical-battles.html>. The Hebrew Bible (the “Tanakh”) states that in 587 B.C. the Babylonians, led by King Nebuchadnezzar II, destroyed most of Jerusalem and sacked it. *Id.* The Hebrew Bible also claims that the Egyptian Pharaoh Shishak took Jerusalem and sacked the royal palace. *Id.*

13. BABATUNDE E. ADEBIYI, LEGAL AND OTHER ISSUES IN REPATRIATING NIGERIA’S LOOTED ARTEFACTS 157 (2009).

14. Alan Riding, *Gold Bar Found in Mexico Thought to be Cortes’s*, N.Y. TIMES (Apr. 4, 1981), <https://www.nytimes.com/1981/04/19/world/gold-bar-found-in-mexico-thought-to-be-cortes-s.html>.

15. James Owen, *Lost Inca Gold*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.com/history/archaeology/lost-inca-gold/> (last visited Oct. 10, 2021).

By the twentieth century, some nations attempted to curtail this practice. “The 1907 Hague Convention forbade the seizure and destruction of cultural property” during wartime.¹⁶ However, the law did not prove effective in preventing looting during conflicts, with World War II witnessing the most large-scale art looting cases.¹⁷ Although art looting was a common war practice, the Nazis looted art “on an unprecedented scale.”¹⁸ Nazis then sold the art worldwide.¹⁹ Many museums around the world acquired a substantial number of the looted artworks.²⁰ Similarly, the Bolsheviks confiscated art and sold it across the world during and after the Bolshevik Revolution by auctioning off art to international art galleries or selling it directly to buyers.²¹ Because of these sales, Russia lost a number of culturally and historically significant artworks.²² Looting cultural artifacts has significant consequences. As in both the Bolshevik Revolution and World War II, “[t]hese losses of family heirlooms, cultural artifacts, and valuable assets compound[ed] the tragic loss of life and [exemplify] just one reason why restitution is so important [today].”²³ In the twenty-first century, restitution cases

16. Falconer, *supra* note 4, at 386.

17. *Id.* at 383.

18. *Id.*

19. Barbie Latza Nadeau, *Museums Use ‘Nazi Tactics’ to Keep Art Stolen by the Nazis*, DAILY BEAST (Nov. 29, 2018, 4:56 AM), <https://www.thedailybeast.com/museums-use-nazi-tactics-to-keep-art-stolen-by-the-nazis>.

20. Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 660 (2000) (quoting Ronald Lauder in Thomas W. Lippman, *44 Nations Pledge to Act on Art Looted by Nazis*, WASH. POST (Dec. 4, 1998), <https://www.washingtonpost.com/archive/politics/1998/12/04/44-nations-pledge-to-act-on-art-looted-by-nazis/4ba6f59c-556f-4e9b-a91c-f30ea5377e67/>).

21. Oleg Krasnov, *How the Bolsheviks Sold Off-Romanov Treasures to the West*, RUSS. BEYOND (Nov. 25, 2017), <https://www.rbth.com/arts/326830-lost-treasures-hermitage-kremlin-bolsheviks-sold>. Sales were set up for the Russian antiques (from the Romanov treasures) at “New York’s largest department store, Lord & Taylor.” *Id.* The Soviet government would give a ten percent commission to the person who managed the auction. *Id.* Many of these royal crowns, diamonds, icons, rare paintings, and sculptures were sold to museums in the United States. *Id.* Many of these treasures “became the pride of museums,” such as the Met and the Hillwood in Washington D.C. *Id.*

22. *Id.* The Soviet Union sold the Imperial Nuptial Crown from the 1890s. *Id.* This crown was worn by the last Russian empress, Alexandra Fyodorovna, during her wedding in 1894. *Id.* This crown was sold to Norman Weis, and it is now part of the Hillwood collection in Washington D.C. *Id.* Additionally, the Soviet Union sold off various other Russian Empire treasures and paintings, such as Emperor Nicholas II’s Faberge egg (now part of the Malcolm Forbes collection in New York) and the *Madonna Alba* painted by Raphael (now residing in the National Gallery of Art in Washington D.C.). *Id.*

23. Jennifer Anglim Kreder, *Guarding the Historical Record from the Nazi-Era Art Litigation Tumbling Toward the Supreme Court*, 159 U. PA. L. REV. PENNUMBRA 253, 255–56 (2010).

continue to rise as more art re-emerges from obscurity through auctions, museums, and private collections.²⁴

This Article focuses on Bolshevik-looted art and its associated cases to argue for the repatriation of art, specifically held in the United States, to the heirs of the Russian aristocrats. In order to facilitate the return of Bolshevik-looted art to Russian victims, the judicial, executive, and legislative branches must reframe and rework current laws and policies. While both the Nazis and the Bolsheviks stole art, Russian and Jewish victims have experienced vastly different results in U.S. courts when attempting to gain reparation for the stolen artwork.²⁵ Additionally, Congress has legislated for Jewish cases at a higher rate than Russian cases.²⁶ This Article will examine the history of legislation and case holdings regarding Nazi-looted art and Bolshevik-looted art, compare the laws and policies in place for reparation, and discuss possible solutions for the return of Bolshevik-looted art.

Part II of this Article discusses the history of Nazi and Bolshevik-looted art. It is imperative to understand the history of Nazi-looted art and Bolshevik-looted art and of the United States government's response to Nazi-looted art and Bolshevik-looted art victims. Part III examines the actions of the judicial branch in Jewish and Russian art restitution, specifically exploring the judicial system's application of the Act of State Doctrine. Part IV explores the actions of both the legislative and executive branches in assisting both Jewish and Russian victims. This Part specifically details the executive and legislative branch's involvement in policymaking. Part V provides solutions to aid in the return of the lost Russian artworks to their rightful owners.

II. ART HISTORY ON NAZI AND BOLSHEVIK-LOOTED ART

The history of Nazi-looted art and Bolshevik-looted art is significant in understanding Jewish and Russian art restitution, as well as the application of the Act of State Doctrine by U.S. courts. While the Hague Convention of 1954 addressed the issue of art reparation, the Convention did not remedy all the problems associated with looted art. Furthermore, while both Nazi-looted art and Bolshevik-looted art

24. Falconer, *supra* note 4. Many current expropriated art cases stem from the Nazi Regime from Germany and the Bolshevik Regime from the Russian Empire. Natalie Rogozinsky, *Stolen Art and the Act of State Doctrine: An Unsettled Past and an Uncertain Future*, 26 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 1 (2015).

25. See *infra* pt. III.A.2 for a discussion of potential reasons for these different results.

26. See *infra* pt. IV for a discussion of those policies.

inspired litigation in the twentieth century, efforts to return the art slowed significantly in the 1950s.

A. Nazi-Looted Art History

While millions of individuals lost their lives during World War II, millions of artworks were also casualties of the Nazis.²⁷ The Nazis stole approximately twenty percent of all the art in Europe during World War II.²⁸ “Hitler created the *Einsatzstab Reichsleiter Rosenberg* (“Einstab”) in 1940 for the special task of confiscating and destroying art in the occupied territories.”²⁹ Nazis specifically targeted art owned by Jews as part of a systematic attempt to eradicate Jewish culture.³⁰ Estimates suggest that more than 100,000 pieces of art remain missing since World War II.³¹ Nazi-looted art from World War II has “been the subject of much recent litigation” in the art world, especially with cases in the United States.³² Although seventy-six years have passed, plenty of Nazi-looted art has not been returned to its rightful owners.³³

Initially, the international community returned art quickly after World War II,³⁴ addressing the issue of art reparation in the Hague Convention of 1954.³⁵ This Convention “establishe[d] a regime for special protection of a highly limited category of cultural property . . . [and] provide[d] both for preparations in peacetime for safeguarding cultural property against foreseeable effects of armed conflicts, and also for respecting such property in time of war or military occupation.”³⁶

27. Falconer, *supra* note 4, at 383.

28. Judy Dempsey, *Roadblocks Remain in Case of Paintings Lost to Nazis*, N.Y. TIMES (Oct. 28, 2010), <http://www.nytimes.com/2010/10/29/arts/29iht-loot.html> (citing the Commission for Art Recovery for the statistic).

29. Kreder, *supra* note 11, at 3.

30. Nicholas Perrino, *International Law — Expropriation Exception Allows Jewish Family to Bring Action to Recover Art Stolen During the Holocaust — De Csepel v. Republic of Hung.*, 859 F.3d 1094 (D.C. Cir. 2017), 41 SUFFOLK TRANSNAT’L L. REV. 625, 645–46 (2018).

31. Phelan, *supra* note 20 (quoting Ronald Lauder in Thomas W. Lippmann, *44 Nations Pledge to Act on Art Looted by Nazis*, WASH. POST (Dec. 4, 1998), <https://www.washingtonpost.com/archive/politics/1998/12/04/44-nations-pledge-to-act-on-art-looted-by-nazis/4ba6f59c-556f-4e9b-a91c-f30ea5377e67/>).

32. Kreder, *supra* note 5; see *Republic of Austria v. Altmann*, 541 U.S. 677, 681 (2004); *Vineberg v. Bissonnette*, 548 F.3d 50, 53 (1st Cir. 2008); *Detroit Inst. of Art v. Ullin*, No. 06-10333, 2007 WL 1016996, at *1 (E.D. Mich. Mar. 31, 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 804 (N.D. Ohio 2006).

33. Kreder, *supra* note 11, at 1.

34. Falconer, *supra* note 4, at 385.

35. *Id.* at 387.

36. See Letter of Transmittal from Bill Clinton, President of the U.S., to Cong. of the U.S. (Jan. 6, 1999), <https://www.congress.gov/treaty-document/106th-congress/1/B/document-text?overview=closed>

However, this definition only concerned national property—not privately-owned property.³⁷ Furthermore, the United States was not a signatory of the treaty, which limited its effectiveness in the United States.³⁸

As time progressed, some regained their property after hard-fought trials and only on an individual basis.³⁹ Despite the number of returned artworks, “thousands of pieces of art remain displaced.”⁴⁰ Initially, the United States attempted to help victims of art looting by placing specialist officers in charge of art reparations.⁴¹ Like the Nazis, Western Allies had art specialists called “monuments officers.”⁴² “In order to preserve . . . irreplaceable works,” the monuments officers had “to secure and sort out the vast quantities of art that had been looted by the Nazis.”⁴³ Though this was a valiant effort, not all U.S. forces approached this task with fidelity.⁴⁴ As victors of the war, many U.S. troops took the art and cultural property as “war booty.”⁴⁵ Efforts by the United States were unorganized and “lacked uniform policy.”⁴⁶ By 1949, U.S. forces had mostly withdrawn from Germany, and the monuments officers entrusted the artwork to the Bavarian State Government rather than returning the art directly to the victims.⁴⁷ As a result, the Bavarian State

37. Falconer, *supra* note 4, at 388.

38. *Id.*

39. *Id.* at 385–86.

40. *Id.* at 384.

41. *Id.* at 397.

42. Andrew Beaujon, *How a Trove of Nazi Art Wound Up Under Lock and Key on an Army Base in Virginia*, WASHINGTONIAN (Nov. 12, 2017), <https://www.washingtonian.com/2017/11/12/trove-nazi-art-wound-lock-key-army-base-virginia/>.

43. Falconer, *supra* note 4, at 397.

44. *Id.* at 397–98. Moral obligation existed but it was not strictly enforced due to having no structure of when and how the art should be returned. *Id.*

45. *Id.* at 399.

46. *Id.* at 397. Since there was no proper structure, U.S. forces retained most of the art in the occupied zone. *Id.* at 397–98. “President Truman . . . had approximately 200 . . . important . . . works . . . removed to Washington.” *Id.* at 398. Additionally, “the U.S. military [took part] in looting of its own.” *Id.* at 398. There was even a situation where the United States stopped the “Gold Train” (a train with valuables stolen by Nazis from Hungary), but American officials ignored the pleas of Hungarian citizens to return those assets. *Id.* at 398–99.

47. Justin Huggler, *Nazi-Looted Art Rescued by US ‘Monuments Men’ Was ‘Sold for Profit’ by Bavarian Government*, TELEGRAPH (June 26, 2016, 7:28 PM), <https://www.telegraph.co.uk/news/2016/06/26/nazi-looted-art-rescued-by-us-monuments-men-was-sold-for-profit/>.

Government sold some of the art.⁴⁸ By the 1950s, efforts to return art and cultural property slowed significantly.⁴⁹

B. Bolshevik-Looted Art History

To better understand Bolshevik-looted art, it is important to note the evolution of Russian Imperial art history. Until the seventeenth century, most Russian-owned artworks contained mainly “Christian imagery and content.”⁵⁰ That began to change when Peter the Great abandoned medieval traditions for more modern art, a progression further reinforced when Catherine the Great began collecting some of the greatest art pieces in the world.⁵¹

Russia’s entrance into World War I not only created a political disaster,⁵² but also devastated the Empire’s newly established art culture.⁵³ The Bolshevik government ended Russia’s involvement in the war by signing an armistice agreement with Germany.⁵⁴ “In March of 1917, Tsar Nicholas II of Russia abdicated his power to a provisional government.”⁵⁵ By October, the Bolsheviks seized control over the

48. *Id.* Some art was returned by the monuments officers. Megan Willet-Wei, *These Incredible Works of Art Were Saved by the Real-Life ‘Monuments Men’ of WWII*, BUS. INSIDER (Feb. 20, 2014, 3:37 PM), <https://www.businessinsider.com/monuments-men-famous-works-of-art-2014-2>. Some paintings that were recovered and returned by the monuments officers included the *Mona Lisa* (returned to the Louvre) and the *Portrait of Cecilia Gallerini* (returned to Poland’s Czartoryski Museum in Krakow). *Id.* Today, through the Monuments Men Foundation, monuments officers continue their mission to return art even though seventy years have passed since World War II. Christopher Klein, *The Real-Life Story Behind “The Monument Men,”* HISTORY (May 13, 2014), <https://www.history.com/news/the-real-life-story-behind-the-monuments-men> [<https://web.archive.org/web/20210307001137/https://www.history.com/news/the-real-life-story-behind-the-monuments-men>]. The Monuments Men Foundation is continuing to search for thousands of artworks by Monet, Van Gogh, Cezanne, Rodin, and Botticelli that are presently missing. *Id.*

49. Falconer, *supra* note 4, at 399.

50. Prewitt, *supra* note 7, at 858.

51. *Id.* Catherine the Great’s collection was placed in the Hermitage (the Russian palace) and “was one of the premier locations to view Western European painting.” *Id.*

52. Rogozinsky, *supra* note 24, at 5. This proved disastrous because “war, famine and disease killed over 9 million people in the next few years.” *Id.*

53. Martin Sixsmith, *The Story of Art in the Russian Revolution*, ROYAL ACAD. OF ARTS (Dec. 20, 2016), <https://www.royalacademy.org.uk/article/art-and-the-russian-revolution>.

54. Erick Trickey, *The Forgotten Story of the American Troops Who Got Caught Up in the Russian Civil War*, SMITHSONIAN (Feb. 12, 2019), <https://www.smithsonianmag.com/history/forgotten-doughboys-who-died-fighting-russian-civil-war-180971470/>.

55. Prewitt, *supra* note 7, at 860. “[T]he Russian population . . . lost faith in [Tsar] Nicholas II’s leadership.” Jennifer Anglim Kreder, *International Hurdles in Nazi-Era and Russian Revolution Cultural Property Cases*, 49 CASE W. RES. J. INT’L L. 227, 228 (2017). Tsar Nicholas II abdicated his throne to his brother, Grand Duke Michael. *Id.* at 229. Afterwards, Grand Duke Michael refused the throne, finally ending more than three hundred years of the Romanov Dynasty. *Russian Revolution*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Russian-Revolution> (last updated Oct. 17, 2021).

Empire⁵⁶ and by December established their own provisional government.⁵⁷ Although the Bolsheviks initially tolerated art, it was soon “broadly rejected as self-indulgent, extravagant, and a waste of money.”⁵⁸ When the Bolsheviks gained total control of the Empire, they decreed all private property as state property—including artwork owned by the Tsars and the aristocrats.⁵⁹ According to one scholar, the Bolsheviks deliberately destroyed Russia’s economy, making the Russian Empire dependent on foreign financing.⁶⁰ The Bolsheviks achieved this by “abolishing private banks and repudiating government bonds.”⁶¹ As a result, the Russian Empire regressed from its position as the largest exporter of grain to the brink of large-scale starvation.⁶² Bolsheviks could only raise funding by selling anything they could confiscate from their own citizens to foreign buyers.⁶³ The Bolsheviks expropriated collections of major private art collectors.⁶⁴ Under this new governmental mandate, aristocrats with art collections had to transform their homes into museums.⁶⁵ By 1928, the Soviet Union began secretly selling their amassed collection of artworks,⁶⁶ selling many of these artworks at public auctions in Berlin and Vienna.⁶⁷ Families that abandoned the Soviet Union and fled to other countries often found their art displayed at some of these auctions.⁶⁸ In Berlin, over “sixty émigrés claimed ownership of works offered, sued for the return of their

56. Prewitt, *supra* note 7, at 860.

57. Aaron Rosenthal, *The Conundrum of Comity: How the Continued Application of the Act of State Doctrine Creates Tension on Government-Taken Art*, 22 DEPAUL J. ART, TECH. & INTELL. PROP. L. 413, 425 (2012). Eventually the Soviet Union was created in 1922. Rogozinsky, *supra* note 24, at 6.

58. Prewitt, *supra* note 7, at 858; see Sixsmith, *supra* note 53. The regime had even decreed that art in the Soviet Union could only “depict a man’s struggle for socialist progress,” and, therefore, the government had to get rid of the rest of the art. *Id.*

59. See *Former Russian Tsar Executed by Bolsheviks*, RTE, <https://www.rte.ie/centuryireland/index.php/articles/russian-tsar-executed-by-bolsheviks> (writing from the “perspective of a journalist 100 years ago” based on news reports during the time) (last visited Oct. 24, 2021); Marcus Warren, *How the Bolsheviks Sold Russia’s Treasures*, TELEGRAPH (Dec. 8, 2000), <https://www.telegraph.co.uk/news/worldnews/1377527/How-the-Bolsheviks-sold-Russia-treasures.html>; see also Rosenthal, *supra* note 57.

60. Kirsch, *supra* note 1.

61. *Id.*

62. *Id.*

63. *Id.* “[T]hey acted less like a government [and more] like a gang of thieves.” *Id.* The Bolshevik Government even commanded safe-deposit “box owners to turn over their keys” in order to take their property. *Id.*

64. *Id.* Examples of major private art collectors are Ivan Morozov and Sergei Shchukin. See *infra* pt. III.A.2.a for a discussion on these collectors and their cases.

65. Prewitt, *supra* note 7, at 856.

66. *Id.*

67. *Id.* at 863.

68. Waltraud M. Bayer, “A Past That Won’t Pass”: *Stalin’s Museum Sales in a Transformed Global Context*, 2 J. ART MKT. STUD. 2018, at 1, 1–2, <https://www.fokum-jams.org/index.php/jams/article/view/22/91>.

property, [and] briefly succeeded in a temporary halt of a portion of the auction items.”⁶⁹ However, they lost their lawsuit because Germany deemed that the Bolshevik nationalization was a lawful government action.⁷⁰ Similar lawsuits occurred before the Court of Appeal of England and Wales but failed on similar grounds.⁷¹ In 1929, Princess Olga Paley “initiated court action against a London dealer to prevent the sale of her art collection,” but the lawsuit was rejected.⁷²

In the 1930s, “the Soviet regime had sold works confiscated from the Romanov [Tsars’] collection to Paul Mellon and J.P. Morgan . . . in [order] to fund industrialization projects.”⁷³ These Bolshevik-looted art sales have subsequently inspired further litigation and concern in Europe and the United States in the twentieth century.⁷⁴

III. CHALLENGES OF ART REPARATIONS TO RUSSIAN VICTIMS IN THE JUDICIAL SYSTEM

The Act of State Doctrine is one of the barriers to the judicial recovery of looted artwork. Although the Act of State Doctrine does have apparent benefits, Bolshevik-looted art victims have severe challenges to retaining their family’s looted art because of the Doctrine. These challenges include the United States’ wrongful recognition of the Soviet Union, wrongful unrecognition of Russia’s repudiation of Bolshevik acts, and wrongful application of the Act of State Doctrine. Before discussing the benefits and challenges of the Act of State Doctrine, it is imperative to define the Act of State Doctrine.

69. *Id.* at 7.

70. *Id.*

71. *Id.* at 8.

72. *Id.* at 7.

73. Allan Gerson, *The Night Café Redux: A Study of Sordidness, from Arles to the U.S. Courts*, 49 CASE W. RES. J. INT’L L. 197, 199 (2017). Many of these works were sold in secret to U.S. buyers. Prewitt, *supra* note 7, at 865.

74. Prewitt, *supra* note 7, at 870. One specific example was litigation in France in 1954 where an heir of a Russian Aristocrat tried to recover a Picasso taken from her father. *Id.* at n.185 (citing JOHN HENRY MERRYMAN ET AL., *LAW, ETHICS AND THE VISUAL ARTS* 51 (5th ed. 2007)). Additionally, although not litigation, other Russian descendants have expressed concerns about the art that was taken from their families. See John Varoli, *Recent Developments in Restitution Claims in Russia Prove that Some Art Theft Is ‘Legitimate’; When It Is Committed by a Government That Is Recognized by Nations Around the World*, ART (Nov. 1, 2003), <https://www.theartnewspaper.com/archive/restitution-issues-russia-when-is-theft-not-theft>. The descendants of Arkady Roumanoff want some form of compensation for the Roumanoff’s art collection that is now dispersed in twenty-five museums in four countries. *Id.* “I think the best thing [the Russian government] could do would be to let me visit the museums for free, and put up a label stating that these works came from the collection of my father,” says Daniel Roumanoff, Arkady Roumanoff’s son.” *Id.*

A. Judicial Branch: Defining the Act of State Doctrine

The Act of State Doctrine restricts the courts of the United States from invalidating acts of foreign governments.⁷⁵ The Act of State Doctrine has a twofold purpose. One purpose is for U.S. courts to “abstain from adjudicating claims” that question the legality of a foreign nation’s official action taken in its own territory; the other is for U.S. courts to maintain a separation of powers in administering foreign affairs decisions that belong to the legislative branch.⁷⁶ The United States Supreme Court in *Banco Nacional de Cuba v. Sabbatino* specifically defined the Act of State Doctrine in the following manner:

The [A]ct of [S]tate [D]octrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory . . . extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.⁷⁷

Specifically, under *Sabbatino*, the Act of State Doctrine has four requirements: (1) the taking must occur by a foreign sovereign government; (2) the taking must occur within the territorial limitations of that government; (3) the foreign government must be “extant and recognized by this country at the time of suit”; and (4) the taking must not violate a treaty obligation.⁷⁸ This also applies if the taking violated any foreign state’s own law.⁷⁹ Specifically, the Act of State Doctrine precludes the United States “from inquiring into the validity of the public acts of a recognized foreign sovereign power within its own territory.”⁸⁰ Essentially, in the situation of governments confiscating art from their own citizens, the Act of State Doctrine bars U.S. courts from deciding on the validity and lawfulness of such takings.⁸¹ In the past, “courts have

75. Rogozinsky, *supra* note 24, at 2.

76. *Id.* at 2. Additionally, the Act of State Doctrine can still apply even if the foreign government is not directly involved. *Id.* at 1.

77. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 428 (1964).

78. *Id.* at 428.

79. Patty Gerstenblith, David Bright, Clarissa Cutler, Michael McCullough, & Kevin Ray, *International Art and Cultural Heritage*, 48 ABA/SIL YIR 421, 426 (2014).

80. *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 143 (2d Cir. 2012) (quoting *Sabbatino*, 376 U.S. at 401). The court also noted that the Act of State Doctrine would still “apply ‘even if international law was violated.’” *Id.* (quoting *Sabbatino*, 376 U.S. at 431).

81. *Metro. Museum of Art*, 702 F.3d at 145.

held that the [A]ct of [S]tate [D]octrine is applicable in matters regarding the nationalization of property during the Bolshevik Revolution,” but critics have urged courts to reconsider.⁸² The Act of State Doctrine does not apply when the motivation of an international government is in question.⁸³ The Bolshevik Government was known for seizing art for no legitimate governmental purpose and then selling it by taking bribes.⁸⁴ Current claimants of Bolshevik-looted art have a difficult time in their efforts to regain their art because courts are avoiding the question regarding an international government’s motivations to acquire and sell art.⁸⁵ While a discussion of the Act of State Doctrine’s failings in its current state remains the primary focus, an exploration of the benefits and reasoning behind the Doctrine must precede such a discussion.

1. Benefits of the Act of State Doctrine

The Act of State Doctrine does have some apparent benefits.⁸⁶ While a valid argument, returning a person’s possession is categorically different from prosecuting cases of torture and corruption. Second, the Act of State Doctrine protects museums and other parties from having to return looted art that was acquired through purchases, donations, or loans.⁸⁷ Returning the art may have a drastic impact on museums.⁸⁸ The concern is that returning art to victims would leave museums devoid of historically significant works of art.⁸⁹ After being in the United States for over half a century, the art, along with its history and origin, are now viewed as part of U.S. heritage.⁹⁰

82. Prewitt, *supra* note 7, at 857; *see also Sabbatino*, 376 U.S. at 406–07.

83. *W.S. Kirkpatrick & Co. Inc. v. Env’t. Tectonics Corp., Int’l*, 493 U.S. 400, 409–10 (1990).

84. Gerson, *supra* note 73, at 199–200.

85. *See, e.g., Metro. Museum of Art*, 702 F.3d at 148; *Yale Univ. v. Konowaloff*, 5 F. Supp. 3d 237, 239 (D. Conn. 2014).

86. Prewitt, *supra* note 7, at 874. In a variety of settings, courts have not allowed the act of torture in other countries by accepting the Act of State Doctrine. Andrew D. Patterson, *The Act of State Doctrine Is Alive and Well: Why Critics of the Doctrine Are Wrong*, 15 U.C. DAVIS J. INT’L L. & POL’Y 111, 130 (2008). “Because the states themselves disavow torture and the torturer, these proceedings are unlikely to offend the government.” *Id.* However, the Act of State Doctrine “may [still] apply [even] if the state itself endorsed and accepted torture as a state practice.” *Id.*

87. Jennifer Anglim Kreder, *The Revolution in U.S. Museums Concerning the Ethics of Acquiring Antiquities*, 64 U. MIAMI L. REV. 997, 1001 (2010); *see, e.g., Metro. Museum of Art*, 702 F.3d at 143; *Yale Univ.*, 5 F. Supp. 3d at 239. Any private party, like museums, can cite to the Act of State Doctrine. *See, e.g., Metro. Museum of Art*, 702 F.3d at 148; *Yale Univ.*, 5 F. Supp. 3d at 239.

88. Prewitt, *supra* note 7, at 878.

89. *Id.* For example, “[i]n 1990, Van Gogh’s ‘Portrait of Doctor Gachet’ (1890) was sold to a Japanese millionaire for eighty-two million dollars, but its whereabouts have remained publicly unknown since the purchase.” *Id.*

90. *Id.* at 878–79.

2. Issues with the Act of State Doctrine

The Act of State Doctrine has three specific issues regarding Bolshevik-looted art. The first issue is that the United States did not recognize the Soviet Union until 1933.⁹¹ Most of the art stolen and sold by the Soviet government occurred prior to the United States recognizing the Soviet Union.⁹² This is significant because the Act of State Doctrine only applies to a country the United States recognizes.⁹³ The second issue is that the Russian Federation repudiated the actions of the Soviet government and the Bolsheviks.⁹⁴ Courts cannot apply the Act of State Doctrine when an international government has repudiated the actions of the previous regime.⁹⁵ The third issue is that the courts apply the Act of State Doctrine as a first option, rather than a last resort.⁹⁶ Courts have other alternative legal tools to use before even considering the Act of State Doctrine.⁹⁷

a. The Act of State Doctrine Does Not Apply to Bolshevik-Looted Art Because the United States Did Not Initially Recognize the Soviet Union

An important distinction between Nazi-looted art and Bolshevik-looted art is that a majority of Nazi-looted art has not fallen under the Act of State Doctrine.⁹⁸ The reason for this is that, unlike Nazi takings, Soviet takings typically arose under public law, which qualified as state action.⁹⁹ Some have argued “that the doctrine is regularly abused by the

91. *Metro. Museum of Art*, 702 F.3d at 142.

92. Gerson, *supra* note 73, at 199; *see also Metro. Museum of Art*, 702 F.3d at 141–42.

93. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 428 (1964).

94. Prewitt, *supra* note 7, at 877.

95. Rosenthal, *supra* note 57, at 436.

96. *W.S. Kirkpatrick & Co. v. Env't. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990).

97. *Id.*

98. *See Republic of Austria v. Altmann*, 541 U.S. 677, 680–81, 700 (2004); *Vineberg v. Bissonnette*, 548 F.3d 50, 53–54 (1st Cir. 2008); *Detroit Institute of Art v. Ullin*, No. 06-10333, 2007 WL 1016996, at *1 (E.D. Mich. Mar. 31, 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 804 (N.D. Ohio 2006).

99. Rosenthal, *supra* note 57, at 433. The Act of State Doctrine also does not apply because the Nazi regime was considered a criminal organization, while the Bolshevik organization was not considered criminal. Jennifer Anglim Kreder, *State Law Holocaust-Era Art Claims and Federal Executive Power*, 105 NW. U. L. REV. COLLOQUY 315, 320 (2011). Additionally, a U.S. directive in 1949 stated that Nazi seizures of property were discriminatory. Prewitt, *supra* note 7, at 868. To put things into perspective, six million Jews were killed during the Nazi regime because of their Jewish identity. United States Holocaust Memorial Museum, Washington, D.C., *Documenting Numbers of Victims of the Holocaust and Nazi Persecution*, HOLOCAUST ENCYC. (Dec. 8, 2020), <https://encyclopedia.ushmm.org/content/en/article/documenting-numbers-of-victims-of-the->

courts as a means of avoiding difficult decisions, which impairs the effectiveness of many federal laws.”¹⁰⁰ Moreover, nationalization of private property, such as uncompensated seizures of property by governmental action, “contradicts the United States policies of justice and equality.”¹⁰¹ Others argue that the Doctrine does not have enough strength, and the judicial branch can easily set a case aside for Congress to deal with it.¹⁰² However, Congress has not assisted in the return of Bolshevik-looted art.¹⁰³

The two most famous and important cases in the United States involving Bolshevik-looted art that lost the battle to the Act of State Doctrine were the two Konowaloff cases involving *Madame Cezanne in the Conservatory* by Paul Cezanne and *The Night Café* by Van Gogh.¹⁰⁴ In both cases, the courts permitted Yale (for *The Night Café*) and the Met (for *Madame Cezanne in the Conservatory*) to rely on the Act of State Doctrine.¹⁰⁵

Both of these cases began with the description of Ivan Morozov, a Russian aristocrat, who had one of the finest collections of art in Europe prior to the Bolsheviks’ rise to power and subsequent confiscation of his collection.¹⁰⁶ Ivan Morozov purchased *The Night Café* in Paris in 1908¹⁰⁷ and *Madame Cezanne in the Conservatory* in 1911.¹⁰⁸ Following the Revolution in 1917, the Bolsheviks nationalized Morozov’s paintings

holocaust-and-nazi-persecution. During the Russian Revolution people were discriminated by class and:

[s]uch convictions set the stage for decades of murder on an industrial scale. In total, no fewer than 20 million Soviet citizens were put to death by the regime or died as a direct result of its repressive policies. . . . The victims include 200,000 killed during the Red Terror (1918-22); 11 million dead from famine and dekulakization; 700,000 executed during the Great Terror (1937-38); 400,000 more executed between 1929 and 1953; 1.6 million dead during forced population transfers; and a minimum 2.7 million dead in the Gulag labor colonies and special settlements.

David Satter, *100 Years of Communism-and 100 Million Dead*, WSJ (Nov. 6, 2017), <https://www.wsj.com/articles/100-years-of-communism-and-100-million-dead-1510011810>.

Courts consider the acts of the Nazis to be criminal but not those of the Bolsheviks. See *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 148 (2d Cir. 2012).

100. Prewitt, *supra* note 7, at 873.

101. *Id.*

102. *Id.* at 874.

103. *Id.* at 873-74.

104. See, e.g., *Metro. Museum of Art*, 702 F.3d at 140; *Yale Univ. v. Konowaloff*, 5 F. Supp. 3d 237, 238 (D. Conn. 2014). The plaintiff here, Konowaloff, is the same. *Metro. Museum of Art*, 702 F.3d at 140; *Yale Univ.*, 5 F. Supp. 3d at 237.

105. *Metro. Museum of Art*, 702 F.3d at 146; *Yale Univ.*, 5 F. Supp. 3d at 240. It is important to note that in *Yale University Konowaloff* made the same arguments from *Metropolitan Museum of Art*; Likewise, the court in *Yale University* used the same arguments from *Metropolitan Museum of Art* as well. *Yale Univ.*, 5 F. Supp. 3d at 240-42.

106. *Metro. Museum of Art*, 702 F.3d at 141; *Yale Univ.*, 5 F. Supp. 3d at 238-39.

107. Prewitt, *supra* note 7, at 855-56.

108. *Metro. Museum of Art*, 702 F.3d at 141.

and transformed his home into a museum.¹⁰⁹ In December 1918, the Bolsheviks decreed the Morozov painting collection as state property.¹¹⁰ The artworks were “transferred to the ownership of the People’s Commissariat of the Enlightenment, . . . which then seized Morozov’s home.”¹¹¹ Soon after, Morozov and his family fled to France.¹¹² By 1928, the Soviet government, desperate for capital to fund its new government, took Morozov’s paintings and began to look for buyers.¹¹³

Stephen Clark, a businessman and art collector, acquired both paintings in 1933.¹¹⁴ Clark acquired *The Night Café* by having the Mattison Gallery bribe a Soviet official to release the painting to the gallery, which would then sell the painting to Clark.¹¹⁵ Clark hid both paintings until his death in 1960.¹¹⁶ After Clark died, he bequeathed the painting to Yale, and the painting has resided there since 1961.¹¹⁷ Clark also purchased *Madame Cezanne in the Conservatory* after he had an agent secretly buy the painting for him, despite the Soviet museum officials protesting this sale.¹¹⁸ Clark then bequeathed this painting to the Met,¹¹⁹ where it currently still resides.¹²⁰

In both Konowaloff cases, the plaintiff was the sole heir of his great-grandfather, Ivan Morozov.¹²¹ “Both Yale and the Met invoked the Act of State Doctrine as a defense to support their claims of title to the paintings.”¹²² The Second Circuit in *Madame Cezanne in the Conservatory* upheld the district court’s decision to dismiss the case under the Act of State Doctrine.¹²³ The court reasoned that the Soviet government’s taking of the art fit the type of situation that bars U.S. courts from meddling in those affairs.¹²⁴ This decision was similar to the holding in

109. Prewitt, *supra* note 7, at 856.

110. *Metro. Museum of Art*, 702 F.3d at 142; *see also* Prewitt, *supra* note 7, at 856.

111. Rosenthal, *supra* note 57, at 425.

112. *Id.*

113. Prewitt, *supra* note 7, at 856.

114. *Id.*

115. Gerson, *supra* note 73, at 199.

116. Prewitt, *supra* note 7, at 865.

117. *Id.* at 200; *see also* Yale Univ. v. Konowaloff, 5 F. Supp. 3d 237, 239 (D. Conn. 2014).

118. Bridget Freeland, *Metropolitan Museum Sued for a Cezanne*, COURTHOUSE NEWS SERV. (Dec. 9, 2010), <https://www.courthousenews.com/metropolitan-museum-sued-for-a-cezanne/>. Stephen Clark paid around \$260,000 for *Madame Cezanne in the Conservatory* and three other paintings. *Id.* Clark did not acknowledge Morozov’s provenance until 1954 and he never made any effort to return the paintings, even though it was common knowledge that Morozov’s family resided in Paris, France. *Id.*

119. Prewitt, *supra* note 7, at 856.

120. *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 141 (2d Cir. 2012).

121. *Id.*

122. Prewitt, *supra* note 7, at 857.

123. *Metro. Museum of Art*, 702 F.3d at 148.

124. *Id.* at 147 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)).

The Night Café.¹²⁵ Konowaloff was not the only plaintiff to struggle in a fight against the Act of State Doctrine. The heir of Sergei Shchukin¹²⁶ and the heir of Count Alexander Sergevitch Stroganoff¹²⁷ had similar issues that led to the same conclusions from the courts. As seen in Shchukin's and Stroganoff's situations, as well as both Konowaloff cases, courts use the Act of State Doctrine as a shield to defend themselves from reviewing any other applicable law.¹²⁸ The biggest source of abuse stems from courts' contention that the Soviet taking of art constituted a government decision, and the United States does not want to interfere with these takings.¹²⁹ However, the courts use this same shield as a sword in Nazi-looted art cases. The United States has created multiple loopholes for Nazi-looted art cases that have not applied to Bolshevik-looted art cases.

In *Menzel v. List*, the court created a loophole in the Act of State Doctrine for Nazi-looted art.¹³⁰ It specified that the taking was not the action of a sovereign, but was taken by the "Elisatzstab des Reichsleiter

125. *Yale Univ. v. Konowaloff*, 5 F. Supp. 3d 237, 242 (D. Conn. 2014).

126. André-Marc Deloche-Fourcaud, the heir of Sergei Shchukin, a Russian aristocrat, banded together with Konowaloff to fight for the return of their family's art. *Heirs Seek Proceeds from Russian Art Show*, N.Y. TIMES (Jan. 23, 2008), https://www.nytimes.com/2008/01/23/arts/23arts-HEIRSSEEKPRO_BRF.html. Sergei Shchukin began collecting French art in 1898. Edward Charlton-Jones, *Article: Sergei Schukin: Life Journey of a Remarkable Art Collector. Part I*, RUSSIANART+CULTURE (Oct. 3, 2017), <https://www.russianartandculture.com/article-sergei-schukin-the-life-journey-of-a-remarkable-art-collector-tortured-by-memories-by-edward-charlton-jones/>. Shchukin's collection was reported to have a market value of three billion dollars, which included Picasso, Matisse, Gauguin, Derain, Monet, Cezanne, Degas, Marquet, and Van Gogh. Rose Guest & Till Vere-Hodge, *Series on Art Restitution – Bolshevik Looted Art*, ART@LAW (Jul. 12, 2016), <https://www.artatlaw.com/bolshevik-looted-art/>. After Shchukin's death, his brother Ivan took over his collection and continued expanding it. Prewitt, *supra* note 7, at 859. In 1918, the new government nationalized Shchukin's collection. *Id.* at 861. Just like Morozov's paintings, the Bolsheviks secretly sold off Shchukin's paintings. *Id.* at 864. Shchukin's grandson, André-Marc Deloche-Fourcaud, continued to search for the paintings that were sold. *Id.* at 866. "In 2003, he filed a lawsuit against the Los Angeles County Museum of Art seeking seizure of works from a traveling Russian exhibition that were formerly part of the Shchukin collection." *Id.* However, the court quickly dismissed all his lawsuits. Jackie Wullschlager, *The Russians are Coming*, FINANCIAL TIMES (Jan. 4, 2008), <https://www.ft.com/content/4dd8c7cc-ba6b-11dc-abcb-0000779fd2ac>. Both André and Konowaloff worked together to at least get proceeds for the looted art; however, neither was successful. *Heirs Seek Proceeds from Russian Art Show*, N.Y. TIMES (Jan. 23, 2008), https://www.nytimes.com/2008/01/23/arts/23arts-HEIRSSEEKPRO_BRF.html.

127. The Stroganoff family filed for a public appeal to have their art returned when the Soviet government had taken it. *Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18, 21 (S.D.N.Y. 1976). However, in 1976, the United States District Court of New York granted a motion for summary judgment against the Stroganoff heir because of the Act of State Doctrine. *Id.* at 22. Though the United States did not recognize the Soviet Union when that sale had occurred, the court emphasized that the seizure had occurred in Russia and stated that this was Russia's action. *Id.*

128. *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 147–48 (2d Cir. 2012); *Stroganoff-Scherbatoff*, 420 F. Supp. at 22; Prewitt, *supra* note 7, at 873.

129. *Metro. Museum of Art*, 702 F.3d at 145.

130. *Menzel v. List*, 267 N.Y.S.2d 804, 814–15 (Sup. Ct. 1966). This case was about the Chagall art piece. *Id.* at 806.

Rosenberg (“Einsatzstab”), Hitler’s Center for Socialist Ideological and Educational Research.”¹³¹ “The court reasoned, based on its research into the records of the Nuremberg Trials and other documents, that the Einsatzstab was not acting as the agent of the foreign sovereign nation.”¹³² Instead, “the Einsatzstab was an organ of the Nazi party.”¹³³

Courts reason that Bolshevik-looted art cannot be returned because the confiscations were a public taking, and therefore constitute a qualified act of the Soviet State; however, courts are quick to point out that Nazi confiscations do not fit this classification.¹³⁴ The court in *Agudas Chasidei Chabad of U.S. v. Russian Federation* could not decide if the Russian Federation is the successor of the Soviet Union.¹³⁵ However, the United States had not recognized the Soviet Union when most of this artwork was taken, and therefore, it cannot be considered a sovereign nation during the looting.¹³⁶ As a result, U.S. courts should apply laws to events that occurred under the Bolshevik regime,¹³⁷ despite the judicial branch’s reluctance to apply U.S. laws to the international community.¹³⁸ The *Chabad* argument should not have applied in any of the aforementioned cases because the United States did not recognize the Soviet Union until November 1933.¹³⁹ In fact, Clark, the buyer of both *The Night Café* and *Madame Cezanne at the Conservatory*, bought the paintings in May of 1933, before the United States recognized the Soviet Union.¹⁴⁰ Due to this lack of recognition, Clark faced numerous impediments in acquiring the art pieces because the U.S. government opposed the purchase.¹⁴¹ Courts may employ the Act of State Doctrine only when the outcome of the case turns upon the effect of official action by a foreign sovereign.¹⁴² But if the United States did not recognize the

131. Rosenthal, *supra* note 57, at 421.

132. *Id.* at 422.

133. *Id.*

134. *Id.* at 433.

135. *Agudas Chasidei Chabad of U.S. v. Russian Fed’n*, 528 F.3d 934, 945–46 (D.C. Cir. 2008).

136. Gerson, *supra* note 73, at 198; *see* Konowaloff v. Metro. Museum of Art, 702 F.3d 140, 141–42 (2d Cir. 2012).

137. In *United States v. Belmont*, 301 U.S. 324, 326, 330 (1937), the Court concluded that the United States formally recognized the Soviet government in 1933, and the Court validated all the acts of the Soviet Government since it began to exist (after 1917). This is a problematic decision though because the Soviet Union was not recognized until 1933, making the immediate recognition of everything before 1933 unfair to Russian heirs. Prewitt, *supra* note 7, at 874.

138. Prewitt, *supra* note 7, at 874.

139. *Metro. Museum of Art*, 702 F.3d at 141–42. In November of 1933, President Franklin Roosevelt recognized the Soviet Union as a legitimate government. Brittany Wolf, Konowaloff v. Metropolitan Museum of Art: *How the Act of State Doctrine Saved the Cézanne in the Museum*, 22 TUL. J. INT’L & COMP. L. 461, 465 (2014).

140. *Metro. Museum of Art*, 702 F.3d at 141–42; *see also* Gerson, *supra* note 73, at 198–99.

141. Gerson, *supra* note 73, at 199. The U.S. refused to trade with the Soviet Union. *Id.*

142. *Id.* at 203.

Soviet Union as a foreign nation at the time of the purchase of these paintings, or any paintings, then the United States is unfairly applying this Doctrine. Therefore, to apply the Act of State Doctrine fairly, the United States must exclude the use of the Act of State Doctrine for the timeframe that it did not recognize the Soviet Union.

b. The Act of State Doctrine Does Not Apply to Bolshevik-Looted Art Because the Russian Federation Repudiated the Bolshevik's Art Looting Actions

Courts utilize the Act of State Doctrine when a country has not renounced the acts of its previous regime.¹⁴³ The Act of State Doctrine is unnecessary if a country has renounced the acts of its previous regime because the country has invalidated the acts of the previous regime.¹⁴⁴ In both *Konowaloff* cases, the courts utilized the Act of State Doctrine because these courts did not want to decide the validity of the Bolshevik's actions.¹⁴⁵ However, what these courts have failed to examine is a loophole specifically created for situations where a foreign government has repudiated the actions of the previous regime. In *Bigio v. Coca-Cola Company*, the court found that a previous Egyptian regime's actions of expropriation against its Jewish citizens were not protected under the Act of State Doctrine because the new Egyptian government repudiated those actions.¹⁴⁶ Therefore, if a government repudiates actions of its former regime, courts should decline to apply the Act of State Doctrine.¹⁴⁷ "Such repudiation might take the form of a clear statement by a head of state or national leader in favor of the plaintiff."¹⁴⁸

143. *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 453 (2d. Cir. 2000) (quoting *Dominicus Americana Bohio v. Gulf & Western Indus.*, 473 F. Supp. 680, 690 (S.D.N.Y. 1979)); see also Rosenthal, *supra* note 57, at 424.

144. The purpose of the Act of State Doctrine is to restrict courts from deciding the validity of another regime's actions. *Metro. Museum of Art*, 702 F.3d at 143 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)).

145. *Metro. Museum of Art*, 702 F.3d at 141; *Yale Univ. v. Konowaloff*, 5 F. Supp. 3d 237, 240 (D. Conn. 2014).

146. *Bigio*, 239 F.3d at 453; Rosenthal, *supra* note 57, at 424. In *Sabbatino*, the Court has stated that "[t]he balance of relevant considerations may... be shifted if the government which perpetrated the challenged act of state is no longer in existence." *Sabbatino*, 376 U.S. at 428. Plaintiffs in *Bigio* asserted that the Nasser government is no longer in existence. *Bigio*, 239 F.3d at 453. The current government had repudiated the acts of the Nasser government and sought to have property returned to the Bigios. *Id.* "Any finding of impropriety with respect to Egyptian expropriation of Jewish-owned property in the early 1960's would more likely be consonant, than at odds, with the present position of the Egyptian government." *Id.*

147. Rosenthal, *supra* note 57, at 436.

148. *Id.* at 437.

This same holding can—and should—apply in Bolshevik-looted art cases. The Soviet Union no longer exists; therefore, according to this exception, Russia would have to repudiate the actions of the Bolsheviks for the U.S. courts to bypass the Act of State Doctrine and return art.¹⁴⁹ A clear statement from a head of state or “acts by a government official other than the head of state may result in repudiation.”¹⁵⁰ While critics have mentioned that the political climate will make it impossible for Russia to repudiate the actions of the Bolsheviks, a repudiation was in fact made in 2009.¹⁵¹ Similar to the government in *Bigio*, the then-incumbent President Dmitry Medvedev stated that the Russian government condemned the actions of the Bolsheviks and had desired for the return of Bolshevik-looted art to Russia.¹⁵² President Medvedev himself declared Bolshevik nationalization decrees illegal.¹⁵³ Additionally, the Russian government began investigating Soviet art sales from the 1930s.¹⁵⁴

This *Bigio* exception should apply to Bolshevik-looted art cases, but courts do not agree with this exception unless Russia repudiates all former Soviet actions.¹⁵⁵ However, Medvedev’s statement specifically repudiating the Bolshevik’s art looting should suffice for the courts to apply this exception.

c. The Act of State Doctrine Does Not Apply to Bolshevik-Looted Art when the Courts Fail to Use Supplemental Resources for Their Decision-making

Despite the United States not recognizing the Soviet Union and President Medvedev repudiating the Bolshevik’s actions, courts should have applied other laws before considering the Act of State Doctrine in Bolshevik-looted art cases.

149. The Soviet Union collapsed in December of 1991. Wolf, *supra* note 139, at 468.

150. Rosenthal, *supra* note 57, at 437.

151. *Id.*; see also Prewitt, *supra* note 7, at 877. The critic here is Aaron Rosenthal, as his work pertains to why the Act of State Doctrine was applied correctly in the *Metropolitan Museum of Art* case. Rosenthal, *supra* note 57, at 413. However, other academics, like Allan Gerson, have criticized the Act of State Doctrine and have stated that *Madame Cezanne in the Conservatory* and *The Night Café* should be returned to the heir of Ivan Morozov. Gerson, *supra* note 73, at 208–09; see also Suzanne Sataline, *A DC Lawyer’s Battle Over “Madame Cezanne in the Conservatory,”* WASHINGTONIAN (Aug. 30, 2012), <https://www.washingtonian.com/2012/08/30/a-dc-lawyers-battle-over-madame-cezanne-in-the-conservatory/>.

152. Prewitt, *supra* note 7, at 877.

153. *Id.*

154. *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 144 (2d Cir. 2012).

155. Rosenthal, *supra* note 57, at 428–29.

Clark bribed different people to obtain *The Night Café* and *Madame Cezanne in the Conservatory*.¹⁵⁶ Starting with *Madame Cezanne in the Conservatory*, Konowaloff had alleged that the Bolshevik's taking of the property constituted theft.¹⁵⁷ The plaintiff "alleged that the [*Madame Cezanne in the Conservatory*] was acquired illegally in 1933 by Stephen Clark (who eventually donated it to the Metropolitan Museum of Art in 1960) when he purchased it from Knoedler, one of the galleries representing the Soviet government in the sale of art."¹⁵⁸ The complaint alleged that both the Bolsheviks looting the art and the sale to Clark violated Soviet law and should be characterized as an "act of a party, not an act of state."¹⁵⁹ However, the court rejected any consideration of the issue of the sale to Clark.¹⁶⁰ Furthermore, the court held that even though:

the current government of Russia is apparently disinclined to engage in further appropriations or private property and has initiated an investigation into the 1930s art sales . . . it has not repudiated the 1918 appropriation that is the government act that deprived Morozov, and hence Konowaloff, of any right of the Painting.¹⁶¹

Therefore, the court decided that Russia's repudiation did not suffice and it would apply the Act of State Doctrine without considering any further resolutions.¹⁶²

The Night Café faced a similar problem, as Clark did not acquire the piece through a legitimate sale.¹⁶³ Clark had a difficult time acquiring the paintings because the United States did not want to trade with the Soviet Union, a regime which the United States did not recognize until November 1933.¹⁶⁴ Furthermore, Clark and his dealer realized that having an open transaction would "likely draw the attention of the exiled

156. Gerson, *supra* note 73, at 199; *see* Freeland, *supra* note 117. With armed conflicts comes illicit trade. This became such a huge problem that in 1970 the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") enacted a convention that forbade trading works that "were not already outside their 'source' countries." Georgina Adam, *Art Looting and Smuggling: A Deadly Business*, BBC (Apr. 14, 2014), <http://www.bbc.com/culture/story/20140415-arts-most-deadly-deal-making>.

157. *Metro. Museum of Art*, 702 F.3d at 147.

158. Gerstenblith et al., *supra* note 79, at 426.

159. *Metro. Museum of Art*, 702 F.3d at 142.

160. *Id.* at 147.

161. *Id.* at 148.

162. Rosenthal, *supra* note 57, at 431–33.

163. Gerson, *supra* note 73, at 200.

164. *Id.* at 199; *see* Wolf, *supra* note 139, at 465.

members of the Morozov family in France.”¹⁶⁵ Clark secretly bought the painting and hid it for years before he died and bequeathed it to Yale.¹⁶⁶ Soon after, Konowaloff started to search for the artwork. So, on “March 23, 2009, Yale filed a complaint in the United States District Court, District of Connecticut to quiet title to ‘*The Night Café*’ and to seek a declaratory judgment favoring Yale against Pierre Konowaloff, the great-grandson of Morozov.”¹⁶⁷

There are no records officially approving the work’s sale to Clark.¹⁶⁸ “More specifically, there is no chain of provenance showing that the painting had been duly acquired through a legitimate sale.”¹⁶⁹ “Yale’s title is as good as that of Clark, and Clark appears as a thief.”¹⁷⁰ The problem was the statute of limitations had run on bringing up the question of good title.¹⁷¹ Though a legally sound reason for the lawsuit, the heir did not know the location of the painting until 2007.¹⁷² Furthermore, potentially damaging evidence “arrived from the Russian Federation under official seal, suggesting that Soviet officials had turned a blind eye to the underhanded nature of the painting’s sale,” which caused Yale to drop the good title declaration.¹⁷³ “Instead, [Yale] filed for summary dismissal of Konowaloff’s claims, thus assuring that the Russian Federation documents would never see the light of day.”¹⁷⁴

Yale prevailed solely through an incorrect application of the Act of State Doctrine.¹⁷⁵ “[T]he legitimacy of Russia’s confiscation was irrelevant insofar as the governing question was whether—however Russia acquired the painting—it had lost possession by virtue of theft.”¹⁷⁶ Yale knew of the illegitimacy of their title and filed to establish, at least within the United States, valid title to the work despite the questionable history of its transfer.¹⁷⁷ Yale’s good title claim failed, yet succeeded in keeping the potentially damaging evidence suppressed.¹⁷⁸

165. Gerson, *supra* note 73, at 199. Clark and Henschel planned to bribe a Soviet official to release this painting to the Mattison gallery in Berlin. *Id.* The painting would make its way to New York, where Clark would complete the final sale with no traces of the origin of the painting. *Id.*

166. *Id.* at 199–200. Clark’s dealer, Henschel, told him that he needed to keep the painting hidden for many years before he could publicly display it as part of his collection. *Id.*

167. Prewitt, *supra* note 7, at 856.

168. Gerson, *supra* note 73, at 200.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 201.

174. *Id.*

175. *Id.* at 203.

176. *Id.* at 206.

177. *Id.* at 200.

178. *Id.* at 201.

Additionally, after Yale dropped the good title claim, it filed to dismiss Konowaloff's claims based on the Act of State Doctrine.¹⁷⁹ "The upshot was that Yale could continue to hold on to the [painting] despite its lack of any record of good title."¹⁸⁰ Despite Yale's acknowledgment of its gain through a series of illegitimate and sordid transactions, Yale retained the piece despite never establishing good title, instead winning through a "summary, unpublished appellate-court opinion" that denied Konowaloff his day in court.¹⁸¹

Konowaloff attempted to get *The Night Café* back once more using the letter from the Russian Federation. The letter had stated:

*I [Alexei Melnikov, former Head of the Legal Department of the Russian Ministry of Communications] made enquiries with the Russian State Archive of Social and Political History and the State Archive of the Russian Federation and received their official responses (both attached) that their respective archives do not contain any documents directly or indirectly related to the sale of Van Gogh's The Night Café painting. Having said this, I make the following CONCLUSIONS . . . [T]he supreme bodies of government and administration of the [Soviet Union] did not make any decision in May of 1933 on the sale of Van Gogh's The Night Café painting and, moreover, did not review the potential sale thereof.*¹⁸²

According to Phillip Brown, co-counsel to Konowaloff:

*Mr. Melinkov's supplement states that there is no record that the sale of the painting in 1933 was authorized by the Soviet government, despite the fact that there was system of redundancy requiring multiple approvals, thus raising issues of material fact as to title as to whether U.S. foreign relations would possibly be adversely impacted by adjudication of Yale's claim to a declaration of title in this matter.*¹⁸³

When the court did not respond, Konowaloff filed for the examination of evidence and to have a settlement conference.¹⁸⁴ The

179. *Id.*

180. *Id.*

181. *Id.* at 207.

182. Gerson, *supra* note 73, at 202 (citing Affidavit of Alexei Melnikov, *Yale Univ. v. Konowaloff*, 5 F. Supp. 3d 237 (D. Conn. 2014) (No. 150)). This occurred September 20, 2013. *Id.*

183. Gerson, *supra* note 73, at 202 (citing Affidavit of Phillip Brown, *Yale Univ.*, 5 F. Supp. 3d (No. 148) (filed in opposition to Yale University's motion for summary judgment on Konowaloff's counterclaim to good title to the painting).

184. Gerson, *supra* note 73, at 202.

court decided that the Act of State Doctrine applied anyway and that Konowaloff provided insufficient evidence.¹⁸⁵

The Act of State Doctrine should only apply when there is a “deviation from courts’ normal duty to adjudicate.”¹⁸⁶ The Act of State Doctrine bars U.S. courts from deciding the validity and lawfulness of a taking.¹⁸⁷ However, Konowaloff had renounced his intent to challenge the validity of the confiscation by the Bolsheviks.¹⁸⁸ Under *W.S. Kirkpatrick & Company v. Environmental Tectonics Corporation, International*, “[t]he act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.”¹⁸⁹ In both of the *Konowaloff* cases, Konowaloff’s challenge only implicated the motivation of the Soviet Union’s own actions in its own jurisdiction, precluding the application of the Act of State Doctrine.¹⁹⁰ Had the courts in both *Konowaloff* cases considered the motivations of the Soviet government, “[they] would ineluctably have been led to the conclusion that Konowaloff’s counterclaims were not barred by act-of-state considerations.”¹⁹¹ Instead, both courts ruled that the Act of State Doctrine applied while also ignoring the findings of *Kirkpatrick*.¹⁹² “Additionally, the Summary Order did not expressly base dismissal on act-of-state grounds, but rather on the assertion that the Russian confiscation ‘extinguished’ Konowaloff’s rights because of the factually incorrect assertion that he ‘accepted’ its lawfulness.”¹⁹³

185. *Yale Univ.*, 5 F. Supp. 3d at 242.

186. Gerson, *supra* note 73, at 203. In *Kirkpatrick*, Justice Scalia had admonished that the Act of State Doctrine may only be used when an outcome relies upon “the effect of official action by a foreign sovereign.” *Id.*

187. *Id.* at 204.

188. *Id.* at 203.

189. *W.S. Kirkpatrick & Co. v. Env’t. Tectonics Corp., Int’l*, 493 U.S. 400, 409 (1990) (finding that the validity of a foreign sovereign act was not at issue, but the motivation of the acts was at issue when the Nigerian officials violated Nigerian law).

190. Gerson, *supra* note 73, at 203. Konowaloff was challenging the motivation of the Soviets not following their own laws relating to bribery.

191. *Id.* at 205.

192. *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 148 (2d Cir. 2012); *Yale Univ. v. Konowaloff*, 5 F. Supp. 3d 237, 242 (D. Conn. 2014).

193. Gerson, *supra* note 73, at 207.

IV. CHALLENGES OF ART REPARATION TO RUSSIAN VICTIMS IN THE LEGISLATIVE AND EXECUTIVE BRANCHES

The legislature has not taken action to assist in the recovery of Bolshevik-looted art. Both the executive and legislative branches have taken part in creating policies and laws to assist Jewish victims in retrieving their art. Some of these policies include the HEAR Act and the Washington Principles on Nazi-Confiscated Art.¹⁹⁴ Furthermore, the State Department has assisted Jewish victims by providing letters to waive the Act of State Doctrine.¹⁹⁵ On the contrary, the legislative and executive branches have done little to assist Russian victims.

A. Holocaust Expropriated Art Recovery Act of 2016 (“HEAR Act”)

Before the Obama-era Congress passed the HEAR Act, plaintiffs in Nazi-looted art cases struggled to reacquire their art because of the statute of limitations.¹⁹⁶ Congress had previously proposed legislation to redress Holocaust victims.¹⁹⁷ For example, President Bill Clinton signed into law the U.S. Holocaust Assets Commission Extension Act.¹⁹⁸ Unfortunately, the international community failed to follow the Act, resulting in a law without force.¹⁹⁹

During Obama’s presidency, the United States decided to finally take concrete action. In 2016, President Obama signed the HEAR Act into law, which provided victims of “Holocaust-era persecution”²⁰⁰ and their heirs an opportunity to recover Nazi-stolen art within six years from the “actual discovery” of the art.²⁰¹ Congress included the actual discovery as a means to toll the statute of limitations since many pieces remained

194. Kreder, *supra* note 11, at 18; see also Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37, 41 (2009).

195. Rosenthal, *supra* note 57, at 423.

196. See *Vineberg v. Bissonnette*, 548 F.3d 50, 53–54 (1st Cir. 2008); *Detroit Inst. of Art v. Ullin*, No. 06-10333, 2007 WL 1016996, at *1 (E.D. Mich. Mar. 31, 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 803 (N.D. Ohio 2006). *But see* *Republic of Austria v. Altmann*, 541 U.S. 677, 680–81 (2004).

197. Falconer, *supra* note 4, at 400–04. “[T]he 106th Congress has considered eight Holocaust-related bills.” *Id.* at 402. The House proposed legislation to help Americans who were Holocaust survivors. *Id.* at 403. Although none of these efforts greatly benefited Holocaust victims, this shows that the United States has taken steps to try to help, something it has not done for Russian victims.

198. *Id.* at 402.

199. *Id.* at 400.

200. Soffia H. Kuehner Gray, *The Holocaust Expropriated Art Recovery Act of 2016: An Ineffective Remedy for Returning Nazi-Looted Art*, 2019 U. ILL. L. REV. 363, 366 (2019).

201. *Id.*

hidden away or not found for extensive periods of time.²⁰² This Act is especially necessary as a result of the many cases that were barred due to the expiration of the statute of limitations.²⁰³ This has been a good step forward in giving heirs the time necessary to locate their art.²⁰⁴ However, the biggest issue with this Act is that it does not help locate any of the missing art.²⁰⁵ The art is often hidden in a variety of locations across the globe.²⁰⁶ Due to the art being difficult to locate, “this legislation has yet to withstand numerous substantial legal challenges” since the enactment in 2016.²⁰⁷

B. Other Legislative Policies

In 1988, forty-four countries, including the United States, “signed the Washington Principles on Nazi-Confiscated Art, a nonbinding agreement that called for a ‘just and fair solution’ for Jews and other victims of Nazi persecution.”²⁰⁸ This decree “called on museums, governments, commercial galleries, and auction houses” to help locate art by researching the provenance of art in order to return any Nazi-looted art to its rightful heirs.²⁰⁹ Museums have attempted to bar claims by asserting the statute of limitations.²¹⁰ However, forty-six states agreed to sign the Terezin Declaration of 2009, which “encouraged states to refrain from applying legal provisions”²¹¹ “that may impede the restitution of art and cultural property.”²¹²

202. *Id.* at 366–67.

203. There are claims that were barred before World War II even ended. *See, e.g.*, *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2009) (finding that the lower court invalidated a California law that extended the state statute of limitations for claims seeking recovery of Holocaust-era artwork because the Federal government had exclusive power over foreign affairs). *See Vineberg v. Bissonnette*, 548 F.3d 50, 53–54 (1st Cir. 2008); *Detroit Institute of Art v. Ullin*, No. 06-10333, 2007 WL 1016996, at *1 (E.D. Mich. Mar. 31, 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 803 (N.D. Ohio 2006).

204. Gray, *supra* note 200, at 366.

205. *Id.* at 367.

206. *Id.* at 366.

207. *Id.* at 388.

208. Patricia Cohen, *The Story Behind ‘Woman in Gold’: Nazi Art Thieves and One Painting’s Return*, N.Y. TIMES (Mar. 30, 2015), <https://www.nytimes.com/2015/03/31/arts/design/the-story-behind-woman-in-gold-nazi-art-thieves-and-one-paintings-return.html>.

209. Kreder, *supra* note 194, at 41.

210. Kreder, *supra* note 11, at 19.

211. *Id.* at 13.

212. *See The Holocaust Era Assets Conference Terezin Declaration 4*, HOLOCAUST ERA ASSETS CONF. (June 30, 2009), <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/>.

Furthermore, under *Bernstein*,²¹³ the government must undo forced transfers and restitute identifiable property of victims of Nazi persecution.²¹⁴ Victims of Nazi-looted art can acquire a letter from the State Department for this exception.²¹⁵ These letters inform courts whether foreign United States policy requires courts to apply the Act of State Doctrine in certain cases.²¹⁶

V. SOLUTIONS TO FIXING THE ACT OF STATE DOCTRINE IN ALL BRANCHES OF GOVERNMENT

The judicial, executive, and legislative branches must each act to ensure that Bolshevik-looted art returns to the rightful owners. The judicial branch must properly utilize the Act of State Doctrine, the *Bigio* exception, and any other relevant policies. The executive and legislative branches need to pass bills that will strengthen the consistency of the Act of State Doctrine and properly apply any exceptions. Additionally, the legislative and executive branches must create a method for the location of stolen art.

A. Solutions to the Act of State Doctrine's Application in the Judicial Branch

Courts should use the Act of State Doctrine as a supplement. The loopholes used for Nazi-looted art should also apply to Bolshevik-looted art as the only way to fairly apply the Act of State Doctrine to all potential art restitution cases. First, the United States did not recognize the Soviet

213. *Bernstein v. N. V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954). *Bernstein*, the plaintiff, was initially forced to sign away his company to a Nazi sympathizer and he filed a lawsuit in an older case. *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246, 248-49 (2d Cir. 1947). The court dismissed the restitution claim. *Id.* at 252. The plaintiff then brought a different lawsuit. *N. V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij*, 210 F.2d at 375. The Court of Appeals reversed the previous decision after the Department of State had issued a statement:

[I]t is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and . . . to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Id. at 376.

214. *Id.*

215. Rosenthal, *supra* note 57, at 423.

216. *Id.* at 423. This exception is used on a case-by-case basis because the State Department must review the potential impacts of every single case on U.S. foreign relations. *Id.*

Union when the art was looted²¹⁷ and, therefore, should prohibit any use of the Act of State Doctrine.

Second, because President Medvedev repudiated the art looting by the Bolsheviks and Russia began investigating the Soviet Union art sales, the United States should use the *Bigio* exception, which allows courts to bypass the Act of State Doctrine when a repudiation occurs.²¹⁸ Medvedev clearly repudiated the looting of art. He may not have repudiated all Bolshevik actions, but this repudiation should suffice for this loophole to apply.

Lastly, courts must examine the illegal actions of a government when the illegal actions violate the laws of its own country (like bribery). Too often courts have used the Act of State Doctrine as an expedient excuse. Instead, courts should only use the Act of State Doctrine when no other policy or law that exists would apply and when questioning the validity of the country's own legal actions. If the United States court system follows the Act of State Doctrine and its exceptions correctly, more Bolshevik-looted art would be returned in the future. However, "[i]n our system of government, it is not the courts, but the legislative and the executive branches that are the final word where issues of U.S. foreign relations arise."²¹⁹ Therefore, the legislative branch must create and pass legislation to effectuate the necessary change to the improper application of the Act of State Doctrine the courts currently employ.

B. Solutions to Fixing the Act of State Doctrine with Laws and Policies

The legislative branch needs to pass bills that will help strengthen the consistency of the Act of State Doctrine, use current Nazi-looted art exceptions for Russian heirs, and create different policy solutions for hidden art. The legislative branch has continued to push for different policies, successful or not, to help Nazi-looted art victims reacquire their art.²²⁰ Bolshevik-looted art and its proper heirs should at least enjoy the same considerations.

Historically, some countries have shown a blatant disregard of moral standards and only followed their own version of legal standards. Other countries have made it their mission to return art, and the United

217. *Id.* at 440 n.154 (stating that Russia was now the recognized de jure regime governing the former Soviet Union).

218. *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 453 (2d. Cir. 2000).

219. Gerson, *supra* note 73, at 208.

220. Holocaust Expropriated Art Recovery Act of 2016, S. Rep. No. 114-394, 114th Cong. § 2763 (2016).

States should follow their example. For instance, Austria returned “heirless treasures” back to the Austrian Jewish community.²²¹ Additionally, the Austrian government auctions sold works to raise money for Holocaust victims.²²² Furthermore, Austria returned 200 pieces of art to the Rothschild family that were auctioned for \$90 million.²²³ While Austria has shown clear efforts to return its art, the United States has failed to effectively address many of its Jewish restitution cases.

American museums have generally avoided returning paintings.²²⁴ “Despite the relatively small number of purchase acquisitions made directly by museums, [museums] still receive many financial and in-kind donations from collectors who do acquire items on the market and, therefore, should act as leaders to exemplify best practices to combat the illicit trade in cultural property.”²²⁵ While museums should exemplify best practices, museums have regularly been found in clear violation of missing documentation for proper title of the artwork.²²⁶

The United States must utilize legislative policy to assist Bolshevik-looted art victims. First, the United States can pass legislation similar to the HEAR Act for Bolshevik-looted art victims, providing a policy that requires courts to review all other possible alternatives before using the Act of State Doctrine. Second, the State Department can assist victims with letters, informing courts whether foreign United States policy requires the courts to apply the Act of State Doctrine in certain cases. Third, the legislative branch must promote policies that will help identify lost art. The United States must help with art identification²²⁷ because “without a specific way to advance the discovery and subsequent restitution of the stolen art, hundreds of thousands of works will remain lost.”²²⁸ However, at some point ownership needs to become

221. Falconer, *supra* note 4, at 416.

222. *Id.*

223. *Id.* at 417.

224. Prewitt, *supra* note 7, at 877–78.

225. Kreder, *supra* note 87, at 1002.

226. *Id.* at 1006. For example, when *Madame Cezanne in the Conservatory* was bequeathed to the Met, the museum knew that Clark’s art was looted. Freeland, *supra* note 118. However, the Met did not investigate the title. *Id.* The Met was aware that Clark and his agent Knoedler worked together to get the painting through the Mattison (the gallery where the painting was sold from). *Id.* This gallery was known for selling looted art because in 1946 the Final Report of the Art Looting Investigation and the Office of Strategic Services reported that the Mattison was an organization that was involved in art looting. *Id.*

227. This can also apply to the HEAR Act, in order to help Nazi-looted art victims. S. Rep. No. 114–394.

228. Gray, *supra* note 200, at 367.

secure and a possessor should have clear title to the art.²²⁹ A registry of artwork should exist and if the artwork is not claimed after a certain number of years, then the possessor should get clear title to the artwork.²³⁰ Fourth, legislators should create legislation requiring museums to have more stringent provenance checks in the future.²³¹ In order to receive government funding, the government should require museums to create a public database where the government and citizens can check the provenance of art.²³² To contend with private collectors, legislation should “require compliance on the part of art storage facilities in order to ensure that the art stored there does not have a questionable provenance.”²³³ These specific policies would provide Bolshevik-looted art victims with a better opportunity to reacquire their artwork, while also expediting the process. Requiring museums to do a provenance check would also ensure that no questionable transactions would occur, such as the one with Clark and *The Night Café* and *Madame Cezanne in the Conservatory*.

Many European nations have an art restitution panel,²³⁴ and the United States should follow Europe’s example by creating its own panel to help relieve some of the legal pressure from the courts. This panel should not only involve art stolen by the Bolsheviks but should also involve any looted art that is found in the United States. The following are examples of various panels that exist, along with the benefits and drawbacks of each.

1. Austria’s Panel

Austria’s panel is effective. It has detailed online reports, along with an annual report that provides details of relevant artworks.²³⁵ Austria has also reviewed around 350 cases, which shows the panel’s

229. Falconer, *supra* note 4, at 424.

230. *Id.*

231. Currently provenance checks are not utilized. For example, both the Met and Yale continue to ignore provenance checks even after the Konowaloff trial. Menachem Wecker, *Despite Smuggled Antiquities Purchase, Some Say Criticism of Bible Museum is Unfair*, RELIGION NEWS SERV. (Aug. 3, 2017), <https://religionnews.com/2017/08/03/despite-smuggled-antiquities-purchase-some-say-criticism-of-bible-museum-is-unfair/>. Just in 2017, “New York prosecutors seized a 2,300-year-old Greek vase from the Metropolitan Museum that they suspect was looted.” *Id.*

232. Gray, *supra* note 200, at 394.

233. *Id.* at 396.

234. Catherine Hickley, *Washington Principles: The Restitution of Nazi-Looted Art is Still a Work in Progress, 20 Years on Major Conference in Berlin This Week Marks Anniversary of Landmark Agreement*, ART NEWSPAPER (Nov. 26, 2018), <http://authenticationinart.org/wp-content/uploads/2018/11/washington-principles-progress.pdf>.

235. *Id.* This panel was founded in 1998 and it is called the Kunstrückgabebeirat (Council for Art Restitution). *Id.*

commitment to restituting art.²³⁶ The panel does have a weakness because it can only handle art in federal museums and, therefore, has no authority to address art within private institutions.²³⁷

2. *France's Panel*

France's panel only has one benefit. France has dealt with 298 cases.²³⁸ The drawback with France's panel is transparency because the panel does not publish any of its reports.²³⁹ The French panel does provide compensation, but many claimants do not feel that it is adequate compensation.²⁴⁰

3. *Germany's Panel*

The German panel's strength lies in its provision of short and detailed reports, readily accessible and understandable to many viewers.²⁴¹ However, even though it is a well-structured process, Germany has only dealt with fifteen cases since 2003, making it an extremely slow process.²⁴² This panel is also limited because it can only be used if museums agree with its application.²⁴³ Furthermore, the panel's written recommendations are often not considered detailed enough.²⁴⁴

D. What the United States Panel Should Look Like

Reviewing the characteristics of each panel, the United States should form its own organization that takes the best traits of each panel, while mitigating the major drawbacks. First, the United States should create a panel that has short, understandable, detailed, and easily accessible reports of every case. Unlike France's panel, the United States would need to have a panel that is transparent to its citizens. Second, unlike Germany's panel, which only reviewed fifteen cases since 2003, the United States should also address more cases. To facilitate this, the

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* This panel was founded in 2003 and is called Beratende Kommission (Advisory Commission).

242. *Id.*

243. *Id.*

244. *Id.*

United States cannot limit the cases it addresses to only federal museums. One way to avoid this limitation is for both federal and private museums to be considered by the United States. Third, the heirs of stolen art should be allowed to decide what to do with the art when they reacquire it, whether that decision is to receive compensation or have the art returned to them.

The jurisdiction of such a panel should be federal jurisdiction, as most of these art cases appear in federal court and are international. The President of the United States would appoint five people to this panel, focusing on individuals with extensive art backgrounds and international experience. The panel would start by creating a system where museums will be required to register all their artwork and provide documents for provenance. Recommendations from outside individuals and organizations should be taken into consideration by the panel, in addition to independent research to decide what art restitution cases to review. The panel itself would be similar to an arbitration panel where both the victim and the current holder of the painting would present evidence. Additionally, independent research would be conducted to inform the panel on decision-making concerning whether a painting should be restituted based on a museum's provenance, the history on how the painting was taken from the victim, and whether it is ethical to return the painting. Decisions can be appealed to federal court if the panel has overstepped its authority. Otherwise, the panel's decision will be final. Since stolen art is less of an American issue, raising taxes would not be the best way to acquire funding. This panel would find funding by taking a portion of federal museum ticket sales.

VI. CONCLUSION

People can continue to admire *Adele Bloch-Bauer* in the Neue Gallerie without worrying about its provenance,²⁴⁵ but when viewing *Madame Cezanne in the Conservatory* in the Met or *The Night Café* at Yale, such peace of mind does not exist.²⁴⁶ Over one hundred years have passed since the Bolshevik-led revolution, and most of the art stolen during that time has yet to return to its rightful owners. The judicial, executive, and legislative branches are limiting their contributions in solving this problem. Even though Konowaloff lost in court for both artworks, something still needs to be done today. Hidden art keeps

245. Kirsch, *supra* note 1.

246. *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140 (2d Cir. 2012); *Yale Univ. v. Konowaloff*, 5 F. Supp. 3d 237 (D. Conn. 2014).

emerging, not just for Bolshevik-looted art, but Nazi-looted art as well. If cultural property is not returned to Russian descendants, then tensions will continue to surface as more documentation of other Bolshevik-seized property becomes available to the public.²⁴⁷ If more cases arise, there may be a larger push for the State Department to send letters waiving the Act of State Doctrine, but until then, Russian heirs will not get any art back. “Beyond the moral issues, claims to ownership of these looted works threaten the normal functioning of the art world.”²⁴⁸ The United States has long ignored its moral obligation in returning Bolshevik-looted art to Russian aristocrat heirs. The United States needs to hold museums not only morally accountable but legally liable as well. Until that happens, Bolshevik-looted art will never be returned to its rightful heirs.

247. Rosenthal, *supra* note 57, at 448.

248. Falconer, *supra* note 4, at 425.