

1  
2                   **REFORM OF U.S. CULTURAL PROPERTY POLICY**  
3                   *ACCOUNTABILITY, TRANSPARENCY, AND LEGAL CERTAINTY*

4                   Cardozo Law School, New York, NY

5                   April 10, 2014

6  
7                   **Transcription**

8  
9                   Note: panelist and moderator biographies are appended at the end of the transcription.

10  
11  
12                  Pamela Grutman, Arts and Entertainment Law Journal: Welcoming Remarks

13  
14                  Good afternoon ladies and gentlemen. On behalf of the Cardozo Arts & Entertainment  
15                  Law Journal, I am pleased to welcome you to the Cardozo School of Law for what should  
16                  be an informative discussion on the merits of *A Proposal to Reform U.S. Law and Policy*  
17                  *Relating to the International Exchange of Cultural Property*, a White Paper by William  
18                  G. Pearlstein, which advocates that United States cultural policy is in need of  
19                  reformation.

20                  Before we begin, I would like to thank our sponsor of the program, the Committee for  
21                  Cultural Policy, with special acknowledgement to Kate Fitz Gibbon for her extraordinary  
22                  work in coordinating these panels. Additional thanks goes to the Staff and Editors of  
23                  AELJ for their hard work in both editing the White Paper and preparing for today's event.  
24                  The first mention of cultural property in AELJ dates back to its second volume, published  
25                  in 1983, and since 1994 has published 40 articles on the subject from stalwarts in the  
26                  field, including Patty Gerstenblith, David Rudenstine, John Henry Merryman, and most  
27                  recently Derek Fincham. It is fitting that Mr. Pearlstein and the Committee for Cultural  
28                  Policy approached AELJ about today's conference, as AELJ and Cardozo have been  
29                  heavily involved in this academic debate since at least 2001, when AELJ hosted a  
30                  symposium and devoted an entire issue to "Reports from the Front Lines of the Art and  
31                  Cultural Property Wars" and hosted a roundtable entitled *Who Is Entitled to Own the*  
32                  *Past?*

33                  Professor Rudenstine opened that roundtable with the following:

34  
35                         The remarkable thing about this topic...is that the interested communities in this  
36                         broad field have deep suspicions of each other and don't necessarily engage in  
37                         collegial dialogue with one another. That condition allows universities to come  
38                         forward and play one of the more constructive roles that universities can play in a  
39                         society like ours. Universities can be kind of a neutral meeting ground where  
40                         people with strongly opposed views can come together and exchange ideas.  
41                         Cardozo hopes to be able, in the years ahead, to do more of that in this art rich  
42                         city, which is not only a center of culture for the United States but, as many  
43                         people think, for the world.  
44  
45

1 Today we continue in this grand tradition and further the academic discussion  
2 about the interplay of cultural objects and international trade policy at Cardozo in the  
3 safety of the University setting.

4 Mr. Pearlstein's paper suggests the following 5 reformations to create consistent  
5 U.S. policy relating to these objects—which can be found in the Executive Summary  
6 passed out with today's materials. The first of these is to “amend criminal law”, including  
7 reviving and passing Senate Bill 605 which would amend the National Stolen Property  
8 Act to provide that no archaeological material taken from a foreign country claiming  
9 ownership shall be considered stolen if such claim is based only upon an act or  
10 declaration by the foreign country meant to establish national ownership of the material,  
11 or if the alleged act of stealing is solely based upon an illegal export of the material from  
12 the foreign country.

13 Second, “ensure that customs practice conform with U.S. law” and when the forfeiture  
14 doctrine is applied it complies with the basic requirements of the decisions reached in  
15 *United States v. McClain* and *United States v. Schultz*. These elements are whether the  
16 foreign law includes a clear and unambiguous declaration of national ownership, or is  
17 domestically enforced, or was in effect on the date of export, or whether the importer  
18 knew or consciously avoided knowledge of the applicable law at the date of export.

19 Next, “ensure that the legal requirements of the Cultural Property Implementation Act are  
20 followed.” The CPIA implements the 1970 UNESCO Convention in the United States,  
21 and while 125 countries are signatories to the UNESCO Convention, the US must enter  
22 into bilateral agreements with other member countries to enforce import restrictions. Mr.  
23 Pearlstein proposes that new binding guidelines are needed to ensure neutral  
24 interpretation of the CPIA and fair administration of the Cultural Property Advisory  
25 Committee, and that stewardship of the CPIA be moved to the Department of Commerce.  
26 The fourth reform suggests limiting the Justice Department's use of the Archeological  
27 Resources Protection Action of 1979 to materials found on land owned or administered  
28 by the U.S. Government or Native American tribes.

29 And finally, the paper proposes “the creation of an electronic database of objects to  
30 encourage transparency, restore liquidity, and provide repose.” The terms and conditions  
31 of the database would need to be binding on foreign and domestic governments and  
32 agencies to insure its effectiveness.

33 Today's forum has been organized to discuss the merits of the paper.

34 Mr. Pearlstein will begin our afternoon with his view of the state of affairs and what led  
35 him to write this White Paper.

36 Mr. Pearlstein.

37  
38 William Pearlstein: Introductory Remarks

39  
40 Good afternoon. My name is William Pearlstein. I'm a partner in Pearlstein &  
41 McCullough LLP, a new art law firm. I've been practicing in the international art trade  
42 tor almost 20 years.

43  
44 When one of my UK clients asked me why it has become so difficult to do business in the  
45 US, I said that US law governing the antiquities trade has evolved in a different direction

1 than was originally intended. That is the short answer. The White Paper is the long  
2 answer.

3  
4 Let's agree that archeological looting is bad. That's where the discussion begins, not  
5 where it ends. There are probably five basic points of view.

6  
7 Cultural nationalists say that artifact-rich nations have the right to nationalize every  
8 cultural object within their borders, in or out of the ground. Most source nations have  
9 enacted a national patrimony law of some sort. In general, constructive ownership and  
10 theft are created by legislative decree and not by taking an object from an owner's  
11 physical possession.

12  
13 Cultural internationalists say that the lawful circulation of objects among nations serves a  
14 universal educational and civilizing purpose. Should this circulation be limited to  
15 government loans to museums—preferably Universal Museums that promote  
16 Enlightenment Principals--or should it also promote private ownership and a legal  
17 market?

18  
19 Archeologists say that the preservation of archeological context is the preeminent policy  
20 goal. Only objects discovered in virgin stratigraphic context preserve the full spectrum of  
21 information for scientific analysis. Objects without context are stripped of meaning and  
22 devoid of content. Unprovenanced antiquities are inherently suspect, presumably looted  
23 and must be shunned. The archeological goal is to reduce demand by enforcing the  
24 national retention of cultural materials.

25  
26 Andrew Emmerich best expressed the free market position. Emmerich, an important  
27 dealer, scholar and connoisseur, said that whoever is willing to pay the most for an object  
28 deserves to own it. In this view, the preservation of the object is paramount and context is  
29 secondary. Emmerich wrote that multiple finds often yield redundant objects and  
30 repetitive, duplicative context. The archeologist shudders but is Emmerich wrong? The  
31 view that an object's esthetic quality and art historical value are preeminent probably  
32 prevailed through the early 1980s. Only thereafter did the view come to prevail in  
33 academia that objects ought to be valued foremost in context as scientific data points.

34  
35 Finally, there's a middle way that tries to balance the competing demands of cultural  
36 nationalism, cultural internationalism, archeology, and the private market.

37  
38 The US started down this middle path. The US sent a distinguished Delegation to Paris  
39 to negotiate what has become known as the 1970 UNESCO Convention, including Paul  
40 Bator, a Harvard Law School professor, and Mark Feldman, a young State Department  
41 lawyer. UNESCO is heavily weighted in favor of cultural nationalism. Archeological  
42 preservation is hardly mentioned. In a sense, UNESCO is moderate—it focusses on  
43 objects that are important to the national heritage and contemplates private ownership and  
44 export markets. Nevertheless, the US Delegation would not allow the US to hand a  
45 "blank check" to foreign nations and automatically enforce their patrimony laws.

46

1 Implementing UNESCO into US law took 13 years. This process pitted the State  
2 Department against the cultural internationalists, led by Senator Moynihan of New York,  
3 Professor Bator and a New York-based dealers association, including Emmerich. They  
4 were concerned that, absent meaningful checks and balances, the State Department would  
5 trade import restrictions on cultural objects for concessions on other foreign policy  
6 matters.

7  
8 When Congress passed the Convention on Cultural Property Implementation Act in 1983,  
9 the internationalists thought they had won. The US would not hand a blank check to  
10 foreign nations. The CPIA's concept of stolen property is limited to theft from inventory,  
11 not theft by decree. The US would reserve judgment on foreign requests for import  
12 restrictions. These would be limited to "culturally significant" archeological materials  
13 and non-redundant ethnological materials that are "first discovered" in and "subject to  
14 export control" by the source nation. Restrictions are conditioned on satisfying  
15 requirements demonstrating Pillage, Self-Help, Concerted International Response,  
16 Mitigation and International Exchange. Under a plain reading of the CPIA, import  
17 restrictions ought to function as a selective filter--limited, focused and finite. Instead they  
18 have become blanket embargoes on everything old. Worse, the State Department  
19 routinely restricts imports of materials that are privately owned and freely traded in  
20 countries like Italy and China. State's anti-American bias is unjustifiable. The worst fears  
21 of the internationalists have come true.

22  
23 While Congress was enacting an internationalist policy, US criminal law endorsed  
24 national retention. Under the *McClain* cases, a holder can be liable under US criminal law  
25 if he knows that an object was exported in violation of a clear foreign ownership law.  
26 This is the blank check rule that was rejected by the US Delegation to UNESCO.

27  
28 In 1985, Senator Moynihan proposed S.605, a bill that would have limited US criminal  
29 law to theft from inventory and not by decree. A looting crisis would be addressed by  
30 fact-specific import restrictions under the CPIA and not by general criminal laws.  
31 Professor Bator testified in favor of the bill but the State and Justice Departments testified  
32 against. Justice stressed the need to preserve the widest scope for enforcement and gave  
33 assurances that the burden of proving criminal intent would protect the innocent and  
34 prevent prosecutorial abuse. The bill failed. In consequence, two theories can govern the  
35 legality of importing the same object, and criminal liability can be triggered by imports  
36 that are permitted by the CPIA. This makes no sense. Yet in the *Schultz* case, the Federal  
37 Court of Appeals declined to resolve the tension between the conflicting theories.

38  
39 Civil forfeiture has become a third theory of liability. Seizure of an object can result in  
40 forfeiture and repatriation based on an alleged breach of foreign law, without any proof  
41 of critical facts, foreign law or the merits of the claim. Examples are the Steinhardt phiale,  
42 the Cambodian statue and Mongolian fossils. The high burden of proof and the bar to  
43 prosecutorial abuse stressed by Justice at the Hearings on S.605 has disappeared.

44  
45 The trend is troubling. Jim Fitzpatrick's 1983 article called customs policy "Wayward"  
46 and "Lawless." Urice and Adler's recent trilogy of articles call it "Extralegal." The

1 pendulum has swung in favor of cultural nationalism, national retention, restitution and  
2 repatriation. The centrist, internationalist, legacy of Moynihan, Bator and Feldman is  
3 dead. Is this where we want to be as a nation? For example, the State Department  
4 proposes to return to Iraq Jewish archives confiscated by Sadaam's police. Is that the  
5 right thing to do?

6  
7 Should the market adopt a web-based system of publication and registration? This seems  
8 necessary to redress the mass orphanage of under-provenanced objects created by the  
9 AAMD's 1970 Rule. But I would not do so unless transparency is rewarded with repose  
10 and a fair dispute resolution process.

11  
12 I leave further discussion for the panelists. And I leave you with three questions: where  
13 does the national interest lie, what should our policy goals be, and what legal theory  
14 would best achieve those goals?

15  
16 Thank you very much.

17  
18 *Panel 1. Resolving the conflict between the Convention on Cultural Property*  
19 *Implementation Act (CCPIA) and U.S. criminal law.*

20 Panelists: Andrew Adler, James McAndrew, Evan Barr, and Michael McCullough.

21 Moderator: Jeanne Schroeder.

22  
23 Welcome to our first panel on cultural property and US criminal law.

24 [Introduction of panelists, see panelist info above]

25  
26 JEAN SCHROEDER: the first question I want to ask is do we have a problem and if so  
27 what is it? I'm going to start with Evan.

28 Evan Barr: I appreciate that. So I think I've got a fairly balanced outlook on this. I was a  
29 prosecutor for 10 years and now I'm actually on the defense side representing galleries,  
30 collectors, and or claimants in these forfeiture cases so I think I've become fairly  
31 balanced. And I think I'm here today in a way balancing on the one hand my legacy  
32 versus my livelihood, and I am going to come out in defense ultimately of my legacy. I  
33 think this White Paper is obviously a remarkable piece of scholarship, a fascinating read  
34 for me, but I think it's an overreaction. I say that because I think that the reality is that the  
35 apparent inconsistency that Bill sees between the CPIA on the one hand and what I'll call  
36 the NSPA set of cases, McClain, Steinhardt, Schultz, I think it's not an inconsistency that  
37 an overlap that exists in many areas of criminal law. That is these are alternate remedies.  
38 I think it's quite clear from even the Senate report, in 1983 with respect to the CPIA, that  
39 it was not intended to supplant or preempt any other body of law, which included the  
40 NSPA. When I say NSPA I mean the national stolen property act. When I refer to that I  
41 mean these cases that were US prosecutors are essentially bringing a forfeiture case based  
42 on the fact that an archaeological item actually belongs to a foreign country such as Italy  
43 based on that country's patrimony law. That it was found in the soil of Italy and therefore  
44 it belongs to Italy and trafficking in it here means you are basically trafficking in stolen  
45 property. This law sits alongside the treaty mechanism and neither is exclusive. In my  
46 practice there is a remedy under title 15 which would seem to broaden this but federal

1 prosecutors often bring cases, mail fraud or wire fraud, and they're allowed to do this.  
2 This is a reality in our system. Similarly there is no inconsistency in having forfeiture  
3 cases and criminal cases. These go together all the time.  
4 My other reaction is that alarm bells need not be ringing so loudly because the problem  
5 does not exist – there have not been in 20 or 30 years that many criminal cases, I think  
6 you can basically count them on one hand. Since 1983, and we are all familiar with them,  
7 there is just a handful of cases. Prosecutors for the most part have exercised discretion in  
8 going after only those cases that have the most egregious fact patterns. I do not see a  
9 criminal case in which there really is a gray area where the cultural property that is  
10 crossing the borders is not subject to a National Stolen Property Act claim. In the Schultz  
11 case the facts are just overwhelming showing knowledge and intent. Even the Steinhardt  
12 case, which is not a criminal case but a forfeiture case, we had a very strong fact pattern  
13 of the item being moved in a very suspicious way and things in the import forms that  
14 were highly suspicious. I think yes there is a question for arresting everyone in seizing  
15 everything but it hasn't happened in the 25 or 30 years that we have been dealing with  
16 this issue. And in most of the forfeiture cases, you will see another predicate offense  
17 another US-based offense in addition to the National Stolen Property Act claim in that  
18 forfeiture complaint. In other words, there will be a false statement or a customs  
19 importation violation that is a separate problem from the NSPA. So that is also a comfort  
20 knowing that there is an independent basis for a violation separate and apart from the  
21 violation of foreign law. I guess my final reaction is and then I'll stop talking – that we're  
22 in a different world. The Cultural Property Implementation Act Cultural Property  
23 Implementation Act Cultural Property Implementation Act is more than 30 years ago now,  
24 right, and international cooperation has exploded since that time in terms of red lists and  
25 Interpol and extraditions are much more common then now than they were 30 years ago  
26 so it shouldn't surprise us that on this side enforcement is also ramped up in terms of  
27 enforcing foreign countries national laws and treaty request to season item. It's a different  
28 world. And to the extent that the CPIA does not adequately address the problem federal  
29 prosecutors and others who stepped up by making creative use of these other statutes.  
30

31 JEAN SCHROEDER: okay well I would like to turn to Andy with the question, well it's  
32 certainly true that there a lot of civil statutes used with criminal statutes, for example civil  
33 insider trading law and criminal insider trading law, and criminal law does require a  
34 degree of scienter, but one of the allegations in the White Paper is not just that you have a  
35 civil remedy and a criminal remedy, but that the underlying theories are radically  
36 different. So address that and also flesh out what are the sanctions? Did Schultz go to  
37 jail? But for most people that's not going to be the case right there going to be forfeiting?  
38

39 ANDREW ADLER: : well that's a lot. I think there are two different issues here that I  
40 would like to separate. One is, is there a conflict between the laws? And second, if there  
41 is, is that a problem? I think the second is a closer question and Evan has given a strong  
42 argument that even if there is a conflict we've been dealing with this for 20 years and few  
43 criminal cases have been brought and more civil forfeiture cases have been brought. I  
44 think there are some arguments on the other side of that, but before we get there let's  
45 identify with the conflicts that were talking about here. The White Paper does make a  
46 compelling case that there are serious conflicts on the one hand between the McClain

1 doctrine and the NFPA and the Cultural Property Implementation Act. So I thought I'd  
2 explain briefly what some of these conflicts are. You have these in the White Paper but at  
3 least I can summarize them briefly. First there is a disparity between the definitions of the  
4 word stolen. This is a critical conflict. On the one hand we have the CPI in which stolen  
5 is limited to provenanced objects, objects which are taken from an institution, or a  
6 museum, or site, so they are documented objects. Many of the objects that we are talking  
7 about here are not provenanced objects, they are just found in the ground or in a hillside  
8 somewhere. And those objects are encompassed under the McClain doctrine. The  
9 McClain doctrine encompasses objects that are covered under an foreign patrimony law  
10 and those objects include objects that are just found. It is much broader in scope as far as  
11 what it covers.

12  
13 JEAN SCHROEDER: one of the concerns is that usually you think of civil actions is  
14 being a lot broader than criminal actions. In part that's because the penalties are so severe.  
15 In this case it seems that the civil action is narrower than the criminal action.

16  
17 ANDREW ADLER: I don't think that the distinction between criminal and civil is key  
18 because what happens here is under the McClain doctrine, the NFPA which is a criminal  
19 statute, the prosecutors can bring a criminal action but what happens more often is they  
20 use an underlying claim that there is a violation under the NSPA to do a civil forfeiture  
21 on the same theory against the object itself, in an *in rem* proceeding. That's one of these  
22 legal fictions where the defendant is the object. It's not so much a difference between  
23 civil and criminal but in so far as the scope between these two statutes. And there is also  
24 a conflict, and this is a major conflict that the White Paper points out, that is the matter of  
25 repose. Is a period for repose once an object is in this country for a certain amount of  
26 time? The Cultural Property Implementation Act sets out a safe harbor. If an object is  
27 been in this country for X number of years and has been displayed and publicized for a  
28 certain period of time then we are going to say that object is okay. But under the National  
29 Stolen Property Act there is a statute of limitation of five years but because that statute  
30 criminalizes possession, it's a crime. So long as you are possessing an object, the statute  
31 of limitations is never triggered. So you could be in compliance with the safe harbor of  
32 the CPIA and at the same time be subject to an action under the NSPA. That's a real  
33 conflict and I think the White Paper does a good job to emphasize that.

34 There is also a technical conflict so far as burdens of proof are concerned in civil  
35 forfeiture actions. You can bring a civil forfeiture action under the McClain NSPA line  
36 of cases, and the government only has to show probable cause to believe that the object is  
37 subject to forfeiture and the burden is on the claimant to come in and show proof that the  
38 object is not subject to forfeiture. That's a lower burden on the government. Under the  
39 implementation act on the other hand the burden is on the government to prove that an  
40 object was in fact stolen.

41 It varies in terms of the burden – it's a little technical but it's important. There are other  
42 conflicts as well but these are the kinds of things we're talking about here.

43  
44 JEAN SCHROEDER: so let's turn to Jim McAndrew in your view when my questions is  
45 why is Homeland Security involved in this at all?

46

1 JAMES MCANDREW: Homeland Security derives its legacy from customs. It had and  
2 has now under Homeland Security, the primary jurisdiction over the ports of entry. And  
3 the customs authority that Homeland Security has was carried over from U.S. Customs -  
4 that's a big one of course, and most importantly in the realm of cultural property is  
5 because it's a national industry the weak point of the trade is the port of entry. Some of  
6 you have heard of me say this before, but I like being in this position because this is my  
7 experience this is what I know. We talk about the law, McClain and Schultz, civil and  
8 criminal and how there are not that many criminal actions out there, but there are  
9 thousands of civil actions happening, under the radar screen, that more times than not are  
10 being done administratively. Customs and Homeland Security has the ability to detain  
11 and seize anything, let alone cultural property. Now with the forfeiture process being  
12 handled administratively, meaning inside the agency. A Homeland Security agent or a  
13 customs officer has authority to begin a forfeiture action at the port of entry, he doesn't  
14 need a search warrant, he can just take a look inside and see if what he sees matches what  
15 is described on the customs import documentation. And if on his own discretion the  
16 officer feels like something is not correct, that there's some kind of anomaly, and he does  
17 not need much of anything – if anything – in order to detain it. Also, the burden is already  
18 shifting in a sense, to the importer. Why is there this anomaly? Where's your proof? I  
19 always say that an entry is a battle for the burden. The importer now has to respond to  
20 questions from the inspector, more often than not custom inspectors questions are being  
21 fed to him by the agent. The inspector does not operate unilaterally. He can if he wants to,  
22 but he doesn't.

23 When I was the agent, he would say Jim I have this object, what you think? Take a photo  
24 of it, detain it, send the photo off to the country that the agent thinks might be the country  
25 of origin, and that starts a trickle-down effect. This grossly affects the trade in art and  
26 antiquities. And of course you know more times than not, any country that sees that  
27 request, is going to make a claim. And now, the race is on. The foreign country needs to  
28 show that it knows the piece is stolen. It needs the source or the find spot or the  
29 provenience of the object in order to bring things to the next stage. That's a very high  
30 burden of proof, and I would say that 90 percent of the time, and that is conservative, the  
31 source country is not going to be able to establish the provenience of the object.  
32 So let's turn it right back around. Here's the potential claimant country, and mind you that  
33 country might not even be the right country to make the claim. What's the Roman  
34 Empire? It spans the entire Mediterranean basin. So what's Italian? Does Italy have a  
35 right to claim it? Is it Morocco? Spain? Anywhere else? Can the agent send photos to all  
36 the Mediterranean countries or not? You're supposed to leave it up to them to develop  
37 some information or some corroboration to support that claim. That is a Herculean task  
38 for the source country – although that is their responsibility. So what the foreign  
39 countries prefer, is to go back to the customs or Homeland Security agent, and say listen,  
40 is there anything on the customs documentation that is not correct? It could even be  
41 correct but just vague or merely not correct in some way. Some minutiae that takes the  
42 burden of proof off of the potential claimant country to prove their case and lays it right  
43 in the lap of the importer, who acquired the piece more than likely honestly, out of an  
44 auction somewhere in Europe or Asia or South America, or out of a known source, and  
45 start them cycling backwards, because they are stuck with the burden.



1 And what is an easy question to ask the importer? You say, all right, no problem, give me  
2 your provenance. You look at the [patrimony] law - in Italy it's 1939, in some cases it's  
3 the 1800s, and you keep going backwards.

4 So, I'm not going to get much more long-winded. I think you have a good idea where I'm  
5 going with this. The program here is to take the proof, the burden of proof, off the source  
6 country, which couldn't probably establish the claim in the first place, and hope and pray  
7 that some flaw in the customs papers will leave the importer or the institution or collector  
8 or whoever scrambling to come up with the answers to questions that for the most part  
9 they are going to be unable to answer.

10 If the seizure is accomplished administratively it never has to go before a federal  
11 prosecutor, like Evan Barr, and it never has to touch the Department of Justice, and you  
12 wish it would, because they are a lot more fair in their application of the law. And  
13 because the customs inspector and the customs agent, and the customs lawyer are all in  
14 the same family, in an administrative procedure you kind of have a sense what the  
15 outcome is going to be.

16  
17 JEAN SCHROEDER: okay, Mike?

18  
19 MICHAEL MCCULLOUGH: can I just comment on what is been said so far? Evan said  
20 he could count the number of criminal prosecutions on one hand, I think. He must have a  
21 big hand or a lot more fingers and we can see. There was one criminal prosecution last  
22 year I think, US vs. Khouli. And Khouli's attorney wrote a very good memo that  
23 summarized all of the prosecutions that have happened in cultural property over the last  
24 20 years. It was somewhere between 20 and 30 cases that he cited, of which only two I  
25 believe resulted in jail time. Most of them resulted in no jail time at all.

26  
27 JEAN SCHROEDER: was that Schultz?

28  
29 MICHAEL MCCULLOUGH: Schultz was the only one that actually went to trial. I think  
30 they all settled. I think there are more cases out there than people are aware of. There  
31 were a couple of cases of soldiers taking cultural property from Iraq. There were other  
32 cases, but I think there were pretty decent number of cases. I'm talking about cases based  
33 on that NSPA theory of criminal prosecution. But let's get to Jim's point. I work with  
34 people who buy and sell, so that I look at this from the point of sitting in the seat of  
35 someone who wants to sell something or who wants to buy something overseas. There  
36 are really three main areas to be concerned with.

37 One is when something is coming into the country, when it is being imported, what are  
38 the standards you have to look at? The second is, based on the provenance and  
39 knowledge of the piece, do you risk criminal exposure for purchasing the piece? And  
40 third, is the CPIA so if you are dealing with property regulated by the CPIA what are the  
41 standards there and how do you meet those burdens? Three different areas to be  
42 concerned about.

43 The second one, whether there is criminal exposure - whether this piece of property could  
44 be stolen from a foreign country - is the most complicated of the three. Our panel is the  
45 conflict between the CPIA and the US criminal law - I really don't think there is a  
46 conflict. The conflict is how does a person who wants to purchase an object determine

1 whether it is properly owned, or whether there is a possibility of a government claim for  
2 it. That is a very complex, very difficult question to answer.

3 Look at the Sotheby's Cambodian sculpture case, which was just settled. Look at the  
4 facts and what happened there. You have very smart lawyers at Sotheby's, trying to  
5 determine, is there a legal claim to be made by the Cambodian government. And it seems  
6 like their answer was no. They looked at the Cambodian law, they determined that there  
7 was no issue in importing it, and then they imported the object. What seemed to happen  
8 in between is the US government along with the Cambodian government did an  
9 investigation and it sort of reminded me of the movie Sea Biscuit.

10 In the beginning of the movie Charles Howard is a guy who eventually becomes a very  
11 successful automobile salesman. Before that he's a clerk in a bicycle shop. This  
12 newfangled thing called an automobile breaks down in front of the bicycle shop and the  
13 guy gets out and says, can you fix this fine automobile? The clerk has never seen an  
14 engine before but he say "Sure," and he spends all night and he figures it out and fixes it  
15 and the guy goes on his way.

16 The Cambodian government fixed this the same way. It seemed to me that the US  
17 government went and asked the Cambodian government, do you have an ownership  
18 statute, and the Cambodian government said, "Sure, we do" and went out and found one.  
19 And what they found was something in the colonial laws of Indochina that somehow  
20 applied to this site or these objects and that seemed to be the basis for the stolen property  
21 claim in the United States. So to me, the tension really is between the NSPA, which is a  
22 statute that has no provisions in it about how it applies to these foreign patrimony claims.  
23 I think that's the hardest part because at least the CPIA is a statute that is well defined, its  
24 intentions are known, and how you comply with it is relatively simple to figure out. In the  
25 case of the NSPA, this is court created law; courts have created the standards for how the  
26 National Stolen Property Act applies. What we really need and where the tension is is we  
27 really need that statute to be revised. We need some provisions in that statute to tell you  
28 how to apply the National Stolen Property Act when a foreign government is claiming  
29 ownership under a foreign ownership law. Because if, as in the Cambodian sculpture  
30 case, really smart lawyers can't figure this out, and I don't know how much they spent,  
31 but probably they spent about \$1 million to try and get the piece back and they failed.

32  
33 JEAN SCHROEDER: so you're in practice. How are you advising your clients now?

34  
35 MICHAEL MCCULLOUGH: They fall into two different categories. One category of  
36 people who own objects that they purchased in the past and they are doing due diligence  
37 and want to know if they have any exposure, and that could be across any of these legal  
38 theories. Another category of people wants to buy something overseas and want to bring  
39 them in. Those are two very different camps to be in. Historical thefts and historical  
40 imports where there probably are no longer records of how something was imported are  
41 in a much different position from someone who has an object it was imported recently. If  
42 you have an object that you bought 20-30 years ago, and you want to do diligence and  
43 find out how it was imported, you simply are not going to be able to find much  
44 information. You're in a much different position from someone who brought something  
45 in recently. If you imported something recently and don't have any information about  
46 where it came from, to quote an old song, there is no use crying, and praying won't do

1 you no good, because there is going to be a record of that import with Customs and they  
2 will trace that back and you will have an issue with that piece. There is a third category of  
3 people who are the people Jim mentioned, who import something and got it stopped at  
4 the border. That is the worst position to be in, because as Jim said, the import power is  
5 very broad, and the ability of Customs and Border Protection to detain, seize and forfeit  
6 objects is very, very broad. Like Jim, I have many cases over the last few years, where an  
7 object has come in and it does not have a long provenance, and the answer from Customs  
8 is, "You prove to us that this object is not stolen, or we are going to seize it," and they  
9 seize it. And then it goes through an administrative forfeiture proceeding. Unless you are  
10 willing to pay \$100,000-\$200,000 to start going through that process, there is no use in  
11 contesting it. So many of the seizures and forfeitures happen administratively. The object  
12 is lost. Unless it is very valuable, you cannot pay to go through that process and there is  
13 no use doing anything.

14  
15 JAMES MCANDREW: One comment about the CPIA - when it was written I think it  
16 was written the best that it could be at the time. One of the things that customs does when  
17 an object comes in from one of the 14 countries that has a bilateral agreement under the  
18 CPIA, the CPIA says that if an object is imported without a permit from the source  
19 country then the import can be allowed under the statute by providing "satisfactory  
20 information" that the object was out of the country before the imposition of the bilateral,  
21 or has been out of the country for more than ten years. And there are two paragraphs that  
22 quote what that satisfactory evidence consists of and what it should state. It was out of  
23 the country for 10 years prior to import - it was out of the country before the imposition  
24 of the bilateral, and so on. Just to show you what happens in that case. An affidavit that  
25 satisfies this should be sufficient for the piece to be released, but it is not. You can  
26 literally lift that language right out of the law and have your client sign an affidavit that  
27 attests to that. Because it states exactly what the statute requires it should be sufficient.  
28 The shipment should be released, right? No. The CPIA does not put limitations on  
29 customs and Homeland Security to stop asking for more. The agent or inspector comes  
30 back and says, I want more. They say, I don't like that affidavit, give me another. I don't  
31 know that person, give me one from another person. They continually ask for more and  
32 create, at a whim, what they want. The question is do you feed the government more? If  
33 you don't give them more, they seize it. If you do give them more, they ask for more  
34 again. Maybe they are looking for you to establish that you made a false statement and  
35 take you down the path you never intended to go down. Then the case goes from civil to  
36 criminal. Don't forget that behind the scenes, any document you give them, they are  
37 sending collateral requests to the agents in foreign countries to verify the document. And  
38 if they can catch you with a false document or a false statement, intentionally or  
39 unintentionally now you have a criminal problem. There is no limitation on what is called  
40 quote unquote satisfactory evidence. I have a client who had an object seized in April  
41 2011 - this is April 2014, and I still haven't got it released. This could go on for another  
42 30 years. Again, there is no limitation on what they can ask for and what is satisfactory  
43 evidence and that is what is wrong with the CPIA.

44  
45 EVAN BARR: I want to comment on Mike's comment on how you figure out the foreign  
46 law question. I hope you'll hire counsel. You also have to contemplate if the piece is

1 significant enough, to hire foreign counsel. A lot of these cases end up with a battle of the  
2 experts on the particular foreign patrimony law. Were sitting around trying to figure out  
3 what these laws mean. It's clear since McClain in 1975 that these laws are avidly  
4 obviously out there and nobody can claim that oh my God I'm surprised. That's off. That's  
5 not going to fly anymore. And just stick back and think about this from the perspective of  
6 the rest of the world and on how they have to understand US law. We impose very  
7 complex legal requirements on people in other countries. Some of our arcane laws such  
8 as OFAC which has all kinds of real regulations having to do with Iran and North Korea,  
9 the IRS expects Swiss banks to do a lot of its enforcement over in Switzerland. Other  
10 countries are prosecuted all the time by the US for violating our complex trade sanctions.  
11 We have to get pretty savvy in understanding these other countries rules as well.

12

13 JEANE SCHROEDER What do you advise clients?

14

15 EVAN BARR: Hire a very good Customs lawyer. One thing that is true is that the  
16 marketplace for antiquities that do not have good documentation has dropped  
17 dramatically. There are very few people in NY in the antiquities business compared to  
18 when we started doing these cases. It has had that impact. There may be some  
19 uncertainty about the foreign law but in case like Cambodia. The best advice is to stay  
20 away from a situation that smells bad. The feet are still in the ground and you've got the  
21 other part of the statue? Bad facts, look out. In the Steinhardt case I think the same thing.  
22 The Steinhardt case the piece was effectively transshipped out of Italy so that it could be  
23 hand carried over into Switzerland and flown to the US. They clearly understood it was  
24 of Sicilian origin. This is not a case where purely innocent folks are caught up. When the  
25 facts are bad, the authorities are going to get interested. If the facts are pretty good on  
26 their face I don't think you're going to have to worry. Not an a case purely based on a  
27 gray area of the law.

28

29 ANDREW ADLER: I might respectfully disagree on that. The egregious cases, the  
30 Schultz case, are not what are worrisome. People are worried about the gray cases. The  
31 fact that we have to ask this question is a problem for the people in the real world who  
32 want to know what to do. When you have transactions not just in art, but in anything, you  
33 want to know what the rules are. When the rules are not clear, and there is uncertainty,  
34 that's a problem. Transactions are much more unstable, they are subject to disruption, it  
35 is not a good situation. I don't practice in this area, so I would defer to others in that way.  
36 However, from my perspective as a disinterested lawyer, trying to be as objective as I can  
37 with no stake in the game, I think from a legislative perspective, when as a matter of fact  
38 you can comply with the CPIA and you can import something lawfully under the CPIA  
39 and have that same object subject to action by the federal government, possibly even  
40 criminal action, it might be unlikely but it is certainly possible, that's a problem. From  
41 the standpoint of having our laws make sense and be coherent, to have two federal  
42 statutes addressing the same issue from different perspectives and that are at odds with  
43 each other, that to me is problematic. I worry about that a little more perhaps, than Evan  
44 does.

45

1 MICHAEL MCCULLOUGH: I agree with you. We have to distinguish between  
2 traditional theft cases and these national patrimony laws. If I am not mistaken, the  
3 Schultz case was a theft case, the objects were stolen from police custody, they were  
4 covered in plastic, both the dealers involved knew this was a stolen piece. I could be  
5 mistaken about that. The St. Louis Museum case the Ka Nefer Nefer case, that piece was  
6 stolen from a museum. Then you have other cases where the origin is unknown and the  
7 argument is that the best title for that art object is created under a national patrimony law.  
8 The Cambodian case, the object was taken from a temple. Well, many objects are taken  
9 from temples. Maybe it makes us feel better or worse about an object in that case but  
10 legally, it is not relevant whether the feet are still there or not. The fact is that all these  
11 objects are taken from a foreign country  
12 What is important is whether the buyer in the United States or importer can figure out the  
13 foreign country laws are before they import it and can rely on the fact that if they have  
14 good counsel advising them, they can know whether they can import it or not. In the  
15 Cambodian case, even very good lawyers looking at the case thought they could import it  
16 lawfully. I think they were right; the Cambodian law is not enforceable in the US under  
17 the NSPA. They were right. The court did not disagree. The problem is the court said,  
18 that's a great point, but that's a defense at trial. You have to wait until a trial to raise that  
19 defense. The problem I have is that you can buy an object, get a very good lawyer to give  
20 you an opinion, you can research the law, you can import it, and then you have to go to  
21 trial to establish that that foreign law cannot be enforced in the US.  
22 How much money are you going to spend, a million or two million dollars to get there?  
23 Instead of doing that, the NSPA should be amended to require that there is an evidentiary  
24 hearing pretrial to determine whether that foreign law is enforceable under our NSPA.  
25 The limitations on whether it is enforceable are laid out in McClain and Schultz.  
26 If there is a pretrial hearing, we would be able in a pretrial setting to determine whether  
27 that law applies. In some cases the law will apply and the object will be seized. And in  
28 some of the cases it won't. At least we will know up front and won't have to spend  
29 millions of dollars to find it out.  
30 There have been other cases, a seizure and forfeiture of an Egyptian sarcophagus cover in  
31 Miami in 2006, in which the court did not recognize the 1983 Egyptian statute but went  
32 back to a 19<sup>th</sup> century Egyptian statute to determine that the object was stolen. The  
33 government does not play by the same rules every time in every case.  
34 I think that the Cambodian statue case is an example in which it could have been  
35 imported, the foreign law is probably not enforceable in the United States, but they took  
36 it anyway.

37  
38 JEANE SCHROEDER: To clarify, I would have thought that it would be the government  
39 that would have the burden of showing that it is stolen and the law applies.

40  
41 MICHAEL MCCULLOUGH: The threshold is low. In both Cambodian sculpture and  
42 Tyrannosaurus Bataar case there is a very good discussion by both the judges about what  
43 the standards are. It's complicated. It depends whether it is a Title 18 or a Title 19 case.

44  
45 EVAN BARR: The government bears the burden of proof to show that the item is subject  
46 to forfeiture in a Title 19 Customs case – the standard is probable cause which is quite

1 low.. In a Title 18 case, a traditional US Federal criminal code case, under a NSPA  
2 theory, the government bears the burden of showing by the preponderance of the  
3 evidence, which is much less than a criminal case. We are talking about an object, not  
4 somebody's freedom. Since the year 2000 there is an innocent owner defense built into  
5 the forfeiture laws, either Customs or Title 18. It's an important sort of safe harbor if you  
6 will. If a person brings in an object and it is forfeited, he or she has the ability to come  
7 forward, and with that situation, and the claimant bears the burden on this issue, and  
8 show they did not have a reason to believe there was a problem and they are a bona fide  
9 purchaser for value – and they bear the burden of proof. If they can meet that threshold,  
10 they can still prevail in litigation, in a civil forfeiture.

11  
12 JEANE SCHROEDER: Someone goes abroad, buys something, what happens? In  
13 America a bona fide purchaser for value never takes free of the claim of another, but  
14 most other countries do have some sort of good faith purchaser where an innocent  
15 purchaser takes good title.

16  
17 EVAN BARR: again in these forfeiture cases if the government meets its burden then it  
18 shifts to the purchaser. A person like a Steinhardt could claim that I am a bona fide  
19 purchaser I had no reason to believe this item was subject to forfeiture. This is a factual  
20 determination. You would have to subject yourself to a deposition. There would be a  
21 deposition and a briefing before a district court judge and the judge would rule on the  
22 validity of the innocent owner claim. If you prevail, the forfeiture is vitiated with respect  
23 to your interest in the property.

24 A criminal case is totally different. If you have a good faith belief based on advice of  
25 counsel, that will be a damn good defense to any criminal prosecution. If you got a  
26 memorandum from a good lawyer in the US and in the foreign country, this would be a  
27 very effective advice of counsel defense to any criminal case, because in an NSPA case,  
28 the government would have to show that you had a deliberate or malicious intent to  
29 violate the law. The government has the burden of proving beyond a reasonable doubt  
30 that you acted with malicious intent. A letter from a fancy law firm is going to be a pretty  
31 good defense.

32  
33 ANDREW ADLER: This is technical but my understanding is that this comes under the  
34 general forfeiture statutes that applies in most cases is 18 USC 981 and 983. In 2000  
35 Congress passed the Civil Asset Forfeiture Reform Act. Under that statute, which applies  
36 generally and is under Title 18, the Criminal Code, the government bears the burden to  
37 prove by the preponderance of the evidence that the object is subject to forfeiture. That is  
38 the general default. But there is a provision in that statute that carves out cases brought  
39 under Title 19 which is the forfeiture and the Customs title, so these cases that we are  
40 talking about under Title 19 you can bring a civil forfeiture action. In that case, there is a  
41 provision under Title 19, 19-USC-1595(a), that allows the government to bring a civil  
42 forfeiture action against stolen property – this is the statute that prosecutors often use in a  
43 cultural property context. If there is a false statement on a Customs form, then they go  
44 back to Title 18. But if there is an independent basis to bring a forfeiture action under  
45 Title 19 which reverses the- well it does not exactly reverse the burden, but in that case,  
46 then we have the government has a probable cause initial burden, which is very low, and

1 then the burden is on the claimant to come in and prove that the object is not subject to  
2 forfeiture. It is almost a reversal here.

3 It gets more complicated when talking about the CPIA. So those are the cases, the  
4 McClain cases, where the underlying theory is based on the NSPA and that is the burden  
5 that is going to apply. It is going to be on the claimant, not on the government.

6 If it is a case under the CPIA – a site specific, documented object –there is an obscure  
7 provision in the CPIA- 19 USC 26.10, that says that in most cases, generally, the Title 19  
8 burden applies so it is on the claimant, however we are going to make an exception for  
9 that in our case with stolen property and the government is going to have the burden. So,  
10 long story short, under the CPIA the burden is on the government to prove that the  
11 property was stolen, and under the NSPA, the civil forfeiture cases, the burden is on the  
12 claimant after the government meets the initial probable cause burden.

13  
14 JEANE SCHROEDER: Talking about the import of objects, the other question which is  
15 raised is what about museums and collectors who are now in possession of objects? There  
16 is a statute of limitations so that after 5 years you would have clear title, but the offense is  
17 not just acquiring the objects, but is continuous because it is possessing the objects, so  
18 every day you remain in possession, the statute is continuously violated and the statute  
19 starts running again.

20  
21 EVAN BARR: in the wake of the Steinhardt case I remember there being concerns  
22 expressed by one of the amicus briefs that if the 2<sup>nd</sup> Circuit affirmed this theory, then no  
23 one would be safe. Italy and other countries were going to go and attach the collection at  
24 the Metropolitan and the Museum of Fine Arts and the museums would be emptied out  
25 within a few years. It has not happened. I do not know of any cases that have been  
26 brought against an item on the basis that it has been sitting in the US for a long time is  
27 going to fit a continuing violation notion. I have to believe that 99% of the cases if not  
28 100% of the cases are based on an import. There is a five-year clock that starts ticking on  
29 the date of import. The false statement is the jurisdictional hook. Typically there is some  
30 sort of false statement that is going along with it. In the history of the peace that is often  
31 unclear that is the one clear demarcating event. Assuming it wasn't smuggled in and  
32 somebody suitcase. I just don't know of any cases where an item has been sitting in a  
33 closet in the Met for 25 years. In fact, the twin of the Steinhardt phiale is sitting in a case  
34 in the Met. And guess what? The feds did not go in and confiscate that piece.

35  
36 MICHAEL MCCULLOUGH: The St. Louis case is the case that bears out exactly what I  
37 was talking about – the possibility of legal claims made against museums with long term  
38 holdings. That involved an object that had been on display for a very long time. In the St.  
39 Louis Museum case the massive Ka Nefer Nefer was on display for 20 years. There was  
40 some earlier contact made by the Egyptian government to a young guy named James  
41 McAndrew and to Bonnie Gardiner at the FBI and the case went nowhere. And then later  
42 on, the government contacted the museum and said we are going to bring a forfeiture  
43 action. The museum hired some very good lawyers and decided to start a declaratory  
44 judgment action in federal court in St. Louis to determine that they had title to the piece.  
45 That was a traditional theft case. It was stolen from a museum inventory and it was stolen  
46 somewhere in a 5 or 7 year period, probably in the 1950s or 60s. The court said sorry,

1 this forfeiture claim cannot go forward, because there is no specific information, you  
2 cannot establish when and how this theft took place. The fact is the Egyptians didn't  
3 know within this five or seven year period what had happened. Just having it there and  
4 then having it not there is not enough. The court said, if you claim that the piece was  
5 stolen, you have to show some proof of the theft.  
6 In the Cambodian sculpture case the complaint only says it was stolen in a window of  
7 time, and was distributed by a well-organized looting network in Indochina somewhere.  
8 That's their theory. The St. Louis case (SLAM) is the same case, and I think it should've  
9 come out the same way but it didn't. The SLAM case is one where an object can be on  
10 display for a very long time and the government can come back at a later time and says it  
11 wants the piece.

12  
13 JAMES MCANDREW: I can't talk about the St. Louis case. Egypt didn't pass national  
14 ownership laws until 1983. And there was this gap of in time which they could not figure  
15 out what happened but they had lost the piece.

16 I had the good fortune during my career in government of travelling the world, going to  
17 Egypt and all the continents for the most part and going to France, attending conferences  
18 and speaking to hundreds of nations at a time at Interpol, and the comment that Evan Barr  
19 made saying that he didn't see countries coming and sweeping though all collections in  
20 museums – that is not by law, in my opinion, that is by their choice. The countries are  
21 selective in what they want to see. They'll look at a collection that is publicized or online  
22 at a museum or auction house, and my experience is that it is an arbitrary approach to  
23 decide what they will go after. So it is not like the pieces sitting at the Met and other  
24 museums you were mentioning are not at risk – they are at risk – the Italian government  
25 can decide tomorrow that the piece they passed over ten years ago, they want it now, and  
26 that will shift the burden back on you. They know they'll have a heck of a time to be able  
27 establish that claim, so they will rely the Customs people to establish how it got into the  
28 country and try and identify an anomaly on the Customs documents and get a Customs  
29 violation, it is as simple as that. In theory, all the collections are out there if they had the  
30 resources and time. The countries could claim whatever they want; they just chose not to.  
31 That's important.

32 It comes down to what I do with the client and you do and Evan does here it comes down  
33 to the old cliché of risk assessment. On a scale of 1 to 10, let me see your collection, let's  
34 evaluate it, see how long you have had it, what was the country of origin, when it was  
35 imported into the US. I want your customs documentation as much as the claiming  
36 country does. If I recognize that the Customs documentation was filled out 100%  
37 properly, then that raises the level of comfort. But if it's a mess, then put the piece back  
38 in the closet and wait for things to change. The risk assessment is critical.

39 What's the cost benefit to the client to allow me to do that? It is because a lot of people  
40 don't want to ask the questions that I will ask. It's a daisy chain, the piece you own today  
41 was owned by someone else before that. As a government agent if I come to you and you  
42 give me a response, that's just the beginning. You're going to tell me where you got it  
43 from in my subpoena is going to keep walking things back. And then I'm good to see  
44 what the documents say and see if I can make a customs violation out of this. Back in the  
45 80s and 70s, no one cared as much about the documentary requirements. Things have  
46 changed since 1983. You can guarantee that if I have to rely on 1970 or 1980



1 documentation, that doesn't give me a good sense of comfort. I can find a customs  
2 violation. But going back the farther and farther you get, you also get comfort from the  
3 age of the transfer. For the collector the increased value for having complete  
4 documentation for the item tells the story.

5  
6 JEANE SCHROEDER: we are going to have to wrap up here. One thing that Evan was  
7 saying that struck me very much was that 1983 was a very different world from today.  
8 There has been a sea change. We had a Congress back in 1983 with Sen. Moynihan  
9 representing New York and now we are dealing with an executive and a State  
10 Department thinking much more internationally. We have more and more of these cases  
11 since 2001 and the change to Homeland Security. Based on that, where can we go?

12  
13 MICHAEL MCCULLOUGH: It will continue like this. The goal should be for people  
14 who collect, museums, and auction houses, to get some legislative effort together to  
15 clarify what the rules are. The idea that you can have to go to court if you are a museum  
16 or an auction house and spend a million dollars to find out whether your client has title to  
17 an object is a terrible burden. It does not happen every day. I agree with that. The fact  
18 that it can happen scares a lot of people and is a chilling effect on the market. I just think  
19 it is really unfair that a museum or a collector has not got rules to follow. People want to  
20 follow the rules.

21  
22 EVAN BARR: I would suggest that rather than attempt to amend the statute, I think there  
23 is a possibility of dialog with the Department of Justice, as well as Homeland Security to  
24 consider certain factors before they bring an action. This could become part of the policy  
25 that they have.  
26 It is not going to be enforceable; it does not create any private right of action, you can't  
27 come in and argue it to the judge and complain that they didn't follow their internal  
28 protocols. My experience with those kinds of thing memoranda that are issued to  
29 prosecutors is that they at least get the individual prosecutor thinking about the right  
30 issues. In these cases any assistant US attorney should be thinking about whether the  
31 foreign country that is making the claim enforces the laws back home. Whether the claim  
32 was brought in a timely fashion or they sat on it. Is there an independent US violation?  
33 Has there been reciprocity? A lot of these cases have a diplomatic component that goes  
34 beyond the artwork, where we might have an interest in seizing an item for the Mexican  
35 government or the Italian government because we have a reciprocal request pending with  
36 them. I think it would be a good idea to get the department, the DOJ or Homeland  
37 Security to consider these factors. After that, as you can tell from a lot of my comments,  
38 you are trusting in the discretionary judgment of the departments. I agree with Mr.  
39 McAndrew that theoretically there are a lot of cases that could be brought, but the reality  
40 is that discretion is exercised.

41  
42 Panel 2

43 *Neutral interpretation and fair administration of the CCPIA.*

44 Panelists: Mark Feldman, James Fitzpatrick, Lucille Roussin, and Marc Wilson.

45 ARTHUR HOUGHTON: Thirty-two years after it was enacted, does the CPIA still serve  
46 the public benefit? Even if the law is really good, a balanced, fair law, does the

1 administration of the CPIA follow the Act -- and does it serve the public benefit? What is  
2 public benefit? What is the international interest and the national interest of the US, what  
3 is the benefit to US citizens?

4 Despite the huge effort that went into drafting the act, does it make any difference at all?  
5 Is the sucking sound that we hear, not art coming to the US, is the art instead flowing to  
6 the Middle East, China?

7  
8 [Introductions of panelists]

9  
10 MARK FELDMAN: I am an antiquity in my own right, can talk about the negotiation of  
11 the UNESCO Convention, presented first two drafts to the Congress. Jim Fitzpatrick,  
12 who is here, had much to do with the final draft that became the CPIA. I was asked to  
13 present background to help evaluate the contentions set forth in the White Paper (WP),  
14 and its been suggested that we address more fundamental questions about the public  
15 interest. CCP and Cardozo have both published my paper on the background  
16 [<http://committeeforculturalpolicy.org/commentary/>]

17 Where does US national interest lie? These are my personal views and also my best  
18 understanding of the US views. There will be those in the State Department today who do  
19 not agree with the values that we negotiated with the stakeholders at that time. One value  
20 remains the same, however, that there is an overriding US interest in helping nations to  
21 curb the pillage of archeological sites for the purpose of preserving the common heritage  
22 of mankind. There is interest in the legislation that we preserve not only the objects but  
23 also the archaeological sites. We also have a strong national interest in international trade  
24 and exchange of ancient art for the purpose of education and preservation – and  
25 particularly education. When I go to a museum and see students studying an object, I am  
26 very excited to see that and think that an important national interest. However, we  
27 decided in 1970 – as a government – that an interest in preservation and culture is not  
28 sustainable if it depends on traffic in plundered art. We decided to try to negotiate  
29 targeted, balanced measures to halt the destruction and pillage. Has it done any good? It  
30 would be good to have an international study to try and determine whether these  
31 measures are having a beneficial effect.

32 Cultural nationalism? In my opinion and it certainly was the position of the government  
33 back in 1970 – it is not in our interest to support the desire of other countries to foreclose  
34 the export of all of their cultural items to the international community and to the United  
35 States. That is not to deny to deny their sovereign right to control; it is whether it is in our  
36 interest to control the export by US legal machinery, and the answer is, in some  
37 circumstances, when it preserves the countries from pillage and if it serves the interests of  
38 the US in the international movement of art so cultures can be appreciated around the  
39 world. When a source nation adopts a policy of complete control of cultural property, it  
40 works against their international interest, in trying to obtain the cooperation of other  
41 states in protecting that property from looting.

42 The US did not initiate the UNESCO negotiations. The draft first on the table said that all  
43 countries should have an export permit and all countries should enforce this. The US  
44 decided it could not enforce this kind of blank check. We decided the US would return  
45 objects stolen from institutions, temples, documented objects stolen in the traditional  
46 sense, and we would encourage collecting institutions not to acquire foreign objects

1 without appropriate provenance, so that the US would not be required to apply coercive  
2 measures on our museums that we did not have the legal authority to do. We succeeded  
3 in that.

4 Furthermore – no blank check. Bill Pearlstein is completely right about this. We called  
5 for a concerted international effort. When a country feels its patrimony is in danger, then  
6 it can work with other countries to negotiate a case specific collective response. I made a  
7 fateful decision to add to the legislation the authority to make bilateral as well as  
8 multilateral agreements. At that time, it seemed very unlikely that other countries would  
9 adhere to the agreement.

10 I am out of time but must state that the US national interest also includes the rule of law  
11 and implementation of the statute in accordance with the requirement laid down by  
12 Congress.

13

14 ARTHUR HOUGHTON: Mark, to what extent do you believe that the UNESCO  
15 Convention has achieved its objectives to preserve the archeological record and reduce  
16 pillage?

17

18 MARK FELDMAN: That is a question I asked. I don't know the answers. Hearing the  
19 answers this morning that the measures in place have reduced the market, then it seems to  
20 have had that impact, but the issue is – is it just being diverted to other markets?

21

22 ARTHUR HOUGHTON: Jim, please proceed and comment on the 4 determinations  
23 required under the act.

24

25 JAMES FITZPATRICK: With respect to this issue, I am an originalist and having been  
26 involved in the legislative process and also having been involved with CPAC over the  
27 years and having seen how it has gone off track, I just want to identify 5 quick points and  
28 then go back to the criteria.

29 The fundamental element in reaching a decision to move the bill forward was that the US  
30 would not act unilaterally but would act in concerted international effort to respond to a  
31 specific problem of looting. That gets an F in terms of its administration.

32 The reality is that after all these years, there is not another country, save Switzerland in  
33 some instances that has joined us in imposing import controls. So the centerpiece of the  
34 legislation, that we go forward multilaterally, not unilaterally, has been lost.

35

36 The second point is the whole issue of efficacy of these restrictions. There is a serious  
37 question of the efficacy. The basic economics is that if you cut demand, you will cut  
38 supply. What we see is that many of the nations that are asking us to close our borders to  
39 the import of foreign materials, are themselves the greatest market for those antiquities  
40 that they are denying the US. China is a roaring example of this– it is the greatest market  
41 in the world for Chinese antiquities and the place with the greatest impetus for demand  
42 for looting. There has been a serious failure of administration in requiring people who  
43 come to us to close our borders to require self-help from them.

44

45 Mark Feldman deserves incredible credit for the work he did to create a balanced  
46 approach. It is clear from his comments that the embargoes were going to be specific and

1 particularized to instances of looting. Right now, what you have in country after country  
2 is virtually the entire cultural history is out of bounds. If our borders are closed, there is a  
3 lateral shift. That market simply goes to London or Geneva or Dubai. You are not  
4 shutting off demand.

5  
6 Finally, in my biased opinion, from the beginning, this law has essentially been  
7 administered with a stacked deck. You have great power in the staff of the Cultural  
8 Property Advisory Committee (CPAC) and in the entire history, you have not had a  
9 single staff person from the dealer, or auction, or museum community. The entire input  
10 has been from the archeological constituency. You have not had the balance we all  
11 anticipated.

12  
13 There was lots of push and pull on what should be the foundation points for  
14 recommendations from the CPAC. The idea was that the expert group heard testimony  
15 and then went into secret session and decided on the following criteria.

16 First, the cultural patrimony of the State Party is currently in jeopardy from the pillage of  
17 archeological or ethnological sites and materials. In the first Italian procedure, there was  
18 a lot of looting in the south and none in the north. The question is, can you embargo all  
19 the cultural objects from a country when there is no showing of looting of those objects.  
20 Second, there must be a determination that the State Party has taken self help measures  
21 consistent with the UNESCO Convention to protect its cultural patrimony – that is, not  
22 rely on the US to police the source country’s cultural patrimony. It is clear that a country  
23 like China has the power to control and police its own sites. During the Cultural  
24 Revolution and after, for years and years, nothing came out of China. You might have a  
25 situation where Iraq does not have the capacity to guard every site outside of Baghdad.  
26 But with Italy and China, the nations have the resources to undertake self-help measures.  
27 The third requirement has two prongs: the concerted effort and it had to be efficacious –  
28 the application of import restrictions by the US, if applied in concert with similar import  
29 restrictions by other nations having a significant trade, would be of substantial benefit in  
30 deterring a serious state of pillage. If a nation creates an internal market for the very  
31 goods it says can’t come to the US – how can that be efficacious?

32 Fourth, the Executive must determine that import restrictions are consistent with the  
33 general interest of the international community in the interchange of cultural property  
34 among nations for scientific, cultural, and educational purposes. This – at the time of  
35 negotiations was held out as a billet-doux to the market. The reality is that this provision  
36 has been honored not only in the breach, but in the disregard. It is directly orthogonal to  
37 the idea of shutting down trade and having a blanket embargo, forever.

38 There were two basic theories going forward in the 12 years that I was involved. The one  
39 that came out of the House was that the US act unilaterally. That was rejected in the final  
40 decision supplanted by the Senate position insisted on by Moynihan that the US would  
41 act in concert with other nations. There have been many contrivances to avoid this  
42 requirement.

43  
44 ARTHUR HOUGHTON: It has been alleged that CPAC and State Department processes  
45 have become increasingly opaque over time. When I served on CPAC, it was as open and  
46 transparent as possible with frequent public statements. Is there an issue with

1 transparency or non-transparency that we have not seen before? One former CPAC  
2 member has stated that the department has deliberately misled Congress in not filing  
3 reports that it should have, in terms of allowing for the visibility of the dissent of CPAC  
4 members from the filed reports. Can you comment?

5  
6 JAMES FITZPATRICK: You would think we were dealing on this Cultural Property  
7 Advisory Committee with the future of Western civilization being suddenly threatened by  
8 germ warfare. When the committee started it was under the aegis of the United States  
9 Information Agency, the USIA, and that was done, I am confident, because there was  
10 concern that the State Department might roll over on any foreign request. Oftentimes, the  
11 State Department is in the business of saying, "Yes" to a foreign nation rather than no.  
12 Ultimately authority over the entire process was shifted to State because Jess Helms had a  
13 fight with USIA and the whole thing was shifted over. Since then you have had a wholly  
14 different view in terms of administering this law. In the old days, if you wanted to file a  
15 Freedom of Information act request, you could get all the internal documents and you  
16 could see what the committee had done. You were able to comment and criticize and  
17 some of those criticisms had beneficial effects. Sunlight did disinfect.  
18 Now you get 40 pages of the CPAC report 32 of which are blank because they have been  
19 excised. This is not befitting an agency which on the one hand has the responsibility of  
20 listening seriously to the source countries concerns and on the other hand listening  
21 seriously to the US citizens interests. By my lights, this is tipped away completely from  
22 listening to US cultural interests.

23  
24 LUCILLE ROUSSIN: I want to answer that question immediately - there is no language  
25 in the statute that requires them to report to the whole Congress. They do report to the  
26 minority and majority leaders of the House and the Senate. And nowhere does it state that  
27 the entire Congress has to be informed. I do believe although I can't prove it right now  
28 that there have been art dealers and antiquities dealers on CPAC. The process under  
29 CPAC is not totally closed. The public is invited to attend an open meeting - they must  
30 submit a statement but they are invited to attend an open meeting in Washington. It is not  
31 a completely closed kangaroo court.

32 In my opinion as an archaeologist, because I am a PhD archaeologist, the legislation has  
33 been effective. There will never be a time when we can stop looting. Can we stop theft  
34 here in United States completely?

35 No, we can't stop murder here completely either. We will never completely stop looting.  
36 But the CPIA has had a strong influence on the decline of looting. Also no place does it  
37 state anywhere that the trade in antiquities within a country should be forbidden. If  
38 people in United States want to deal with non-Indian cultural property they can do so.

39 The museums can exchange I think the answer to part of this is to have temporary  
40 exhibitions long-term. That's the deal that has been made with Italy. Italy sends us  
41 important objects and we send them important objects that can be on view for 3 to 5  
42 years. Italy once had a law that it could only be six months this has been changed. I think  
43 Italy has done as much as they can to prevent looting. They have probably the best task  
44 force or police force in the world to curb looters and bring looters to trial. In fact I think  
45 we should point out that we protect our own archaeological materials better than most  
46 countries. There have been a number of people who have been arrested out west for

1 dealing in Indian artifacts on Indian lands or on US lands. That would be all or national  
2 parks and any land determined by the government to be US lands. Recently there were  
3 Indian objects up for sale in Paris. The French refused to take them off and a foundation I  
4 can't remember which very secretly and very quietly purchased the objects and restituted  
5 them to the appropriate native tribes.

6 It is working and the more consciousness there is of it nationally and internationally, it  
7 will continue to improve. We cannot force another country to act as we do. There are not  
8 just United States and Switzerland, and I wanted to get a list but did not have time, others  
9 have acted to enforce these laws within their own countries and internationally. It is  
10 working. I must say that the issue of due diligence should be on the purchaser or on the  
11 dealer. The dealer should before selling any antiquity, do the due diligence of making  
12 sure that it has not been looted. The AAMD the American Association of Museum  
13 Directors has in fact proposed that all these measures be taken. However they have left  
14 themselves and rightly so a really good loophole. Recognizing that a complete recent  
15 ownership history may not be available for all archaeological material and every work of  
16 ancient art the AAMD realizes that its member museums have the right to exercise their  
17 institutional responsibility to make informed and defensible judgments about the  
18 appropriateness of acquiring such an object if in their opinion doing so the would satisfy  
19 the requirements set forth in the guidelines below. And I'm certainly happy to go through  
20 them. Museums should hold to the highest standards of due diligence and transparency  
21 as articulated in the statement of principles. I congratulated personally Phillip de  
22 Montebello when Italy came up with proof absolute proof that works have been looted.  
23 Philippe de Montebello did not wait for Italy to come to him, and forged an agreement  
24 that I think is excellent. Mutual cooperation - that can be done with other countries as  
25 well. There is no reason that all antiquities should be permitted in the trade. As an  
26 archaeologist, things that are pulled out of the ground without archaeological excavation  
27 are orphans in history. We will never know anything more about that object than its  
28 existence. Therefore we have lost the information about the context how it was used what  
29 other things might've been found with it that the looters threw away information that is  
30 valuable. Full and legitimate excavation is necessary. Can we stop all looting? No, but  
31 we can try. Knowing that we can't does not mean that we should not try. And I have  
32 another comment to add for the trade. Why should \$1 million dollar object not undergo  
33 as much inspection and scrutiny as the purchase of a half million dollar house? You are  
34 dealing with very valuable objects, which should be scrutinized before putting them out  
35 on the market.

36  
37 ARTHUR HOUGHTON: Professor Roussin, would you favor expanding the Act to  
38 include material of cultural importance that is not archaeological may enter the modern  
39 era, and expanding the Act to include ethnological material that is not from a  
40 preindustrial society? Should we bring in the act to include these on the request and  
41 demand of another country to prevent it from entering the United States?  
42

43 LUCILLE ROUSSIN: No, not necessarily. But there are objects of cultural importance in  
44 other countries that are not strictly speaking antiquities. They are old, they are not ancient  
45 and they are in danger of pillage as well. I can cite many of the later objects from  
46 Guatemala or Mexico, which are now protected.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46

ARTHUR HOUGHTON: Move on to Marc Wilson, who may have views on all said so far, please proceed.

MARC WILSON: Thank you. This is very humbling. I am not an attorney and won't talk like one. The last time I was in similar circumstances was a very, very long time ago in a mock trial in Yale Law school, I was there because I was not in law school trying to determine whether the activities in Woodstock were protected under the first amendment. Let me begin by saying that I agree with much that has been said, and I will disagree with some of what Lucille has said, just with the analysis at some points, because archaeology does not stand alone.

In my view, what is not at stake is the right of a nation to control its own borders. That's not what is at stake here. But I do think it is important to understand what are some of the benefits to our nation in particular, to the American mandate, of having works of art of other cultures and other times. Because in the end, where I am coming from is whither America, what is important for American culture, and if I am a lawyer of anything it is going to be the law of unintended consequences, most of which by nature and definition are unpredictable.

First I would like to add a few ideas about what is the American mandate. We are not a monoculture. Now, many nations around the world are not monocultures, but far more so than we. We are the diaspora of the world, in one place. Think about that for a second. We are the diaspora of the world in one place. We have made a proposition. We can agree that principles, as embodied in the law and illuminated by all these agencies, will trump all other social relationships. To put it bluntly principle is above blood. By blood I mean ethnic affinity, tribal affinity, linguistic affinity, all of these affinities, which often organize people and bring great woe to their houses as we witnessed in the Middle East currently, Sri Lanka, Thailand, and more recently where it was the justification for Mr. Putin to go on a real estate expedition. It is critical that we get beyond the notion of these works of art as simply being inspiring, which they are, or emotionally overwhelming. In a country that is the diaspora it is important to see what the rest of the world has produced at the highest possible level. If you do not have that, you lose one of the ways of building respect. So I think in United States to build respect not just if I am a recent émigré from Egypt and doing extremely well, it is important to see the accomplishments of everyone else, who comes from other places - of the Chinese or the Thai. That is very important for the American glue.

Why do I have a stake within this legal battle that we are talking about? So far as CPAC is concerned I have no problem with the law. There is no one who is for pillage. How can you possibly be for pillaging at these looted sites? I do not have a problem with the law I do not have a problem with how it is worded. It may be good law, but can it be good government not to pay attention to the legislative intent? Not to pay attention to the words? There is a big gap between vocabulary and application. That does nothing but create cynicism, cynicism for the very thing we are trying to protect. And there has never been such cynicism as we see today for government and the law. And when the law cannot give its citizens a predictable basis for the future, how generations will proceed from generation to generation, then you are at sea, and it has a chilling effect on all people in every walk of life. That is why the stakes are high.

1 One of the issues is moral legitimacy. Today you find that there is something that is  
2 thought to trump the law of regulations: that is morality and ethics. And you have to be  
3 extremely careful; at what point does a source nation undermine its moral legitimacy by  
4 disregarding the principles and pillaging itself – that is the point that Jim Fitzpatrick was  
5 making. And there China is a case in point. It is not just that it is the market. It is the  
6 system, as operated at the very highest level, including the highest political and military  
7 authorities. There is something wrong with that, and with asking me not to participate.  
8 Secondly, I would say that CPAC is almost a kangaroo court. To say the administration  
9 of CPAC is a stacked deck is very polite. I was involved, very intimately with the MOU  
10 for China, on the other side. Here is what I mean by stacked. If you look at the  
11 legislation, it says that the other nation has to initiate the request. I suppose you can have  
12 the State Department say, “Psst, psst!”  
13 In fact that MOU was initiated by the US State Department and drafted in English first by  
14 the USA. It was only then entered into discussion with the Chinese Ministry for Foreign  
15 Affairs. And its existence as a document caught the administration for cultural heritage in  
16 China by surprise. Is this what was intended?  
17 Then you have a self-defeating system. In China you have three ways of legally owning  
18 archeological property. If it was out by 1949 and registered. [unclear], that’s number two.  
19 Number three; you bring it in from abroad, buy it from Sotheby’s or Christie’s or anyone  
20 else. You have people excavating and pillaging, recent pillaging, bringing something out,  
21 however it gets out, sometimes quite legally, with a permit or without, then it gets washed  
22 in London, ends up properly with a new invoice in London or Paris, and sold back to a  
23 wealthy Chinese dealer, who then brings it back into China. He can own this property and  
24 put it in his museum. That is what is going on. Now with respect to the idea that only  
25 archeology can contribute to the knowledge about these pieces is simply not true. Any  
26 object that is found is subject to several hundred years of accumulated knowledge. When  
27 an object is found in the earth, it also belongs to a class of objects that are already out of  
28 the earth, both provenanced and unprovenanced.  
29 Let’s take you the Euphronios krater for example. It was illegally excavated, that’s true. I  
30 would argue that the Euphronios krater would have informed the site. The site will not  
31 tell us that it was by Euphronios. It says that on it. Nor can the site tell us what the  
32 stories are. The site is not going to tell you that you have Ajax or Achilles or Sarpedon or  
33 whoever it was. The site is not going to tell you what to call it. My point is that  
34 archaeology and other kinds of historical knowledge go together. They are not separable.  
35 Nor is archaeology necessarily more scientific. I am an art historian. I use electron  
36 microscopes. I use carbon-14. I use all these devices. I use archaeology. Archaeology in  
37 and of itself is not the only way, even for archaeological items.  
38 I worry about ultimately where is the glue in this society? What is the importance of these  
39 objects?  
40 And finally, whether with these actions, we are dissolving the traditional bonds of  
41 support between museums and those who support them. It bothers me a lot when I see  
42 this dysfunctional government in Washington - one part is not paying attention to the  
43 other and I don’t see how you going to have a government that functions.  
44  
45 ARTHUR HOUGHTON: It is the view of a lot of people that the array of laws and self-  
46 regulation that we have in place including the CPIA and the NSPA and the self-rule of



1 the AAMD has done a great deal to de-legitimize private ownership of all categories of  
2 art. Not only of antiquities. There is a darkening horizon in which people feel that  
3 something has gone wrong. It is off the track, we have done it to ourselves, and we have  
4 shot ourselves in the foot. Could you comment on that?

5  
6 MARC WILSON: Your question comes back to something that has grown in American  
7 society and many of these sea changes are not really sea changes but rather a tide that is  
8 coming in, very slowly, very inexorably. It has a lot to do with the notion of the  
9 commodification of art and the notion that these things are commercialized and the idea  
10 that somehow works of art are products of a human spirit that should not be associated  
11 with and are tainted by the association with money. A work of art that is in the market  
12 and subject to market value somehow destroys the purity of the human soul that is  
13 associated with its manufacture.

14 The only thing I can say is get over it. Throughout human society as far as we go back,  
15 art and commerce have always gone together. This has always been the case and this is  
16 true today. I would like to offer the proposition that the Romans were the greatest  
17 collectors of all times. The things being dug up in a dig were also products of commerce.  
18 Somebody paid to have the Euphronios krater made. That was found in an Etruscan tomb  
19 presumably, and somehow it got from Attica – was that a raid? Was it commerce?  
20 Whatever it was, it was in that group. You just got to get over the notion of  
21 commodification. It has become a supposedly moral issue. The idea that an individual  
22 should not own art because it belongs to all of us and represents the untamable,  
23 unbounded human spirit—I think that’s baloney.

24  
25 ARTHUR HOUGHTON: I like to open it up to the panel and ask if any of its members  
26 would like to clarify any point with respect to any comments that have been made so far.

27  
28 LUCILLE ROUSSIN: May I? Mark, I never, ever said that archeology is the only way to  
29 know a society.

30  
31 MARC WILSON: I know but your colleagues do.

32  
33 LUCILLE ROUSSIN: No, they don’t. I am still a member of that tribe as I am a member  
34 of the legal tribe. I am one of the few lawyers in the country that has PhDs in archaeology  
35 and art history and law degrees. I never said it was the only way. These things have an  
36 aesthetic value but there are aesthetic values would be enhanced if we knew the context  
37 in which they were used.

38  
39 MARC WILSON: A lot of this is predicated by the unpredictability of what is found in  
40 the hole. You don’t know what you’re going to find when you open it up. Am I going to  
41 say Eureka this has changed my whole idea of the nature of this civilization? Or are you  
42 going to find another fragment of an oil lamp? The sort you used to be able to buy for  
43 \$10 in one of those little bitty ads in the New Yorker. Guaranteed Roman period lamps  
44 for ten bucks. One problem is that we are fighting over every little thing as if they were  
45 the same. A hangnail gets the same kind of legal treatment as a heart attack. A heart

1 attack being one of those grand, glorious things that they Getty bought but should not  
2 have bought, I hangnail being one of those little Roman oil lamps.

3  
4 JAMES FITZPATRICK: I'd like to add something on that hangnail point. What's the  
5 statute says, is that you can embargo goods that are culturally significant. That concept,  
6 under this committee staff's leadership, has morphed from culturally significant to  
7 archaeologically significant. As Bill points out those are two quite different views.  
8 One thing about archaeology and situs, I tell my students, does one really know a lot  
9 more about the Rosetta Stone and its meaning whether it came out of this trench that the  
10 French found when they were next to the Nile or from that trench. There is an enormous  
11 amount of knowledge and information that can come from the surface of a vase telling  
12 you about the ancient Greek society or ancient Roman society.  
13 One thing that this debate unfortunately engenders is extreme positions on both sides and  
14 that doesn't help thoughtful resolution of issues.  
15 I tell my students that there are no angels or archangels or devils in this debate. There are  
16 good arguments on both sides and what one needs to do is back away from categorical  
17 judgments and look as best you can at facts and not emotion. People on my side of the  
18 street are sometimes guilty of extreme statements and people on the archaeological side  
19 are as well and this is something that needs to be guarded against in order to enhance  
20 rational, realistic debate.

21  
22 MARK FELDMAN: A comment on the earlier panel whether there is a conflict between  
23 the UNESCO Convention scheme and the National Stolen Property Act. In my view, this  
24 interpretation was fostered by prosecutors and adopted by the courts - that national  
25 patrimony laws convey a title that is enforceable under the penal laws of the United  
26 States. This idea is fundamentally different. Not prohibited by the CCPIA, but  
27 fundamentally inconsistent with the policy judgment made by the US government that lay  
28 behind the Convention and that statute.

29 Together with the State Department's administration of the statute, which contrary to the  
30 representations made in writing to the Congress, involved comprehensive import controls  
31 on archeology when a request is made, and the Customs enforcement of a criminal theory  
32 which did not exist when we were doing this negotiation and which would have changed  
33 the entire conversation nationally and internationally, we are no longer... I have to stay  
34 with the conclusion of the Pearlstein paper, which is that the balance that existed in 1970  
35 has been replaced by a new balance, a new regime, with a different set of values which  
36 has the potential at least of providing a blank check to any country that wants to do a  
37 national patrimony law.

38 That's a fact, in my opinion. The issue is, is it the right way to go? And who should make  
39 that decision? As a professor of constitutional law, I think that's a decision that should be  
40 made by the Congress, but it has not been made by Congress. But to get the Congress to  
41 address this is quite another matter indeed.

42  
43 ARTHUR HOUGHTON: Any other questions from this side?

44  
45 MARC WILSON: This is also going back to the first session. There is an assumption that  
46 the claimant, and the representatives of the claimant, whether the Ministry of Culture or

1 Ministry of Foreign Affairs is telling the truth, that the claim is valid and they are not  
2 lying. In my experience, there is a great deal of fabrication. This goes back to the  
3 question of burden of proof.

4  
5 As for the agreements put in place by the CPIA - those are not targeted specifically. As  
6 they are written they are completely broad. They cover everything made. Every bit of  
7 material culture is covered, and there is no burden of proof, except what Jim was talking  
8 about, basically on the Customs issues. And the fabrication on the other side is what  
9 makes the situation particularly difficult. I have no problem with the law.

10  
11 ARTHUR HOUGHTON: We have only a few minutes left. I am going to ask the last  
12 question, if I may. This is to Mark Feldman, as a former State department officer to  
13 another former State Department officer. If State has gone off the rails, how do you fix it?

14  
15 MARK FELDMAN: The first thing is to have a dialog to find out whether State has gone  
16 off the rails. I tried through an ABA committee to have a review of the procedural, not  
17 the substantive aspects of the State Department's administration of the statute and that  
18 was blocked by the archeological constituency on the committee. Unless you can get  
19 some independent body with more authority, for example a committee of Congress, to get  
20 the State Department to tell you what they are doing, it will be very hard to make a  
21 definitive judgment on whether they are complying with the statute.

22  
23 Given the way Jim succeeded in having the statute drafted on the face of it, it is very hard  
24 for me to understand how there could have been a finding in good faith that there was a  
25 concerted international effort, from the very beginning. It was even more difficult, in the  
26 very beginning, than it is now.

27  
28 JAMES FITZPATRICK: In terms of next steps, one thing that has to happen is that the  
29 coalition that Ashton Hawkins led for the museum community, and others were involved,  
30 has to be reconstituted. The museum community, unfortunately – and you were there –  
31 fighting to hold off China and you made such a powerful, impassioned statement. The  
32 museum community has largely left the field. They are now, and this is opinion, largely  
33 looking in exchange for an embargo, what is the quantum of loans.

34 From my point of view, we need to have an effective, cultural community response from  
35 museums. Having dealt with the Congress and dealt with the administration agencies, for  
36 a long time, they have the highest element of respect in terms of the way Congress would  
37 respond. I think that to get State back on track, if I am right in my assumption that they  
38 are off track, there has to be a way to enlist the museum community once again as a  
39 central figure in any reform efforts.

40  
41  
42 Panel 3

43 *Museums and collectors, the AAMD 1970 rule, web-based databases and quiet title.*

44 Panelists: Jennifer Kreder, Ronald Spencer, and Marc Wilson.

45 Moderator: Gary Vikan

46

1 GARY VIKAN: I am Gary Vikan. For nearly twenty years I was director of the Walters  
2 Art Museum in Baltimore. I started my cultural property life at a trial in Indianapolis,  
3 Autocephalos Church in Cyprus versus Peg Goldberg. I was an expert witness for the  
4 plaintiff. I think I earned my archeological gold ribbon for that, and I was put on the  
5 Cultural Property Advisory Committee. I learned what Mr. Fitzpatrick spoke about a half  
6 hour ago to be true. There at the time was Kate Fitz Gibbon as well, to whom we owe this  
7 day. Thanks for putting these sessions together, Kate. But I learned also the first time I  
8 entered those rooms – there were 6 of – there should have been 11, but 6 was enough to  
9 make a decision on a pile of papers from Bolivia which were six inches thick, and  
10 included objects of an ethnographic nature with a street value under \$30.  
11 So I realized there was something wrong. Dealers at that point were totally excluded from  
12 the conversation. They could not be at the table. The original legislation does the right  
13 thing in bringing conflicting and certainly contrasting voices to the table. The CPAC I  
14 participated in, in three years didn't achieve anything close to that. I am on the  
15 Committee For Cultural Policy precisely because the voice of museums of collectors and  
16 even of dealers needs to be at the table. It needs to be heard and right now it's not being  
17 heard. This particular session is devoted to the topic of the relationships between  
18 museums and collectors and by extension dealers in the aftermath of the adoption in 2008  
19 by the AAMD, the Association of Art Museum Directors, of a policy that says, normally  
20 museums should not acquire works of art that do not have clear provenance traceable  
21 back to 1970 and my question is for the panel, the moving parts on this are obviously the  
22 AAMD, museums, collectors, dealers, the supply countries because it was hoped when  
23 this policy was adopted that the supply countries would respect 1970 over their own  
24 found in the ground laws – and obviously all of this is meaningful only insofar as it bears  
25 on the public interest. That is the policy that connects museums to the world of art.  
26 My own impression was that 1970 was adopted by the museum community first and  
27 foremost for public relations purposes. We were in a position of great embarrassment.  
28 Two, we took a moral high ground. Three, we forgot about law. I think that is all pretty  
29 explicit through the guidelines. They are only guidelines. And if you follow the storyline  
30 of the guidelines very carefully you may know that there is a registry for works of art that  
31 are acquired but don't have provenance going back to 1970. There are something in  
32 access of 500 objects on this registry. The Walters Art Museum accounts for 60% of  
33 them. I think you can sense where I stand on this. But let's start with the questions - in six  
34 years, what happened? Are there any problems? Are there any patterns that are  
35 identifiable from the AAMD having adopting 1970 as a bright line? And if there are  
36 problems, are there any solutions?  
37 So you almost imagine that there are several of us lending our voices to the solution, we  
38 as a panel and you as the audience, because I am absolutely certain that this storyline is  
39 not over, of the governance laws of the AAMD.  
40 So I am going to call on Ron Spencer, who I met on a hot afternoon at the Brooklyn  
41 Museum in the spring – we were having a flower festival and we were talking to an  
42 audience of seven... six... and I had totally forgot that I had met him until he reminded me  
43 about a half hour ago, but I seem to remember that it was a very impressive speech.  
44  
45 RONALD SPENCER: I happen to have in front of me something that you probably have  
46 before you as well. That is the final adopted AAMD membership guidelines. January 29,

1 2013. The thing that first caught my eye about these guidelines, was that in two places on  
2 page one and two, they say referring to the 2008 guidelines that this analysis, namely the  
3 2013 guidelines, as they amended the 2008 and 2004 guidelines, this analysis is not  
4 necessarily required by the applicable law. No footnote. I wondered what they had in  
5 mind. The next page on that same document, the 2013 guidelines, says, “AAMD  
6 continues to encourage its members to pursue voluntary standards for acquisitions that  
7 are stricter than the requirements of applicable law.” That’s pages 1 and two. In both  
8 cases no footnotes no reasons given for that and I wondered, what’s going on here? We  
9 have a Congress that passed laws. We have an Executive who administer the laws. And  
10 yet the AAMD decided they were going to do something that goes beyond those. Well  
11 they can do that I suppose on a vote of their members, but it seems to me that they owe  
12 the art world and community an explanation of why they did it.  
13 So this is my way of addressing the good question that James Fitzpatrick had. Don’t want  
14 to restate it but this is my impression as well, that museums have largely left the field.  
15 That’s astonishing. It’s shocking - it shouldn’t be that way, whatever your views on this  
16 legislation and its enforcement. Why did they leave the field? I think a lot of you think as  
17 I do that the Fred Schultz case scared the bejesus out of them. Okay? In 2002. They  
18 couldn’t imagine that somebody would go to jail. All of a sudden Fred Schultz went to  
19 jail. He got three years. I think he served most of the three years. That was in 2002. Don’t  
20 forget these guidelines came in in 2004. Were amended in 2008 and amended again in  
21 2013.

22 So, I then went and looked at the Cultural Property Implementation Act. It’s always – I  
23 found that as a lawyer, it’s always helpful to look at the statute to start with. As opposed  
24 to what the judges said the statute meant. The statute has something called safe harbors. It  
25 doesn’t identify them as safe harbors but in section 2611 in the Cultural Property  
26 Implementation Act, as you know passed in 1983, there are numerous safe harbors. And I  
27 said to myself, why don’t the guidelines of the AMD reference even indirectly these safe  
28 harbors? I understand all this stuff about the National Stolen Property Act passed to  
29 protect the interstate transport of stolen vehicles in 1942, I understand it’s the law and I  
30 understand that the Cultural Property Implementation Act unfortunately is not exclusive  
31 like the federal copyright act is exclusive. One way to get this legislation straight if we  
32 want to solve something, we want to get Congress to make the Cultural Property  
33 Implementation Act the exclusive law that applies to these kinds of property. We’re not  
34 going to get that probably because the Department of Justice opposed that back in 1983  
35 and a large part of the art community also opposed that so we’re not going to get that, but  
36 the national stolen property should not be allowed to gag the museum community.  
37 The safe harbor rules. If the property has been held by a museum for three consecutive  
38 years in the museum purchase that property in good faith and then that same museum did  
39 one of three things in either published material that it bought and held for three years, or  
40 it exhibited for two years or a cataloged it and made it available to the public for two  
41 years, then it is out of the Act. Again we are not talking the national stolen property act.  
42 Is excluded from the 1983 act. Now, suppose the museum doesn’t own it? There’s  
43 another safe harbor. For those of you who like to read it’s subparagraph B as in boy. And  
44 it says another safe harbor in effect is that if it’s not in the museum but it’s been in the US  
45 for 10 years, anywhere in somebody’s collection under the bed, wherever, and then it is  
46 exhibited by a museum, not owned by one but exhibited for five years, then it is out of

1 the Act. Safe harbor. And if none of those safe harbors apply, the final safe harbor is in  
2 subsection D as in duck. It says if the piece has been in the country for 20 years, which  
3 today would be since 1994, it is also outside of the act. Right?

4 I am not the only one who has looked at these safe harbor rules. Why didn't the museums  
5 look at them, and if they did what did they say when they were talking about amending  
6 the AAMD guidelines?

7 This seems to me proof positive of Mr. Fitzpatrick's point that the museums have left the  
8 field. I am not the only one to read the safe harbor rules.

9 I know some museums like the Walters, probably like the Met, apply these guidelines  
10 with a common sense approach and use their own judgment based upon the facts and  
11 circumstances, just the way the guidelines expressly state they should. But I also suspect  
12 that a lot of other museums and museum people say we are not allowed to take cultural  
13 property by gift, acquisition or purchase unless we can trace it back to its source, and how  
14 it got into this country. That's not what the guidelines say but it a certainly safer way  
15 from their point of view, to approach this if they don't want to get into a Fred Schultz  
16 kind of situation. And it is certainly safer way for those same museums to cut deals with  
17 the source countries to get exhibitions.

18

19 GARY VIKAN: Marc, did Schultz scare the bejeezus out of the museums?

20

21 MARC WILSON: True confessions? In truth, I was there; I was there in the room for  
22 several years as part of the drafting committee, which consisted of the representatives of  
23 the large American museums who had a stake in antiquities. You naturally found the Met  
24 and Boston and Kansas City, but not Chicago, because they don't have antiquities. There  
25 were directors and legal counsel. So there were not more than a dozen people meeting  
26 and we were meeting at about the time that Schultz was going down. Schultz was not  
27 scary but Schultz may have played into some of our minds. That was not the principle  
28 motivation on the adoptions of these. This is a self-adopted, self-imposed ethical  
29 statement. That is why you see these hedges in here clearly saying that it is not legal.  
30 Also in my mind, you have a conflict here between the AAMD as a professional  
31 organization and the boards of trustees who are located in different states of this country  
32 and have different responsibilities. They are the ones ultimately, who are legally  
33 responsible.

34 What was behind this? First of all there was self-interest. It is not good for museums to be  
35 part of an industry that had any part in pillaging. What drove 1970, why 1970? In the end  
36 it was arbitrary. Well it is the date of the adoption of UNESCO treaty. I argued if you're  
37 going to have a bright line, that it should be 1983 because that coincides with US law. If  
38 you are going to have an arbitrary bright line then you have the option of the CPIA.

39 What drove the adoption of 1970 instead of 1983 was a desire to satisfy our European  
40 colleagues, European archaeologists, some museum people, it was really nothing else.  
41 The other pressure came from the AIA and the pounding that museums in general were  
42 getting, perfectly innocent most of them, because of the misbehavior going on at the  
43 Getty. It was based on a whitewashing of the behavior of the Getty. They shouldn't have  
44 done that. It was wrong. So we were all being whitewashed and tarred unfairly in the  
45 press, which seems to have an unlimited appetite for sensationalism and mayhem.

1 Nothing sells papers better than stolen stuff. It was ethical. It was felt that a bright line  
2 was needed instead of a rolling line.  
3 What came out later was tightening up the loopholes. That is how this came about. There  
4 is however something at work here. This is the law of unintended consequences. This was  
5 intended of course to curb the market. Museums want things from before 1970. That has  
6 driven the market for those things way way up, and driven the market generally speaking,  
7 abroad. The US market is way down, New York is no longer a player in major  
8 antiquities; they are not coming to the Big Apple.  
9 The law of unintended consequences is dissolving the relationship that has been the  
10 foundation for the amazing American museum system, for the benefit of this great nation  
11 and all the different people who live in this country. Museums can no longer buy the  
12 artworks from all the peoples who contributed to the making of this great American  
13 culture. It breaks the bonds between the people who found the pieces, the collectors, and  
14 museums. The collectors are now rejected by the museums. That failed to be foreseen.  
15 Because a lot of board members in Kansas City and California and Washington and  
16 elsewhere said, you mean you are excluding my gift? I am on your board. They alienated  
17 a huge number of board members. That is why you see scrambling to correct.  
18  
19  
20 GARY VIKAN: So a problem in the disjuncture between collectors and museums.  
21  
22 MARC WILSON: Between the symbiotic relationship between collectors and museums.  
23 Everything in those museums is a gift from somebody. They either gave the money to  
24 buy it or they gave the piece. And they give money to the endowment so that the museum  
25 can stay open and pay the charges so that people can attend.  
26  
27 GARY VIKAN: Well, that gets us to the registry notion. So Jenn Kreder, who's CV,  
28 includes all kinds of God's work activity from Holocaust restitution to nuns in El  
29 Salvador, what do you think?  
30  
31 JENNIFER KREDER: Well I actually think a fair amount of my resume is an application  
32 for Hell. That being said, I have written about the use of registries for art and to use it as a  
33 mechanism to clear title, which I think has a lot of benefits both for claimants and for  
34 museums. Transparency is the key to all of this. We have been talking about the  
35 effectiveness of the AAMD 1970 rule. Gary, I took a little different perspective on this.  
36 You talked about museums taking the high ground and morality and ethics. I am  
37 relatively happy with the progress at AAMD. I wrote a paper that's outside called  
38 Revolution In Museum Ethics. It traces the changes in the AAMD guidelines through  
39 2008 and what you see clearly is a pattern of museums becoming more legalistic. So the  
40 law is driving the changes in the AAMD. I think it's not just about ethics and morality, it  
41 definitely is the law. So a lot of people in this room are unhappy with the law and others  
42 think it's working, it's great. If I were to point out what I think is the problem with the  
43 law it would probably be with what you pointed out, subsection D as in duck of the  
44 Convention on Cultural Property Implementation Act, that something simply being in the  
45 country for 20 years is a sufficient safe harbor. I don't think it was sufficient. I don't  
46 disagree that the understanding of some people who were involved in 1969 and 1970 and

1 up to 1983 in the drafting of the Implementation Act. I think that since then changes have  
2 occurred over time in the executive branch's policies in this area - but I don't think the  
3 collector dealer side and the museum side has been bowled over, I think that's false. And  
4 I think that the introduction this year of House Bill 4292 – this is a jurisdictional  
5 immunity for certain art exhibition activity – there is plenty of power represented in  
6 Congress although I don't have CPAC experience. There has simply been a change that  
7 has occurred and change is normal. We have a common law system and change is part of  
8 that system. So what you're seeing under the National Stolen Property Act is pouring  
9 new wine into old bottles. That is what happens. Initially, when Portrait of Wally was  
10 seized, I had some concerns. It was the first time I had really looked into the civil  
11 forfeiture situation. I had concerns about governmental overreaching and having  
12 sufficient due process protections for people whose property is seized. But I think the  
13 characterization in the White Paper of people losing all their interest in their property and  
14 creating all these orphans is exaggerated. I understand it. Plenty of people are  
15 disappointed. They hoped that they would donate certain things but I don't think they  
16 have been deprived of property rights. I happen to teach Property, these are the courses I  
17 teach as a law professor. And one of the things that students learn on day one week one is  
18 that property rights exist so long as government recognizes property rights. That's what  
19 characterizes the bundle of sticks that people recognize as property rights. That sort of  
20 change happens all the time. Think of zoning rights and how that works. People can't  
21 always do what they plan to do. Their investment-backed expectations don't always pan  
22 out to be as good as they had hoped. If I think about what was legal one day and then not  
23 legal and then legal again, I think about prohibition. Here we are with marijuana being  
24 legalized, I mean, things change. That is a normal part of the system. I don't think  
25 anything is happening now in terms of the reported cases -I can't speak to the  
26 administrative cases – and when I read the reported cases, be they civil, or criminal, or  
27 civil forfeiture, I don't see anything that is extralegal in any of them. What I see coming  
28 out of criminal cases seems pretty reasonable use of prosecutorial discretion. That is  
29 something I have not always been comfortable with in the past as being sufficient  
30 protection of people's due process rights and protection of their property. For example  
31 under the Theft of Major Artwork statute, it is a crime to simply possess. The statute  
32 doesn't actually say that but if you read between the lines there is no room left for  
33 anything else when someone possesses stolen property. The National Stolen Property Act  
34 is triggered traditionally when things are moved across state lines. So we do have a  
35 statute on the books that goes quite far called the Theft of Major Artwork statute and  
36 much further than what we're talking about today. The National Stolen Property Act,  
37 customs seizures, those all predate the Cultural Property Implementation Act. They are  
38 all tools and all models that we want to have available.

39 In terms of the database being recommended, an article I wrote was referenced in the  
40 White Paper. I think the White Paper pushes the database idea much farther than I would;  
41 I think the database can only work for uniquely identifiable objects. I understand the  
42 desire in the collecting community and I know that there are plenty of legitimate  
43 collectors whose hearts are in the right place and who want the public to benefit from  
44 their collections, but that's not all that's out there and we all know that and at some point  
45 a line has to be drawn in the sand and at what point to do we say that people are on notice  
46 that there is a problem with the market. And there is a problem with the market.



1 So in terms of the underlying premises of the White Paper, I think the fundamental legal  
2 distinctions are glossed over. There would be two legal issues. One is, what is legally  
3 acquired? I think that the definition is too broad. I think when it comes to who should be  
4 on notice, the concept of due diligence should be stronger. And then, where is the  
5 conscious avoidance versus the good faith purchaser? Again, I think that to defer to  
6 presuming that everyone in the market is acting in good faith is going too far. And to  
7 have a blanket 20-year rolling rule allows for plenty of people to engage in bad faith even  
8 if the ultimate purchaser doesn't have any knowledge. Without much information, maybe  
9 that does not cross the line to conscious avoidance and prosecutions, but I don't think  
10 that's the way we want to encourage our interactions with other parts of the world. I am  
11 in favor of a market, but a market that is undergirded by stronger regard for other  
12 people's property rights. If Venezuela can nationalize its oilfields as a matter of  
13 international law, then I don't see why nations are not within their rights to nationalize  
14 other property, it's international law. I understand where people can differ as to where we  
15 should draw the line but I don't see anything extralegal here.

16  
17 GARY VIKAN: One of the ambiguities in the AAMD guidelines is what 1970 means to  
18 anyone. When Egypt uses 1983, when Italy has 1939, when Iraq has whatever, what does  
19 that tell you about the public interest? Because ultimately the relationship between the  
20 dealer and the collector and the museum is part of the public interest and what has made  
21 the American museums what they are. I think it is fair to say that that is in peril. And the  
22 point of the White Paper, at least in part, is to address that chill on what has historically  
23 been so important to benefit the public through our institutions.

24  
25 MARC WILSON: I don't see any great danger in the AAMD rules because if what it is, a  
26 statement of ethics from a professional organization. Any museum can go ahead and  
27 purchase something so long as they follow the provisions, put it on the database. But  
28 what it has done extra-legally, is to create a situation where those who wish to give,  
29 which is for the public benefit, has had a very chilling effect. What we don't see, are the  
30 unintended consequences that are not legal that is the matter of splitting off and eroding  
31 to a clear degree, across the country, the traditional support that museums need to get  
32 collections and to support them. I am not talking about property law or prosecutorial  
33 discretion.

34  
35 JENNIFER KREDER: I'd like to respond to what is in the public interest here. Museums  
36 are second in our nation for providing education after our schools. That resonates with  
37 me as an educator myself. But I see museums as tools for education, not as tools for  
38 acquisition. And in the context of Nazi looted art, it was a large debate over the  
39 acquisition and those same public policy arguments were made, and one of the things that  
40 I responded in regard to that was that our public institutions should not act as pillars of  
41 society. It is public policy that we are not going to traffic in stolen property, and not in  
42 property that was stolen in this heinous way. So there is a public policy that is broader  
43 than "we love the stuff." It is not that I have a problem with the stuff per se, it is not that I  
44 have a problem with the market per se, but the way that the market is being conducted is  
45 too far afield, so I think there has been a correction and I think that some of the  
46 unintended consequences that have come about have resulted from the expansion of the

1 market since 1970. Some of the historical contexts from which things have been taken are  
2 horrific too. And that continues today. So the idea of preventing those kinds of things  
3 from being traded on the market – there is a public policy aspect there too.

4  
5 GARY VIKAN: I want to come back to the utility or lack of it of a registry the intent of  
6 which is to provide a level of transparency the purpose of which is to invite legitimate  
7 claims to resolve what is not resolved. Ronald, what would be your advice to some  
8 trustees from Baltimore sitting in this room?

9  
10 RONALD SPENCER: Well I think a registry is a nice idea but I don't think it is going to  
11 get legislated, one. Two, I think the idea that someone who has antiquities in this country  
12 now is going to register those pieces, is unrealistic. I think they'd be concerned about  
13 family issues, the taxman, and all kinds of things. And I am not sure. I think if you get a  
14 registry, get the legislation contrary to what I just predicted, and then what happens. Is  
15 the idea that the source countries will be bound under that legislation that will immunize  
16 them from an action by the source countries or from federal agencies? I am not sure it is  
17 going to work that way.

18 I think a better way to achieve what many of us here want to achieve is to one – get the  
19 museums to stand up, two- get the 1983 legislation made exclusive, thus in effect taking  
20 the National Stolen Property Act out of the equation, if we want legislation, that's the  
21 legislation we would want – and I don't think we are going to get it.

22 We are stuck with it. What Harry Truman said is true. You take action to get results and  
23 what you get are consequences.

24  
25 GARY VIKAN: What is going to happen to the stuff if the donor can't make the gifts.

26  
27 MARC WILSON: I am going to play devil's advocate. The point of the registry is by  
28 exposing these things to scrutiny, if nobody raises their hands, fine, it's mine. Why would  
29 I do that as an owner if I already have good title or believe that I do? Number two; if I  
30 want a database of important stuff, I could probably go to Chubb saying okay guys  
31 would've you got? Chubb is going to have thousands hundreds of thousands of things on  
32 their lists of incredible value.

33  
34 GARY VIKAN: Something good?

35  
36 MARC WILSON: What's the harm? The 2004 rule has been in effect for 10 years now  
37 than 2008 rule has been for six years. We have seen the market in this area decline, so we  
38 know that is working. So if we let this play out, at what are the museums going to be  
39 squeezed not by the archeologists, not by our friends in Europe, but by the cash register,  
40 when the donors are no longer there to help with funding.

41 Number two, what happens to these objects? I've got this object what am I supposed to  
42 do with it? Any harm from being out of the ground has already been done; would you  
43 agree with that?

44  
45 JENNIFER KREDER: Sometimes.

46

1 MARC WILSON: as far as the record goes there is no challenge to these things and for  
2 the most part they are really minor, they are knickknacks a lot of them. They're not in  
3 Pier 1 category, I don't want to knock them, that's kind of what they are. What are you  
4 going to do with them? What is wrong with letting these circulate in the greater world?  
5 What is the potential silver lining? If you have a market is still active guess what, these  
6 can be sold abroad. Let's say you have been east Greek head that came out 80 years ago  
7 and has been passed around. East Greek, Where is that? Turkey, right? Let's suppose the  
8 Turkish industrialist who collects all kinds of things Islamic and other, wants to buy this  
9 thing and bring it back. He can do that, and that's the major way in which the Chinese are  
10 getting things back.

11 The Yuan Ming Yuan was destroyed and looted by French and British troops in 1860.  
12 Every Chinese child has been taught that this was the most heinous crime and an act of  
13 unspeakable barbarity. Today, 80% of what was left is back in China. Not one of those  
14 items went back as the result of an intergovernment negotiation. They have all by been  
15 brought back by Chinese or in one case given voluntarily.

16  
17 GARY VIKAN: Let's try another unexpected consequence with a silver lining. 85% of  
18 the Walters collection given by Mr. Walters's is stored, guarded, secured, under ideal  
19 conditions, humidity and temperature, 365 days, 24 /seven, and we are open 35 hours a  
20 week. You just have to do the math. You have to figure how much of your budget is  
21 spent to care for objects that seemingly have no public interest value. Let's imagine, for  
22 the sake of argument, that all that stuff is digitized. Sort of like the Rosetta Stone, you  
23 have squeezed all the information out of it. What is the harm of putting it back out into  
24 the marketplace exactly as you have described? Knickknacks, crappy...

25  
26 MARC WILSON: There is a difference between having the real thing and digitization for  
27 scholarship, but setting that aside. I don't have a problem if you sell things but only to  
28 upgrade the collection. Not sell it to operate the museum. I don't have a problem with  
29 giving away a lot of stuff, except if you are a museum of record. We only have in this  
30 country one museum of record and that is the Metropolitan. The rest of us can hope to be  
31 representative. Then you get into the cultural property issues of when you can  
32 deaccession. How can you do that in a way that is in the interest of the public? There is  
33 also an academic interest in having these as a resource. And as much as we have  
34 progressed in visual imaging, there is nothing like having the piece before you.

35  
36 GARY VIKAN: not long ago Marc raised the issue of what 12 museum directors meeting  
37 in New York decided for the other 180 who were not at the table. And by the way,  
38 museums are confused, that's clear, I read Max Anderson's piece almost a year ago and  
39 that's very confusing. Some of it was almost existential. Ron, what do you do if you are a  
40 museum trustee from a not quite top-level museum? How do they feel about all these  
41 legalisms and moralisms?

42  
43 RONALD SPENCER: Well they should read the guidelines very carefully. They should  
44 read the Implementation Act very carefully. There is not much to read in the National  
45 Stolen Property Act. There are one or two court decisions. And then they should reread  
46 the guidelines and then say, these guidelines give us as museum directors and

1 administrators more latitude than is generally understood. We can make good decisions  
2 based upon our research based upon due diligence, these guidelines give us the ability to  
3 acquire things by purchase and by gift, in many instances where by a quick reading, we  
4 just want to pass on it. So re-read the guidelines and then try to push for a little bit of  
5 change to the guidelines. Under the guidelines today, museums are able to acquire pieces  
6 today if they choose to, and they should.

7  
8 GARY VIKAN: So they should just do it?

9  
10 RONALD SPENCER: Do it.

11  
12 JENNIFER KREDER: I disagree. First, museums are not acquiring knickknacks. They  
13 don't have storage space to acquire knickknacks. So the kinds of things they are  
14 interested in accepting from donors are going to be important and fill a hole in their  
15 collections. They need to ask for that documentation, including affidavits from anyone  
16 who's alive who can support them. People who can say I saw that at someone's house -  
17 museums need to document that before they make any acquisition. The AAMD registry  
18 which I know your museum uses quite often is a good tool for transparency. I understand  
19 that putting something out there creates a risk, and there may be a claim from the legal  
20 side. Although that AAMD registry is private and not governmental, it may have impact  
21 on statute of limitations and laches arguments down the road although I would hope that  
22 museums would not raise that. That is something I would take issue with.

23  
24 GARY VIKAN: Okay - if we're back in 1970, and maybe others have heard this story.  
25 And I didn't make it up. The person is in West Mexico and somebody is having target  
26 practice on a little Colima dog, an ancient ceramic. And somebody comes up to them and  
27 says, instead of shooting it, why don't you sell it to me? And they buy it for \$5 or  
28 something like that. I think those are true stories or capture the essence of some truth. So  
29 what does that have to do with the hundreds of thousands of orphans out there and with  
30 due diligence. What does due diligence mean in that context? Anybody.

31  
32 RONALD SPENCER: I'd look at the safe harbor provisions. The safe harbors under  
33 section 2016 in the 1983 Act deal with pieces not being imported. It deals with pieces in  
34 the country already. And your museum, when you were the head of it, looked to some of  
35 those safe harbors, properly so, and I think you made the right decision based on them.  
36 And museums should continue to do that.

37  
38 JENNIFER KREDER: Under the National Stolen Property Act, you need conscious  
39 avoidance or not demanding the documentation. That's why we are seeing so many  
40 claims.

41  
42 RONALD SPENCER: Philippe de Montebello asked a good question about six or seven  
43 years ago. He said, I am presented with a piece that is unprovenanced. It is a great piece. I  
44 know that if I do not acquire it for the mat, it is going to go to Dubai; it is going to the Far  
45 East. I do need to my museum I have responsibilities to the public, shall I just let the

1 piece go past and go to Dubai, where it will go into a private collection and end up in a  
2 vault in Switzerland, and no one will see it for a century? Is that what he has to do?

3  
4 JENNIFER KREDER: He also has a duty to protect the purse of the museum, and items  
5 that have a high risk of a claim place risk on the museum and that money will be lost.  
6 Most of the time the museum is not doing the purchasing, but the principle still applies.  
7 These organizations and the people behind them also have a duty to comply with the law.  
8 The cat is out of the bag and it is pretty hard to deny that a lot of things on the market are  
9 there because of the blackmarket. It is the same thing if it is a fake. If the museum wants  
10 to acquire a piece and the piece is fake the same thing is true.

11  
12 RONALD SPENCER: Andre Emmerich, a great dealer now deceased, used to say that  
13 the source countries are coming to us asking for pieces from cultures that the source  
14 countries destroyed.

15  
16 MARC WILSON: this is real. Did you all get a chance to see the exhibition at the Asia  
17 Society right now of the Densatil monastery. Densatil was a great 16<sup>th</sup> century monastery  
18 with enormous, beautiful big bronze figures. China shredded it in the Cultural Revolution.  
19 Bits and pieces of it were scattered and brought out by refugees and now China has the  
20 chutzpah, an old Chinese word, to say we'd like to have these back. I am sorry. You need  
21 to pay for these incredible acts of unspeakable barbarity.

22 Look, Jenn, if you think this thing is hot, really hot, don't buy it. I have rejected a lot of  
23 stuff, a lot. But with regard to due diligence, how are we going to impose today's  
24 standards for ironclad documentation on the old world where normative behavior was  
25 very different. We didn't keep receipts and when someone passed and their estate was  
26 distributed or was sold or went to auction, there was no reason to keep the records. There  
27 is also the issue of the right of any owner to remain anonymous. How are you going to  
28 deal with that?

29 There is nothing wrong with these standards but we have a hard time applying them to  
30 people in a different time with different standards of normative behavior.

31  
32 GARY VIKAN: I am going to jump in here because of time and roll my mental tape back  
33 to several sessions ago and ask, what was answered then too, what is different? I am  
34 going to leave everybody with the question – is it going to be the same a dozen years in  
35 the future or not? And if it is going in the wrong direction, let's turn that around, could it  
36 go in a better direction? Does the White Paper provide the beginning of a road map for a  
37 better direction?

38  
39 MARC WILSON: No, the biggest issue in my mind is the impossibility of establishing a  
40 licit market. Why can't we all be like Japan? That requires an intelligent bureaucracy. Is  
41 the rest of the world so unintelligent? But I think that would solve so many problems. I  
42 wish the Chinese would start buying Impressionist pictures. These are the kinds of things  
43 that I think are very important for the whole world.

44  
45 GARY VIKAN: So the fundamental change is outside the control of the United States?  
46

1 MARC WILSON: The fundamental change is very difficult because it is political suicide.  
2 Just go into Egypt or Syria. I don't think that tunnel looting is the biggest problem. Right  
3 now the biggest problem is howitzers. The biggest problems are barrel bombs blasting the  
4 hell out of Aleppo. In the old days it used to be Moshe Dayan excavating with howitzers.  
5 The amount of civil destruction is appalling.  
6  
7 GARY VIKAN: Ok, I am going to restate the question. What Ron, and then I'll go to  
8 Jenn and let her end it, may be in our power, connected or unconnected to the White  
9 Paper, to make it better for the future?  
10  
11 RONALD SPENCER: Change is always there, but good change comes from education. I  
12 saw a 1974 Christie's auction catalog, in which they were selling a piece of art, which  
13 was identified in the catalog as having been seized by the Nazis. And in 1974, no one  
14 said a word, and it was sold by Christie's. This is not a dig at Christie's, it is that things  
15 change. Now it would be unheard of, right? So things do change, but they change with  
16 education and with thought. And that is what we are doing here today.  
17  
18 GARY VIKAN: Jenn?  
19  
20 JENNIFER KREDER: That it is wrong now, to acquire things that were stolen, and it  
21 was wrong then. At some point, everyone is on notice as to what the deal is. In terms of  
22 the AAMD guidelines, the guidelines allow for a case-by-case loophole. If something is  
23 absolutely extraordinary, they have done the due diligence, they can't find any evidence  
24 that it has been looted, they have reached out as much as they can, I understand that  
25 source nations don't always give a response, but if they have done all they can they still  
26 do have the power and they posted on the AAMD website. I don't see the changes set out  
27 in the White Paper are ones that are needed. I think I'll stay with my statement when I  
28 started.  
29  
30 MARC WILSON: Unless you don't believe in a licit market then this is what has to  
31 happen.  
32  
33 GARY VIKAN: I'd like us to follow Bill Pearlstein, the hero of the day, a little beat up  
34 but still standing, out to the lobby for the reception.  
35  
36 Pamela Grutman: [Thanks to all participants]  
37  
38

1 Panel and moderator biographies:  
2

3 **Andrew L. Adler** is an associate at Boies, Schiller & Flexner LLP in Fort Lauderdale,  
4 Florida. He has previously served as a law clerk for Judges for the Eleventh Circuit and  
5 U.S. District Court for the Southern District of Florida. He has served as an adjunct  
6 professor at the University of Miami School of Law, where he co-taught a seminar on  
7 cultural property law with Professor Stephen Urice. He has also authored several articles  
8 on cultural property law, including: Resolving the Disjunction Between Cultural Property  
9 Policy and Law: A Call for Reform, 64 Rutgers Law Review 117 (2011) (with S. Urice);  
10 Book Review, Patrick J. O’Keefe, Commentary on the 1970 UNESCO Convention (2d  
11 ed. 2007), 15 Art Antiquity & Law 281 (2010); and An Unintended and Absurd  
12 Expansion: The Application of the Archaeological Resources Protection Act to Foreign  
13 Lands, 38 New Mexico Law Review 133 (2008).

14 **Evan T. Barr** is a partner in Steptoe & Johnson’s New York office where he  
15 concentrates in white-collar criminal defense and complex regulatory matters. Prior to  
16 joining the firm, Mr. Barr was Chief of the Major Crimes Unit at the US Attorney’s  
17 Office for the Southern District of New York. As a federal prosecutor, Mr. Barr was the  
18 lead attorney in the landmark Second Circuit case United States v. An Antique Platter of  
19 Gold in which a \$1 million antiquity belonging to collector Michael Steinhardt was  
20 ordered forfeited and later returned to the Republic of Italy. Mr. Barr also successfully  
21 litigated cultural property cases for the government involving the civil seizure and  
22 forfeiture of an 18th-century document stolen from the Mexican National Archives;  
23 a Roman marble torso that was stolen from a convent in Naples; an alabaster plaque  
24 looted from a museum in Yemen; and a collection of illegally imported Etruscan  
25 ceremonial potteries seized from a well-known New York antiquities dealer. In 2001, Mr.  
26 Barr received the Department of Justice’s John Marshall Award for Outstanding  
27 Legal Achievement in Asset Forfeiture in connection with his work in recovering  
28 and repatriating numerous items of cultural property.

29 **Mark B. Feldman** is of Counsel at Garvey Schubert Barer and advises U.S. and foreign  
30 companies on a wide range of investment and compliance issues and has represented  
31 foreign governments in Washington. Areas of concentration include expropriation and  
32 political risk, foreign sovereign immunity (FSIA), act of state doctrine, international  
33 arbitration, foreign corrupt practices (FCPA), international art law, and constitutional  
34 issues relating to U.S. foreign policy. Mr. Feldman served as a Deputy and Acting Legal  
35 at the U.S. Department of State (1965-1981) and was closely involved in negotiations  
36 regarding the U.S. implementing legislation for the 1970 UNESCO Convention. He  
37 managed numerous expropriation cases and participated in claims negotiations and  
38 investment dispute settlements with China, Chile, Iran, and Peru. Mr. Feldman is an  
39 Adjunct Professor, Georgetown University Law Center. He also taught at the Johns  
40 Hopkins School of Advanced International Studies (2006-2009), He is a member of the  
41 Council on Foreign Relations, the American Society of International Law, was Co-Chair,  
42 American Bar Association Committee on Art and Cultural Heritage Law (2009-2011),  
43 Past Chairman, ABA Committee on Foreign Sovereign Immunity, and a Past Council  
44 Member, Section International Law and Practice.

1 **James Fitzpatrick** is a senior partner of the Washington law firm of Arnold & Porter  
2 where for many years he was chair of the Legislative and Public Policy Group. For thirty  
3 years, he represented the antiquities dealer community in Congressional proceedings  
4 leading to the 1983 Implementation of the UNESCO 1970 Convention on Cultural  
5 Properties. He represented the dealer and collector communities in judicial and State  
6 Department proceedings dealing with cultural properties. He has taught law school  
7 courses on cultural properties. He was a member of the Art Committee that created and  
8 continued the firm's art collection, now numbering over 250 works. Mr. Fitzpatrick has  
9 taught at the London School of Economics, Trinity College Dublin, and the University of  
10 New Mexico Law School. He is currently an adjunct professor at Georgetown Law  
11 School.

12 **Arthur Houghton** is a former Foreign Service officer with assignments in the Middle  
13 East, the Department of State and on the National Security Council staff;  
14 Arthur Houghton holds a BA degree from Harvard University and MA degrees from  
15 Harvard and the American University of Beirut. From 1982 to 1986, he was associate  
16 curator and curator-in-charge of antiquities at the J. Paul Getty Museum. His current or  
17 previous board memberships include the American School of Classical Studies at Athens;  
18 Cyprus-American Archaeological Research Institute; the Middle East Institute and the  
19 Baltimore Museum of Art. He was president of the American Numismatic Society, 1995-  
20 2000 and is currently president of the Cultural Policy Research Institute. He served on  
21 the U.S. Cultural Property Advisory Committee from 1984 to 1987 as a representative for  
22 museums.

23 **Jennifer Anglim Kreder** is a Professor at Chase College of Law at Northern Kentucky  
24 University. Prior to entering academia, Professor Kreder was a Litigation Associate with  
25 Milbank, Tweed, Hadley & McCloy, LLP, in New York, concentrating on Holocaust-era  
26 inter-governmental negotiation and property litigation issues, art disputes and class  
27 actions. She has been awarded for her work on behalf of Catholic nuns and others  
28 tortured and murdered during the Salvadoran civil war. Professor Kreder has published in  
29 many legal journals and is the author of Chapter 1 in the 2009 Yearbook of Cultural  
30 Property Law. Prof. Kreder has filed amicus briefs on behalf of the American Jewish  
31 Congress, the Commission for Art Recovery, law professors dedicated to alternative  
32 dispute resolution, Holocaust educators, Jewish community leaders, artists and art  
33 historians concerning conflicts law and U.S. executive policy in Nazi-looted art appeals  
34 (and a petition for certiorari to the U.S. Supreme Court), as well as briefs regarding  
35 proper Act of State analysis in cases concerning art stolen during the Russian Revolution.  
36 She has participated in State Department efforts to consider a Nazi-looted art commission  
37 and served as Chair of the American Society of International Law's Cultural Heritage &  
38 the Arts Interest Group.

39 **James McAndrew** joined the firm of Grunfeld, Desiderio, Lebowitz, Silverman &  
40 Klestadt LLP as a Forensic Specialist. He has experience in Customs, international trade,  
41 and the international sale, acquisition and transfer of works of art and antiquity. With  
42 more than 27 years as a Senior Special Agent, first with the United States Customs  
43 Service and onto the Department of Homeland Security (DHS), he was designated as the  
44 subject matter expert in international art and antiquity investigations as well as



1 international trade laws and agreements. At the DHS, he was primarily responsible for  
2 the development and implementation of DHS’s international cultural property program,  
3 as well as the national training program titled “Fighting Illicit Traffic in Cultural Property  
4 at U.S. Ports of Entry” hosted by the Smithsonian Institution in Washington D.C. He was  
5 an active member on the U.S. Department of State’s Cultural Property Task Force and  
6 Interpol’s Cultural Property Task Force. He ultimately recovered over 2000 works of art  
7 and antiquity for countries around the globe worth tens of millions of dollars.

8 **Michael McCullough** is the Founding Member of Michael McCullough LLC, a firm  
9 focused on delivering a full range of legal services to its core sectors of art, cultural assets  
10 and international trade. He advises art collectors, galleries, auction houses, museums, and  
11 online art sellers on the purchase, sale, financing and international trade of fine art, the  
12 decorative arts, cultural property and antiques. He is a former associate counsel to  
13 Sotheby’s worldwide where he facilitated the acquisition and sale of some of the greatest  
14 artworks in the world. Mr. McCullough also has extensive experience in customs law and  
15 international trade matters. He has counseled multinational companies on the  
16 development and implementation of global policies and procedures related to U.S.  
17 regulations. Mr. McCullough is a member of the Art Law Committee of the New York  
18 City Bar Association, a Vice Chair of the Art & Cultural Heritage Law Committee of the  
19 American Bar Association, and a member of the Customs and International Trade Bar  
20 Association.

21 **William G. Pearlstein** William Pearlstein is a partner in Pearlstein & McCullough LLP,  
22 a New York based art-law boutique firm that represents leading dealers, collectors,  
23 museums and auction houses in transactions, disputes and regulatory matters relating to  
24 the international art market. Mr. Pearlstein graduated Yale College in 1979 and  
25 Northwestern Law School in 1984. Mr. Pearlstein’s White Paper, publication  
26 forthcoming in *Cardozo Arts & Entertainment Law Journal*, Volume 32, Issue 2 (2014),  
27 “A Proposal to Reform U.S. Law and Policy Relating to the International Exchange of  
28 Cultural Property”, is the topic of today’s Cultural Property Symposium to Focus on  
29 Policy Reforms.

30 **Lucille A. Roussin** is the founder and Director of the Holocaust Restitution Claims  
31 Externship at the Benjamin N. Cardozo School of Law, where she also teaches a seminar  
32 on Remedies for War Time Confiscation, coaches the Cultural Heritage Moot Court  
33 Team and teaches a seminar on Cultural Heritage Law. She was Deputy Research  
34 Director of the Art and Cultural Property Team of the Presidential Commission on  
35 Holocaust Assets in the US and was an associate in the Art and International Law  
36 Practice Group at Herrick, Feinstein LLP. She also teaches a course on “Art, the Law and  
37 Professional Ethics” in the School of Graduate Studies at the Fashion Institute of  
38 Technology.

39 She was a member of the Cultural Properties Legislation Committee of the  
40 Archaeological Institute of America and Vice Chair of the Art and Cultural Heritage  
41 Committee of the American Society of International Law, on the Board of the Lawyers  
42 Committee for Cultural Heritage Preservation and was a member of the Art Law  
43 Committee of the Association of the Bar of the City of New York for several years. Her

1 law practice is primarily devoted to restitution of property taken from Jewish families  
2 during the Holocaust, especially Jewish ritual objects. She served as an expert witness for  
3 the claimants in *Schoeps et al., v. Museum of Modern Art and the Solomon R.*  
4 *Guggenheim Foundation.*

5 **Jeanne Schroeder** is a professor at the Benjamin N. Cardozo School of Law, Yeshiva  
6 University, specializing in finance, securities, commercial and corporate law. She has  
7 also taught at the University of Michigan Law School, the George Washington University  
8 Law School and the University of Miami School of Law. Prior to entering academia she  
9 was a transactional attorney at the firms of Milgrim Thomajan & Jacobs and Cravath  
10 Swaine & Moore in New York City. She has published over four dozen articles on  
11 property and market theory as well commercial and securities law. The most recent of her  
12 three books is *The Four Discourses or Turning Law Inside-Out.*

13 **Ronald D. Spencer** is of Counsel at Carter Ledyard & Millburn LLP. His practice  
14 focuses on Art Law, including the legal aspects of art authentication and advising, buyers,  
15 sellers, and owners on due diligence with respect to provenance and attribution of works  
16 of art. He has helped several authentication committees and boards of experts  
17 successfully defend against claims involving their decisions on authenticity, and has  
18 advised collectors on the authenticity of their works of art. He has also helped establish  
19 numerous art foundations. Mr. Spencer has written on art law matters for *The Art*  
20 *Newspaper* and the IFAR (International Foundation for Art Research), and journal and  
21 lectured on art law at many law schools and prestigious institutions. He addressed a  
22 forum of art dealers, collectors and insurers on art entrustment and options for owners  
23 when art cannot be recovered from an trustee. He is Co-Director of International  
24 Seminar on the Authentication of Artworks and the Prevention of Forgery, sponsored by  
25 the Salvador Dali Foundation, Figueres y Cadaqués, Spain.

26 **Marc F. Wilson** is an art historian and sinologist of widely ranging interests and training.  
27 Although conversant with much of the history of Western art, he is best known for  
28 publications and exhibitions about Chinese art and for building all aspects of the Nelson-  
29 Atkins Museum of Art, Kansas City, Missouri, where he served as Associate Curator of  
30 Chinese Art (1971-1974), Curator of Oriental Art (1974-1982) and finally as Director for  
31 twenty-eight years from 1982 until his retirement in June, 2010. Mr. Wilson's approach  
32 to massive institutional change is forced evolution. His tenure at the Nelson coincided  
33 with an unusually dynamic era in the museum's history, during which he established  
34 numerous departments and operational practices, raised professional standards and  
35 productivity, encouraged change in governance and expanded the operating budget  
36 ninefold, the operating endowment by twelve-fold, and the facilities by seventy-five  
37 percent. Fifty percent of the Nelson's art collections were acquired during his  
38 directorship. He was concurrently employed in the Department of Calligraphy and  
39 Painting of Taipei's National Palace Museum and served as the Director's translator for  
40 external affairs. Wilson has many publications in exhibition catalogues and journal  
41 articles.

42 **Gary Vikan** was Director of the Walters Art Museum in Baltimore from 1994 to 2013.  
43 He now owns Vikan Consulting, LLC. Dr. Vikan is developing exhibitions on

1 neuroscience and art with the American Association for the Advancement of Science  
2 (AAAS) in Washington, D.C., and is co-chair of the Salzburg Global Seminar for 2015 in  
3 Salzburg, Austria. He serves on the Leadership Council of Johns Hopkins' Brain Science  
4 Institute, on the Advisory Council on Culture and the Arts of the Salzburg Global  
5 Seminar, on the founding Board of Culture Kettle in Santa Fe, on the Committee for  
6 Cultural Policy in New York City, and is a Councilor of the Maryland State Arts Council.  
7 He has been an advisor to the Getty Leadership Institute and Princeton University's  
8 Department of Art and Archaeology. He was appointed by President Clinton to the  
9 Cultural Property Advisory Committee and was knighted by the French Minister of  
10 Culture in the Order of Arts and Letters. Dr. Vikan received Carleton College's  
11 Distinguished Achievement award and an honorary Doctor of Humane Letters degree  
12 from the Maryland Institute College of Art. Before coming to Baltimore, he was Senior  
13 Associate at Harvard's Center for Byzantine Studies at Dumbarton Oaks in Washington,  
14 DC.