ORAL ARGUMENT NOT YET SCHEDULED

NO. 09-5439

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ANCIENT COIN COLLECTORS GUILD,
INTERNATIONAL ASSOCIATION OF
PROFESSIONAL NUMISMATISTS, and
PROFESSIONAL NUMISMATISTS GUILD, INC.,
Plaintiffs–Appellants,

v.

UNITED STATES DEPARTMENT OF STATE,
Defendant–Appellee.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 1:07-CV-02074)

BRIEF OF *AMICI CURIAE* CERTAIN FORMER MEMBERS OF THE CULTURAL PROPERTY ADVISORY COMMITTEE IN SUPPORT OF APPELLANTS

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21 September 2010

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and *Amici*. *Amici curiae* were not parties to this case in the District Court but are advised that all parties appearing before the District Court and in this Court are listed in the Brief for Appellants.

(B) Rulings Under Review. References to the rulings at issue appear in the Brief for Appellants.

(C) Related Cases. *Amici* are unaware of any related cases and are informed that (1) this matter has not previously been before this Court except on Appellee's motion for summary affirmance, which the Court denied, and (2) the only other court to which this matter has been presented was the District Court in the proceedings leading to this appeal.

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GLOSSARY (CIRCUIT RULE 28(A)(3))

ACCG—The Ancient Coin Collectors Guild, Plaintiff–Appellant in this case.

CPAC—The Cultural Property Advisory Committee.

CPIA—The Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601 *et seq.*

ECA—The U.S. State Department's Bureau of Educational and Cultural Affairs.

FACA—The Federal Advisory Committee Act, 5 U.S.C. Appendix 2.

IAPN—The International Association of Professional Numismatists, Plaintiff–Appellant in this case.

PNG—The Professional Numismatists Guild, Inc., Plaintiff–Appellant in this case.

STATEMENT REGARDING STATUTES

Except for a portion of the Federal Advisory Committee Act reproduced in the addendum to this brief, all applicable statutes are contained in the addendum to Appellants' brief.

IDENTITY OF *AMICI CURIAE*

Amici curiae are former members of the U.S. State Department's Cultural Property Advisory Committee ("CPAC"), a body established pursuant to the Convention on Cultural Property Implementation Act ("CPIA"), 19 U.S.C. § 2605, to ensure that consideration of proposed import restrictions on cultural artifacts benefits from "fair representation of the various interests of the public sectors and the private sectors in the international exchange of archaeological and ethnological materials" and "that within such sectors, fair representation is accorded to the interests of regional and local institutions and museums." 19 U.S.C. § 2605(b)(2)(A)–(B).

Individual *amici* are:[1]

Jay Kislak chaired CPAC from 2003 to 2008. Mr. Kislak founded the Jay I. Kislak Foundation, a private nonprofit cultural institution engaged in collection,

[1] This list differs from the names on the front cover of the Joint Appendix because the list of participants was not final when the Joint Appendix went to the printer. The motion for leave to file this brief noted that a number of participants wanted to review the completed brief before joining.

conservation, research, and interpretation of rare books, manuscripts, maps, and indigenous art and cultural artifacts of the Americas and other parts of the world.

Kate Fitz Gibbon was a CPAC member from 2000 to 2003. She is now an attorney practicing law in Santa Fe, New Mexico, with a focus on cultural heritage issues, matters involving international and Native American arts, and law pertaining to art collection and museums.

Arthur Houghton was a CPAC member from 1983 to 1987. He was associate curator, then curator in charge, of the department of antiquities of the J. Paul Getty Museum, Malibu, California, from 1982 to 1986. Mr. Houghton serves on two museum boards, a committee of the U.S. Mint, and heads the Cultural Policy Research Institute, an organization founded to carry out studies of national and international policies to protect antiquities, monuments, and archaeological sites.

Gerald Stiebel was a CPAC member from 1995 to 1999. He is currently president of Stiebel, Ltd., which is a fourth-generation family concern dealing in continental European works of art.

STATEMENT OF *AMICI*'S INTEREST IN CASE

Amici are interested in the outcome of this case as CPAC alumni interested in the fair administration of CPAC's responsibilities in a manner consistent with the CPIA and the statutory intent.

STATEMENT OF *AMICI*'S AUTHORITY TO FILE

On 22 February 2010, *amici* moved for leave to file a brief supporting Appellants (Docket Entry 18). On 9 June 2010, this Court granted the motion (Docket Entry 21).

SUMMARY OF ARGUMENT

This case presents a matter involving tension between two federal statutes with seemingly inconsistent mandates—on one hand, provisions of the Freedom of Information Act that in some cases exempt certain government information from FOIA disclosure; on the other hand, the CPIA and its provisions directing that CPAC operate in a manner that allows for "meaningful consultation" with persons who would be affected by import restrictions recommended by CPAC pursuant to the CPIA. *Amici curiae* have served as past CPAC members and have experienced first-hand the need for CPAC to weigh considerations of confidentiality with the necessity for ensuring that import restrictions are required, in the first instance, and are effective, in the case of renewal proceedings.

The CPIA requires that CPAC include representation of the interests of constituencies interested in importation of cultural property, and it requires that CPAC's decisions be sufficiently documented so that interested constituencies may understand the reasons behind proposed import restrictions, what (if any) alternatives to the enacted restrictions were considered, and the circumstances

giving rise to restrictions. While the CPIA does allow for confidentiality in CPAC's procedures, it must be balanced with requirements established by the Federal Advisory Committee Act ("FACA") and FOIA, both of which generally apply to CPAC (with limited exceptions) and evidence a Congressional intent that federal agencies disclose records to the fullest extent possible while withholding records only to a limited extent. *Amici* submit that in this case, the State Department and the District Court balanced these concerns erroneously by establishing a precedent that would allow a presumption of confidentiality except where the Department deems that CPAC meetings and records ought to be disclosed—i.e., the opposite presumption from the one the statutes and the legislative intent establish.

Amici believe this Court should carefully consider the consequences of allowing the sort of automatic confidentiality claims the District Court allowed because such confidentiality would risk effectively silencing parties interested in the importation of cultural property by denying them the ability to comment on the implementation or renewal of import restrictions. Renewal of import restrictions is contingent upon (a) whether the circumstances upon which the enactment of restrictions was based still exist and (b) whether the restrictions have proven effective in addressing those circumstances. By denying the public access to information on the enactment of restrictions, including the circumstances that gave

rise to the restrictions and whether (and why) less-restrictive alternative measures were rejected, the State Department essentially requires interested parties to comment in the abstract, such that their comments on renewal decisions will be less than meaningful. *Amici* submit that this result is counter to what Congress intended when it established CPAC.

ARGUMENT

Amici do not intend to take a position on the specific FOIA requests at issue here. Rather, *amici* are concerned with the undesirable public policy consequences, and with the frustration of the CPIA's statutory aims, that would come from federal courts' too-readily upholding boilerplate FOIA exemption claims made by the State Department. While there can be cases in which the Department exercises a legitimate confidentiality claim as to documents related to CPAC proceedings, the interplay between the CPIA and FOIA mandates that such claims should be made sparingly and carefully lest the CPIA's intent be nullified.

I. THE CPIA ESTABLISHES CPAC TO ADVISE THE PRESIDENT ON WHETHER IMPORT RESTRICTIONS ON CULTURAL PROPERTY ARE APPROPRIATE AND SETS FORTH PROCEDURES FOR CONSIDERING AND RENEWING RESTRICTIONS.

A. The CPIA Requires CPAC to Report the Reasons for Proposed Import Restrictions.

The CPIA establishes a framework whereby the President, via his designee at the State Department, may, in enumerated circumstances, enter into bilateral

agreements with other countries establishing import restrictions applicable to cultural artifacts. *See generally* 19 U.S.C. § 2602. Such agreements have a maximum five-year effective period, at the end of which the CPIA requires that, before they are renewed, they be reviewed to determine whether the factors justifying the implementation of the agreement still pertain and whether no cause for suspension under the CPIA exists. *Id.* § 2602(b), (e). Cause for suspension exists where the other country or countries involved in an agreement fail(s) to take appropriate corresponding action or where the import restrictions fail to realize a substantial benefit in deterring the pillaging of cultural property. *Id.* § 2602(d). Both implementation and renewal of import restrictions require that the government follow notice-and-comment procedures. *Id.* § 2602(f). The CPIA also requires that, following implementation of import restrictions, the President send a report to Congress describing the action taken, the differences (if any) between the action taken and the action CPAC recommended, and the reasons for such difference. *Id.* § 2602(g).

A further section of the CPIA establishes CPAC to consider foreign governments' requests for import restrictions on cultural artifacts and to make recommendations to the President (and his designee) about whether the U.S. should enter into agreements containing such restrictions. *Id.* § 2605(f). The CPIA requires that, once a foreign government makes a request, the U.S. government

must verify that (a) the artifacts in question were first discovered in the "State Party" seeking restrictions, (b) they are of "cultural significance," (c) measures less drastic than import restrictions are unavailable, and (d) proposed restrictions are part of a "concerted international response" of other "State Parties" to the 1970 U.N. treaty implemented by the CPIA. 19 U.S.C. §§ 2601–02.

Under the CPIA, CPAC reviews the four factors described in the statute and then issues a report to the State Department's Assistant Secretary in charge of the Bureau of Educational and Cultural Affairs ("ECA"), acting as the president's designee.[2] The report sets forth (a) the result of CPAC's investigation and review, (b) CPAC's findings about the nations having a significant trade in the artifacts at issue, and (c) CPAC's recommendation about whether an agreement should be entered into and the reason(s) for that recommendation. *Id.* § 2605(f)(1). If CPAC recommends import restrictions, the report must also include (d) any terms and conditions CPAC recommends for such restrictions and (e) a listing of the materials, specified in a manner CPAC deems appropriate, that should be subject to the agreement. *Id.* § 2605(f)(4).

[2] ECA's expressed purpose is to "foster[ ] mutual understanding between the people of the United States and the people of other countries to promote friendly, sympathetic, and peaceful relations, as mandated by the *Mutual Educational and Cultural Exchanges Act of 1961*." "About the Bureau," http://exchanges.state.gov/about.html.

ECA then decides whether to enter into a Memorandum of Understanding with the requesting country. If ECA does so, the State Department must send a report to Congress stating (a) the actions taken, (b) whether the actions differed from CPAC's recommendations, and (c) the reasons for those differences (if any). *Id.* § 2602(g)(2). The CPIA also requires that copies of CPAC's original report be forwarded to Congress and the President. *Id.* § 2605(f)(6).

B. The CPIA Requires Representation in CPAC's Membership of the Interests of Parties Interested in Cultural Property Importation Who Would Be Affected by Import Restrictions.

In establishing CPAC, the CPIA requires that a range of interests be represented on the Committee, which must include eleven members appointed by the President as follows:

> (A) Two members representing the interests of museums.
>
> (B) Three members who shall be experts in the fields of archaeology, anthropology, ethnology, or related areas.
>
> (C) Three members who shall be experts in the international sale of archaeological, ethnological, or other cultural property.
>
> (D) Three members who shall represent the interest of the general public.

19 U.S.C. § 2605(b)(1). In making appointments, the President must ensure "fair representation of the various interests of the public sectors and the private sectors

in the international exchange of archaeological and ethnological materials" and must also ensure "that within such sectors, fair representation is accorded to the interests of regional and local institutions and museums." *Id.* § 2605(b)(2)(A)–(B).

Thus, the CPIA requires that CPAC be representative of constituencies interested in the importation of cultural property and that CPAC's decisions be documented in a way that will allow such constituencies to understand the reasons behind proposed import restrictions.

C. The CPIA Allows for Some Confidentiality in CPAC's Procedures.

The CPIA allows CPAC to exercise confidentiality in certain circumstances. First, the statute provides for non-disclosure of "information (including trade secrets and commercial or financial information which is privileged or confidential) submitted in confidence by the private sector to officers or employees of the United States or the Committee in connection with the responsibilities of the Committee." 19 U.S.C. § 2605(i)(1). CPAC may disclose material of this sort only to specified individuals. *Id.* Second, the statute provides for *limited* non-disclosure of U.S. government information:

> Information submitted in confidence by officers or employees of the United States to the Committee shall not be disclosed other than in accordance with rules issued by the Director of the United States Information Agency, after consultation with the Committee. Such rules shall define the categories of information which require restricted or confidential handling by such

> Committee considering the extent to which public disclosure of such information can reasonably be expected to prejudice the interests of the United States. *Such rules shall, to the maximum extent feasible, permit meaningful consultations by Committee members with persons affected by proposed agreements authorized by this chapter.*

Id. § 2605(i)(2) (emphasis supplied). The italicized sentence underscores the statutory policy favoring fair and open consultation with affected interests, including through the disclosure of relevant information.[3]

[3] It bears noting that the Obama Administration has expressed a commitment "to creating an unprecedented level of openness in Government" by "work[ing] … to ensure the public trust and establish[ing] a system of transparency, public participation, and collaboration." The President has admonished agency heads that they should "disclose information rapidly in forms that the public can readily find and use" and that "[e]xecutive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefit of their collective expertise and information." Obama, *Memorandum for the Heads of Executive Departments and Agencies*, 74 FR 4685 (21 Jan. 2009). In a follow-up to the President's memorandum, the Attorney General admonished agency heads that "an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption." Holder, *Memorandum for Heads of Executive Departments and Agencies* regarding FOIA (19 Mar. 2009), *available at* http://www.justice.gov/ag/foia-memo-march2009.pdf (retrieved 11 Mar. 2010). While these memoranda do not themselves confer substantive rights on parties such as Appellants nor provide them with a cause of action, *see id.*, *amici* submit that the current Administration's expressed commitment to openness and transparency is consistent with the Congressional intent, in the context of the CPIA, FACA, and FOIA, that the fullest possible disclosure be the norm.

II. FOIA ALSO APPLIES TO CPAC'S PROCEDURES BY VIRTUE OF THE FEDERAL ADVISORY COMMITTEE ACT.

The CPIA contains a provision that makes most portions of FACA applicable to CPAC, except that

> the requirements of subsections (a) and (b) of section 10 and section 11 of such Act (relating to open meetings, public notice, public participation, and public availability of documents) shall not apply to the Committee, whenever and to the extent it is determined by the President or his designee that the disclosure of matters involved in the Committee's proceedings would compromise the Government's negotiation objectives or bargaining positions on the negotiations of any agreement authorized by this chapter.

19 U.S.C. § 2605(h).

This Court has found that "FACA requires that advisory committees covered by the statute file a charter, hold their meetings in public, and make committee documents available to the public subject to the exemptions of FOIA." *NRDC v. Johnson*, 488 F.3d 1002, 1003 (D.C. Cir. 2007) (citing 5 U.S.C. App. 2 §§ 9–10). This Court has also found that Congress intended FACA to presume disclosure:

> [T]he legislative history of FACA shows that Congress intended for the public to have access to section 10(b) materials at or before the meeting for which they were prepared. … Congress passed FACA to open the advisory committee process to the public to prevent "subjective influences not in the public interest" from controlling [advisory committee] meetings. Congress intended section 10 to be[ ] "one of the key sections in the legislation. It establishes the standard of openness in advisory committee deliberations, and provides an

> opportunity for interested parties to present their views and be informed with respect to the subject matter taken up by such committees.… [T]he intention of this legislation is that the standard of openness and public inspection of advisory records is to be liberally construed."

Food Chem. News v. Dep't of Health & Human Servs., 980 F.2d 1468, 1472 (D.C. Cir. 1993) (second ellipsis and final pair of brackets in original; emphasis in second quotation removed) (quoting S. Rep. No. 92-1098, 92d Cong., 2d Sess. 6, 14 (1972)). Thus, this Court has emphasized that

> [i]n order for "interested parties to present their views," and for the public to "be informed with respect to the subject matter," it is essential that, whenever practicable, parties have access to the relevant materials before or at the meeting at which the materials are used and discussed. Opening the meetings to the public would be meaningless if the public could not follow the substance of the discussions.

Id. "[A]n agency is generally obligated to make available for public inspection and copying all materials that were made available to or prepared for or by an advisory committee. Except with respect to those materials that the agency reasonably claims to be exempt from disclosure pursuant to FOIA, a member of the public need not request disclosure in order for FACA 10(b) materials to be made available." *Id.* at 1469.

As quoted above, however, the CPIA exempts CPAC's operations from the provisions of FACA sections 10(a), 10(b), and 11 *in certain circumstances*. That

is, the CPIA's language is clear that those FACA sections *do* in fact apply to CPAC *unless* the circumstances allowing an exception are in place. The issue presented by this case, *amici* submit, is the proper balance between the statutory intent behind FACA's transparency provisions on the one hand and the disclosure-limiting provisions of the CPIA on the other. As discussed in greater detail below, *amici* submit that the proper balance follows the general theme of federal FOIA law whereby the presumption should fall in favor of disclosure and exemptions should not be presumed to apply without some firm showing of their applicability. Moreover, *amici* submit that in this case the District Court's opinion granting summary judgment for the State Department sets the bar entirely too low and tips the balance too far in favor of confidentiality in ways not intended by Congress.

III. THE CPIA AND FACA PRESUME DISCLOSURE.

The statutory matrix governing CPAC's operations reflects Congress's recognition of the necessity for balancing legitimate confidentiality in appropriate situations with open disclosure of material relating to CPAC's proceedings so as to allow for adequate and meaningful participation in the CPAC process by interested parties. *Amici* submit that the District Court overlooked the proper balancing required by the applicable statutes in favor of according undue deference to the government's invocation of FOIA exemptions.

A. The CPIA's Private-Sector Confidentiality Provisions Were Intended to Protect Information That Is Truly Confidential, Not Information Someone Simply Wishes to Keep Secret.

The District Court found it significant that the CPIA provides for nondisclosure of information "submitted in confidence by the private sector" to CPAC such that FOIA exemption (b)(3), which allows for nondisclosure of materials "specifically exempted from disclosure by statute," applies. (JA 423–424.) The District Court's opinion effectively holds that where a party's submission of information—regardless of what it is—is coupled with a statement that the submission is confidential, FOIA exemption (b)(3) applies. This broad reading of the CPIA effectively eviscerates the statutory mandate for transparency and disclosure by making it too easy for information, however innocuous it may be, to be treated as confidential. Put differently, the CPIA contains an expository parenthetical clause germane to this issue: "Any information (including trade secrets and commercial or financial information which is privileged and confidential) submitted in confidence by the private sector …." 19 U.S.C. § 2605(i)(1). The parenthetical clause is crucial. It indicates an intent to ensure that the information "submitted in confidence" is in fact confidential and worthy of protection, whereas under the District Court's view, every single item submitted to CPAC could be deemed confidential, and exempted from disclosure, simply because a submitting party says so. This cannot be the law.

More importantly, the record in this case shows that the State Department has not even attempted to establish that the private sector requested confidentiality as to submitted materials. Rather, the record shows that the State Department *presumes* that material submitted by the private sector is to be considered confidential because people *sometimes* request confidentiality. The State Department's FOIA declarant stated as follows: "I *have been advised that* members of the private sector *frequently* share information with [CPAC] and the Department on a confidential basis. Those who collect, study, and curate archaeological and ethnological material *often share* their observations about how such material enters the U.S. These individuals provide this information with the expectation of confidentiality …." (JA 70–71 (emphasis supplied).)[4] This argument turns the statutory presumption of transparency on its head: If this Court were to accept the State Department's position, the Court would in effect allow the State Department to withhold everything submitted by the private sector simply

[4] Later the declaration states, without detail, that in this case the Department withheld information that "was provided in confidence." (JA 87.) While it is understandable that the Department seeks to avoid inadvertently disclosing information it claims is confidential when it describes the material that was submitted, a vague statement that material was submitted in confidence, without some sort of further description of the information in the nature of the descriptions commonly entered on a privilege log produced under the discovery provisions of the Federal Rules of Civil Procedure, makes it impossible to ascertain whether the confidentiality claims are legitimately grounded under the CPIA's provisions or whether the claims are more generic and thus insufficient for CPIA purposes.

because *some people* request confidentiality. The statute establishes a higher threshold than this.

B. The State Department's Reading of the CPIA's Confidentiality Provisions for U.S. Government–Sourced Information Effectively Guts the CPIA's Mandate for "Meaningful Consultation" with Affected Parties.

Similarly, the District Court found the confidentiality provisions relating to government-sourced information to be significant. The relevant CPIA subsection provides as follows:

> Information submitted in confidence by officers or employees of the United States to [CPAC] shall not be disclosed other than in accordance with rules issued by the Director of the United States Information Agency, after consultation with [CPAC]. Such rules shall define the categories of information which require restricted or confidential handling by [CPAC] considering the extent to which public disclosure of such information can reasonably be expected to prejudice the interests of the United States. Such rules shall, to the maximum extent feasible, permit meaningful consultations by [CPAC] members with persons affected by proposed agreements authorized by this chapter.

19 U.S.C. § 2905(i)(2). The District Court brushed past Appellants' arguments on this provision by noting that no rules of the sort prescribed by the statute have been issued. (JA 424 n.8.) The problem with the District Court's reading is that it renders this provision superfluous: the State Department could forever avoid having to disclose any U.S. government–sourced information simply by ensuring that no rules of the sort described in the statute are ever issued. Yet the statute also

requires that the disclosure rules "permit meaningful consultations … with persons affected by proposed agreements." Under the District Court's reading of the CPIA, the ability or inability of such affected persons to engage in "meaningful consultations" is irrelevant—all that matters is whether rules have been adopted. Such a reading of the statute utterly dispenses with the requirement that the rules allow for "meaningful consultations" "to the maximum extent feasible."

Moreover, as with the State Department's approach to private-sector submissions, *see supra* Part III.A., the Department's FOIA declarant indicates that the Department presumes that governmental submissions are confidential. The CPIA requires that rules governing disclosure or withholding of governmental information take into account "the extent to which public disclosure of such information can reasonably be expected to prejudice the interests of the United States." 19 U.S.C. § 2605(i)(2). The Department's declarant, on the other hand, merely states that government submissions to CPAC "*may* consist of information originally submitted to ECA staff in confidence …. It *may also* consist of information developed by ECA staff …. The disclosure of this type of information *could harm* the Department's ability to obtain reliable information in the future." (JA 72 (emphasis supplied).) The statute does not impose a "could harm" standard—instead, it imposes the higher standard of "can reasonably be expected to harm." The declarant further states that "*[i]n some circumstances*, disclosure of

this information could reasonably be expected to undermine the very purpose of the Convention and the CPIA ….” (JA 72 (emphasis supplied).) Notably, the State Department makes no attempt to establish that such circumstances exist *in this case*. If the Court accepts the Department’s boilerplate FOIA declaration, the Court will effectively nullify the CPIA’s provisions for disclosure of government-sourced information by allowing the Department to presume that such information is confidential without making the required showing.

C. The State Department’s Claims of Presumptive Confidentiality Are Counter to the CPIA’s Plain Meaning.

In analyzing the interplay between the CPIA, FACA, and FOIA, *amici* submit that it is crucial that the Court recognize that the statutes’ confidentiality provisions are never automatic. The exemption the CPIA grants to CPAC from the application of FACA sections 10(a) and (b) and 11 applies only when, and to the extent, the President or his designee determines that “the disclosure of matters involved in [CPAC’s] proceedings would compromise the Government’s negotiating objectives or bargaining positions on the negotiations of any agreement authorized by this chapter.” 19 U.S.C. § 2605(h). In other words, FACA sections 10(a) and (b) and 11 apply to CPAC *unless* the President or his designee has made the determination described in Section 2605(h). A review of the record in this case indicates the State Department believes the opposite and presumes CPAC meetings should be closed:

> The Department and USIA have consistently determined that the disclosure of matters involved in Committee proceedings would compromise the U.S. Government's negotiation objectives and/or bargaining position on the negotiation of agreements. They have felt, further, that the statutory composition of the Committee, by definition, includes "public participation" in the process but that further participation, as a rule, would be counter productive [sic] and harmful overall.

(JA 68–69.) Notably absent from the declaration is any evidence that the President's designee made the required determination *in this case*.

Moreover, the CPIA does not give the State Department unbridled discretion to decide that public participation in the CPAC process is inappropriate. The provision (which the Department has ignored) requiring the promulgation of rules governing the non-disclosure of certain information provides that "[s]uch rules shall, to the maximum extent feasible, permit meaningful consultations by [CPAC] members with persons affected by proposed agreements authorized by this chapter." 19 U.S.C. § 2605(i)(2). The Department's position appears to be that no consultation is to be permitted beyond the theoretical representation of interested groups via the composition of CPAC's membership. Such a position is inconsistent with the statutory mandate for "meaningful consultations." *Amici* submit that the State Department's willful disregard of this mandate underpins and motivates the

Department's entire course of action with respect to its confidentiality claims[5] and that, as a result, the Court should be cautious of readily accepting the Department's claims without further justification. *Cf. Sea-Land Serv., Inc. v. Fed. Maritime Comm'n*, 653 F.2d 544, 551 (D.C. Cir. 1981) ("[T]he 'notice and hearing' requirement in section 15 [of the Shipping Act of 1916] contemplates 'meaningful public participation'; at the very least, this amounts to the [Federal Maritime Commission's] affording any party who stands to be injured by a proposed private agreement the chance to submit statements and data explaining why he believes the newly created agreement should not be approved.") (footnotes omitted).

The sort of unbridled confidentiality, and denial of "meaningful consultations," advocated by the State Department flies in the face of the overall procedure for the enactment and renewal of import restrictions required by the CPIA. The CPIA requires that when a foreign government requests that the U.S. government implement import restrictions, or when the U.S. government considers the renewal of restrictions, the president's designee must "publish notification of the request or proposal in the Federal Register," 19 U.S.C. § 2602(f)(1), submit

[5] *See generally* Urice & Adler, *Unveiling the Executive Branch's Cultural Property Policy*, Miami Law Research Paper Series (13 Aug. 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1658519&download=yes (accessed 18 Aug. 2010) (discussing the Executive Branch's pattern of "consistently—and astonishingly—exceed[ing] constraining legal authority" with respect to the importation of foreign cultural property).

information about the request to CPAC, *id.* § 2602(f)(2), and consider any report on the matter timely returned by CPAC, *id.* § 2602(f)(3). Recent State Department Federal Register notices imply that the Department believes that CPAC meetings are to be presumptively closed and that the public is not entitled to comment on proposed import restrictions except through the beneficence of the Department. *See, e.g.*, Notice of Meeting of the Cultural Advisory Property Committee, 74 FR 54,115 (21 Oct. 2009) ("An open session is not a statutory requirement, nor is the invitation for written or oral comment.").

The government's reading does not comport with the plain language of the CPIA, which provides that FACA's open meeting provision shall not apply to CPAC *only in circumstances* where the president's designee has made the Section 2605(h) determination that an open meeting would compromise the government's negotiating objectives or bargaining position. Put differently, the CPIA provides that FACA's open meeting provisions *do* apply to CPAC:

> The provisions of the Federal Advisory Committee Act *shall apply to [CPAC]* except that the requirements … [ ]relating to open meetings, public notice, public participation, and public availability of documents[ ] *shall not apply to [CPAC], whenever and to the extent* it is determined by the President or his designee that the disclosure of matters involved in [CPAC's] proceedings would compromise the Government's negotiating objectives or bargaining positions on the negotiations of any agreement authorized by this chapter.

19 U.S.C. § 2605(h) (emphasis supplied). The statute therefore creates a presumption that FACA's open meetings, public notice, public participation, and public availability of documents provisions ordinarily apply to CPAC, as it is standard English usage that the use of the phrase "except that" indicates that whatever follows those two words constitutes a departure from the norm. In this case, the CPIA provides an exception—i.e., allows for closed meetings or denial of public participation—*only when and to the extent* the determination described in the statute is made. The phrase "and to the extent" further limits the exception's scope. The plain meaning of this phrase requires that meetings be closed, or that public participation be constrained, only for the part of the meeting, or process, in which the harm described in the statute might occur.[6]

Thus, except where the exception applies, FACA applies to CPAC and requires that "[e]ach advisory committee meeting shall be open to the public," members of the public shall be allowed to submit oral or written comments, and documents prepared by or reviewed by CPAC shall be available for public review.

[6] In addition, it is indisputable that FACA Section 10(d), 5 U.S.C. App. 2 § 10, applies to CPAC, as the CPIA's exceptions to FACA are limited to FACA Sections 10(a), 10(b), and 11. Section 10(d) provides a mechanism for closing *part of* an advisory committee meeting when circumstances warrant but requires that, when meetings are closed, "the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code." 5 U.S.C. App. 2 § 10(d).

5 U.S.C. App. 2 § 10(a)–(b). As quoted above, this Court has noted that FACA "establishes the standard of openness in advisory committee deliberations, and provides an opportunity for interested parties to present their views and be informed with respect to the subject matter taken up by such committees.…" *Food Chem. News*, 980 F.2d at 1472 (ellipsis in original) (quoting S. Rep. No. 92-1098, *supra*). The State Department's apparent position that open CPAC meetings, and disclosure of CPAC materials, should be the exception rather than the norm is counter to the statutory requirements.

IV. PUBLIC POLICY, INFORMED BY LONGSTANDING FEDERAL LAW FAVORING OPENNESS IN GOVERNMENT, SUPPORTS DISCLOSURE IN THE CPAC CONTEXT.

For the reasons discussed above, public notice of proposed import restrictions (or the renewal thereof) and the opportunity for the public to comment on the same is an essential part of the CPAC process established by the CPIA. Public policy further underscores the desirability of ensuring openness, insofar as reasonably possible, in CPAC's operations. *Amici* submit that it is imperative that this Court consider the chilling effect unbridled confidentiality would have on the statutory process and on the ability of cultural property collectors to pursue their interests.

As this Court has recognized, "It is clear that FOIA was designed to embody 'a general philosophy of full agency disclosure unless information is exempted

under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld.'" *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1055 (D.C. Cir. 1981) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)). "… Congress believed that FOIA resolved two crucial but potentially conflicting interests: the right of the citizenry to know what the Government is doing, and the legitimate *but limited* need for secrecy to maintain the effective operation of Government." *Id.* at 1062 (emphasis supplied). The fact that individuals might seek disclosure of federal records regarding an area some people find esoteric is irrelevant: "Congress has made the determination that except for certain specified materials, all government documents are of legitimate public interest." *Id.* at 1066. The Supreme Court has noted that "[t]here are, to be sure, specific exemptions from disclosure set forth in [FOIA]. But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of [FOIA]. Accordingly, these exemptions must be narrowly construed." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (internal quotation marks and citations omitted).

Thus, it is an established tenet of federal FOIA law that Congress intended the presumption to lie in favor of disclosure and desired to allow for an informed citizenry. There is no reason to presume that Congress intended CPAC's operations to fall outside of this well-established regime. CPAC is a panel of

experts charged with advising the President, and his designees within the State Department, on how to achieve a proper balance between efforts to control looting at archaeological sites and the legitimate international exchange of cultural artifacts. The CPIA's legislative history notes that "[t]he exercise by the President of the authorities provided in sections 203–205 [of the CPIA] will require substantial input from knowledgeable representatives of the private sector." S. Rep. No. 97-564, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4078, 4107. The CPIA provisions that apply the normal FACA requirements[7] for open meetings, public comment, and public review of documents to CPAC, *see supra* Part III., echo this overall theme by providing a mechanism for interested parties to learn about proposed import restrictions, to understand the *reasons* for the proposed import restrictions, and to comment upon the desirability of the proposed restrictions as compared to other means of protecting foreign countries' cultural property.

The importance of public input is particularly significant with respect to the *renewal* of import restrictions. The CPIA provides that no agreement with a foreign government requiring the U.S. to implement import restrictions may be effective for more than five years, and the statute further provides that for such agreements to be renewed, they must be subject to a review process to determine

[7] Indeed, the Senate Report notes that "[s]ubsection (h) ensures that in operation [CPAC] will conform to the strictures of FACA," S. Rep. No. 97-564, at 30, 1982 U.S.C.C.A.N. 4078, 4107.

whether the circumstances "which justified the entering into of the agreement still remain" and whether cause for suspension of the agreement exists.[8] 19 U.S.C. § 2602(e). As with the initial implementation of import restrictions, renewal of restrictions requires the publication of notice in the Federal Register and CPAC review of relevant material. *Id.* § 2602(f). In other words, the CPIA requires the same procedure for renewal of import restrictions as it does for implementation of new restrictions.

The State Department's insistence on broad confidentiality is particularly troublesome due to its effect on the ability of interested parties to make meaningful

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[8] In the same vein, the CPIA requires that the President determine that any proposed import restriction "would be of substantial benefit in deterring a serious situation of pillage." 19 U.S.C. § 2602(a)(1)(C)(i).

> However, upon renewing import restrictions, the government seldom updates the designated list of restricted items. This failure to update the list of restricted items raises the following questions regarding the government's adherence to the statutory criteria in the renewal context: If the original import restrictions had the anticipated effect of substantially deterring a situation of pillage, then how could the President find (as statutorily required) a contemporary situation of pillage affecting the very same items five years later?; if, on the other hand, the original import restrictions did not have the anticipated effect of deterring a situation of pillage, then on what basis could the President find (as statutorily required) that concerted action five years later would substantially deter such pillage?

Urice & Adler, *supra* note 5, at 38 (footnotes omitted).

comments in the renewal process. Part of the process required by the CPIA for the initial implementation of import restrictions involves a report from CPAC to the President, or his designee, analyzing the proposed restrictions and whether they would be an effective means for combating the conditions cited as justification for the restrictions. *Id.* § 2605(f). Copies of this report must be sent to Congress. *Id.* § 2605(f)(6). Notably, the CPIA does not provide that the reports shall be submitted in confidence. Thus, the provision requiring the submission of these reports to Congress underscores the intended nature of the reports as items of public record.

The State Department's refusal to release the full CPAC reports created pursuant to this requirement hamstrings the ability of interested parties affected by the import restrictions to make any sort of meaningful comment when the restrictions come up for renewal (and when the CPAC report process is repeated) because, in the absence of the CPAC reports, interested parties cannot know (a) what circumstances gave rise to the request for import restrictions, (b) what alternative measures (including less restrictive restrictions) were considered, and (c) why those alternative measures were found inadequate. Put differently, interested parties cannot really comment on whether particular circumstances are still in existence when they have been denied information on what those circumstances were in the first place, and they cannot opine on whether alternative

measures would have been an effective means to address those circumstances when they cannot know what alternative measures may have been considered.[9]

These considerations are particularly significant where the State Department chooses not to follow CPAC's recommendations. The record in this case includes evidence, provided by the individual who was chairman of CPAC when the decision was made, that the State Department's decision to extend import restrictions to ancient Cypriot coins was made despite CPAC's recommendation that coins not be subject to restrictions. (JA 235.) Release of the CPAC reports would allow interested parties to assess the measures CPAC originally recommended and to comment on why the State Department may have erred in imposing broader restrictions. Release of the reports would also allow interested parties to evaluate the import restrictions in light of CPAC's original analysis and to comment upon whether CPAC correctly analyzed the matters at issue, thus affording a more comprehensive record than could be realized through opining in the abstract.

The deliberative process exemption claimed by the State Department is subject to the same principles as FOIA law in general. "… Congress intended to

[9] The State Department affirmatively avoids revealing what other measures may have been considered. *See*, *e.g.*, Urice & Adler, *supra* note 5, at 40 & n. 271 (citing a CPAC report that simply stated, without explanation, that less drastic remedies than import restrictions were not available).

confine exemption (b)(5) as narrowly as [is] consistent with efficient government operation." *Senate of Cmwlth. of P.R. v. U.S. Dep't of Justice*, 823 F.2d 574, 584 (D.C. Cir. 1987) (internal quotation marks omitted, alteration in original). "General guidelines are of limited utility in this area" because the nature of a document is an inherently fact-based matter. *Id.* at 586. Moreover, "the deliberative process privilege does not protect documents in their entirety; if the government can segregate and disclose non-privileged factual information within a document, it must." *Loving v. Dep't of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008) (citing *Army Times Publ'g Co. v. Dep't of Air Force*, 998 F.2d 1067, 1071 (D.C. Cir. 1993)).

In the context of CPAC's operations, there is a definite tension between the deliberative process and the procedures required by the CPIA. The CPIA requires that when import restrictions are implemented, a report be sent to Congress describing the restrictions, the differences between the actual restrictions implemented and any recommendations CPAC made, and the reasons for any such difference. 19 U.S.C. § 2602(g)(1)–(2). This requirement is wholly consistent with the pro-disclosure theme of FOIA law. Withholding CPAC's reports containing the recommendations that are to be discussed in the reports to Congress prevents interested parties affected by the restrictions from obtaining a clear public record of the rationale for the State Department's decision to enact specific restrictions while rejecting other proposals, and in turn it ensures that it will be difficult or

impossible for such parties to offer meaningful comments when such restrictions come up for renewal.

In sum, the State Department's interpretation of the CPIA, FACA, and FOIA is tailored to make it as difficult as possible for persons affected by cultural property import restrictions to oppose the implementation and renewal of such restrictions. *Amici* urge the Court to approach the Department's positions in this case with caution because of the chilling effect those positions would cause if upheld.

CONCLUSION

For the reasons stated herein, *amici curiae* Certain Former Members of the Cultural Property Advisory Committee urge the Court to reverse the District Court's order granting summary judgment to the United States Department of State.

Respectfully submitted,

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21 September 2010

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of FRAP 32(a)(7)(B), as applied to an *amicus curiae* by FRAP 29(d), because Microsoft Word's word count reports that the brief contains 7000 words, including footnotes and excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii), and

2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared using Microsoft Word 2007 in a proportionally-spaced typeface, Times New Roman 14-point type.

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I hereby certify that on this the 21st day of September, 2010, I electronically filed the foregoing Brief of *Amici Curiae* Certain Former Members of the Cultural Property Advisory Committee in Support of Appellants via the electronic filing system used by the U.S. Court of Appeals for the District of Columbia Circuit, which will deliver a Notice of Docket Activity to:

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In addition, I forwarded a courtesy .PDF copy of the e-filed material via electronic mail to the addresses cited above.

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ADDENDUM

RELEVANT PORTION OF THE FEDERAL ADVISORY COMMITTEE ACT

5 U.S.C. APP. 2 § 10

§ 10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance

(a)(1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Administrator shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Administrator may prescribe.

(b) Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.