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## LORD ELGIN AND THE OTTOMANS: THE QUESTION OF PERMISSION

*David Rudenstine\**

In the early morning light on July 31, 1801, a ship-carpenter, five crew members, and twenty Athenian laborers “mounted the walls” of the Parthenon and with the aid of ropes and pulleys detached and lowered a sculptured marble block depicting a youth and centaur in combat.<sup>1</sup> The next day the group lowered a second sculptured marble from the magnificent temple.<sup>2</sup> Within months, the workers had lowered dozens of additional marble sculptures, and within a few years, most of the rest of the Parthenon’s priceless marbles were removed.<sup>3</sup> These fabulous marbles, sculptured during the age of Pericles<sup>4</sup> under the guiding hand of Phidias<sup>5</sup> out of fine white Pentelic marble quarried ten miles from Athens and hauled by ox-cart to the Acropolis,<sup>6</sup> had remained on the Parthenon for 2,200 years before being removed.

This dismantling of the Parthenon—the most prominent contemporary icon of western civilization—was done at the behest of Lord Elgin, a Scottish Earl and the British ambassador to the Ottoman Empire in Constantinople from 1800 to 1803.<sup>7</sup> In 1816, Lord Elgin sold his extraordinary antiquities collection to the British government,<sup>8</sup> which turned the collection over to the British Museum where it has been exhibited ever since and is

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<sup>1</sup> Letter from Philip Hunt to Lord Elgin (July 31, 1801), *quoted in* A.H. Smith, *Lord Elgin and His Collection*, 36 J. HELLENIC STUD. 163, 196 (1916).

<sup>2</sup> *See id.*

<sup>3</sup> B.F. COOK, *THE ELGIN MARBLES* 73-75 (2d ed. 1997).

<sup>4</sup> *See* DONALD KAGAN, *PERICLES OF ATHENS AND THE BIRTH OF DEMOCRACY* 151-57 (1991); CHARLES FREEMAN, *EGYPT, GREECE AND ROME: CIVILIZATIONS OF THE ANCIENT MEDITERRANEAN* 206-09 (1996); JEFFREY M. HURWIT, *THE ATHENIAN ACROPOLIS* 154-234 (1999); CHRISTIAN MEIER, *ATHENS: A PORTRAIT OF THE CITY IN ITS GOLDEN AGE* 375-433 (Metropolitan Books, 1998) (1993), for a general history of the age of Pericles.

<sup>5</sup> *See* HURWIT, *supra* note 4, at 169.

<sup>6</sup> IAN JENKINS, *THE PARTHENON FRIEZE* 9 (1994).

<sup>7</sup> *See* WILLIAM ST. CLAIR, *LORD ELGIN & THE MARBLES* 28-34, 118 (3d ed. 1998).

<sup>8</sup> *See id.* at 245-60.

considered one of the crown jewels of the museum's exceptional collection.<sup>9</sup> Except for the devastating Venetian bombing in 1687,<sup>10</sup> the removal of these priceless sculptures from the Parthenon's edifice was perhaps the single most violent desecration of classical Greece's most celebrated monument.<sup>11</sup>

Lord Elgin's taking of the world's greatest single collection of classical Greek sculptures is probably the world's most celebrated cultural property dispute.<sup>12</sup> Those defending the taking and retention of the marbles do not claim that Britain is entitled to the marbles merely because it possesses them. They insist that the British Museum is entitled to the marbles Lord Elgin's agents stripped from the Parthenon because he had an unimpeachable legal title to them.<sup>13</sup> They also argue that the marbles have been in Britain so long that they are now part of the British patrimony.<sup>14</sup> Alternatively, they claim that the enduring significance of the world's great cultural treasures transcends the claims and attachments of any one people and belongs to all humankind.<sup>15</sup> They also assert that the return of the marbles would establish a precedent that would threaten the collections of the world's great museums.<sup>16</sup> They emphasize that Elgin rescued the marbles from other collectors, and that they are in better condition today than they would be if they had remained on the Parthenon because they

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<sup>9</sup> *Id.*; see also COOK, *supra* note 3, at 5 ("The Elgin Marbles, as they have come to be known, were placed in the British Museum and have remained ever since one of its chief attractions to artists, scholars and millions of ordinary visitors.")

<sup>10</sup> Manolis Korres, *The Parthenon from Antiquity to the 19th Century*, in *THE PARTHENON AND ITS IMPACT ON MODERN TIMES* 155 (Panayotis Tournikiotis ed., 1994).

<sup>11</sup> See *id.* at 138-161.

<sup>12</sup> Recently, the dispute over the marbles also has been the subject of diplomatic negotiation and international efforts aimed at restricting the outflow of cultural property from art-rich countries. In fact, in January 1999, 339 of the 626 members of the European Parliament urged Britain to return the collection of figures to Greece. See *Property Rights*, N.Y. TIMES, Jan. 19, 1999, at E1. At the end of 1999, after touring the Parthenon, President Clinton offered to mediate Greece's demands that Britain return the marbles. See Marc Lacey, *Clinton Tries to Subdue Greeks' Anger at America*, N.Y. TIMES INT'L, Nov. 21, 1999, at A6. The marbles were the subject of recent international conferences in London and Athens. Then in June 2000, Greek Foreign Minister George Papandreou pressed his country's claim before the Culture Select Committee in the British House of Commons.

<sup>13</sup> See ST. CLAIR, *supra* note 7, at 337; see also William St. Clair, *The Parthenon Sculptures*, in *THE DESTINY OF THE PARTHENON MARBLES* 32 (Richard Hubbard Howland ed., 2000) [hereinafter *DESTINY OF PARTHENON MARBLES*]; COOK, *supra* note 3, at 71-75.

<sup>14</sup> CHRISTOPHER HITCHENS, *THE ELGIN MARBLES: SHOULD THEY BE RETURNED TO GREECE?* 83 (1997).

<sup>15</sup> John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1916 (1985).

<sup>16</sup> HITCHENS, *supra* note 14, at 83.

have been in a museum for 180 years.<sup>17</sup> Lastly, they claim that not every wrong can be righted—assuming that the initial taking was a wrong—and the acceptance of the past requires accepting Elgin's dismantling of the Parthenon.

Greece takes exception to the British assertions. Greece insists that the Ottomans could not legitimately alienate Greece's cultural property merely because the Ottoman military occupied the territory.<sup>18</sup> If the Greeks lent any credence to the British claim that the marbles are part of the British patrimony, they would characterize the marbles as a British step-child rather than one of Greece's own.<sup>19</sup> If the Greeks conceded that the marbles are in better condition today because they have been in a museum, they also would emphasize that the Parthenon is in worse condition because of the brutal means used to remove them.<sup>20</sup> While Greece concedes that it has never sued for the return of the marbles, it dismisses the suggestion since it could only bring such a suit in a British court.<sup>21</sup> Instead, Greece insists that the British recognize that such a taking violates contemporary international norms and that the British honor the rule of law by returning the marbles.<sup>22</sup>

As complicated and wide-ranging as this debate may be, it is widely assumed that the Ottomans gave Elgin permission to remove the marbles.<sup>23</sup> This assumption has helped Britain over the last two centuries gain a toehold on the moral and legal high ground in the exchanges with Greece over whether the sculptures should be returned to Athens,<sup>24</sup> and it has given Britain a powerful weapon to use in forums of international organizations and in the court of public opinion.

This Article is the second of two related articles concerning Lord Elgin, the Ottomans, and the important question of whether the appropriate Ottoman authorities gave Lord Elgin permission to remove dozens of classical Greek marbled sculptures from the Parthenon walls during the first decade of the nineteenth century. The first article<sup>25</sup> focused on the authenticity of the historic 1801 Ottoman document Lord Elgin claimed he received from the

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<sup>17</sup> See ST. CLAIR, *supra* note 7, at 95.

<sup>18</sup> David Rudenstine, *The Legality of Elgin's Taking: A Review Essay of Four Books on the Parthenon Marbles*, 8 INT'L J. CULTURAL PROP. 356, 357 (1999).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> ST. CLAIR, *supra* note 7, at 135-36, 156; Merryman, *supra* note 15, at 1902; COOK, *supra* note 3, at 75.

<sup>24</sup> See Merryman, *supra* note 15, at 1910.

<sup>25</sup> David Rudenstine, *A Tale of Three Documents: Lord Elgin and the Missing, Historic 1801 Ottoman Document*, 22 CARDOZO L. REV. 1853 (2001).

acting Grand Vizier in July of 1801,<sup>26</sup> and which is cited as authorizing the removal of the disputed sculptures. That article reached two different sets of conclusions. The first set of inter-related conclusions were as follows: (1) a surviving Italian document widely considered an accurate translation of the missing 1801 Ottoman document is a draft document and not a translation of the final Ottoman document;<sup>27</sup> (2) an English document published in an appendix to an 1816 Parliamentary Select Committee Report is drawn from the Italian document and thus no more a reliable translation of the missing Ottoman document than the Italian document;<sup>28</sup> (3) although the Select Committee represented that the Italian document was signed by the acting Grand Vizier and contained a signet, it was not signed and it contained no signet;<sup>29</sup> (4) the Parliamentary Select Committee knowingly misrepresented the Italian document, as well as the English document, in order to strengthen the claim that Lord Elgin had good legal title to his collection which he could in turn convey to the British government;<sup>30</sup> (5) the Select Committee engaged in such deceit to undermine Parliamentary opposition to the government purchase of Elgin's collection, which was completed in the spring of 1816.<sup>31</sup>

The second set of interrelated conclusions reached in that article concerned the relationship between the substance of the Italian draft document and the substance of the missing July 1801 Ottoman document Lord Elgin claimed he received in Constantinople. It concluded that: (1) Since that document is missing, it is unknown what activities it permitted Lord Elgin's artisans to engage in on the Acropolis;<sup>32</sup> (2) There is no reason to believe that the activities permitted by the Ottoman document were any greater than those set forth in the surviving Italian document just noted.<sup>33</sup>

This Article examines the important question of whether the Ottomans gave Lord Elgin permission to remove the Parthenon sculptures from its walls. This issue in turn breaks into two parts. The first focuses on whether the Ottomans gave Elgin prior permission to remove the sculptures;<sup>34</sup> the second part examines

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<sup>26</sup> See ST. CLAIR, *supra* note 7, at 86-97.

<sup>27</sup> See Rudenstine, *supra* note 25, at 1882-83.

<sup>28</sup> See *id.* at 1883.

<sup>29</sup> See *id.* at 1874.

<sup>30</sup> See *id.* at 1875-78.

<sup>31</sup> See *id.* at 1878.

<sup>32</sup> See *id.* at 1883.

<sup>33</sup> See *id.*

<sup>34</sup> See *infra* notes 39-61 and accompanying text.

the claim that the Ottomans gave Elgin latter-in-time permission which constituted retroactive ratification of all past illegalities.<sup>35</sup> The article concludes that the widely held assumption that the Ottomans gave Lord Elgin permission—whether prior or subsequent—to remove the marbles is no more than a grand illusion. Indeed, a review of the evidence establishes three points: (1) there is no surviving evidence that the Ottomans gave Elgin prior or subsequent permission;<sup>36</sup> (2) there is undisputed evidence that Lord Elgin and his agents bribed Ottoman officials in Athens and Constantinople and that the bribed were an essential ingredient to Elgin's entire operation;<sup>37</sup> and (3) Ottoman authorities in Constantinople condemned Elgin's taking of the Parthenon sculptures as illegal.<sup>38</sup>

Toppling a fundamental premise central to the contemporary debate over the fate of the Parthenon sculptures is no mere academic exercise. Laying bare the illusion that has circumscribed the contemporary debate should alter the substantive context in which the debate is situated, and it should cause shifts not only in positions asserted in the international dispute but in comparative advantages, which may eventually affect the ultimate question of repatriation.

## I. PRIOR PERMISSION

An inquiry into the question of prior permission is essentially an evaluation of the activities permitted in the July 1801 Ottoman document. As already noted, that significant document is missing, and we cannot rely upon a surviving Italian document, or the English document which was derived from the Italian document and was contained in the 1816 Parliament's Select Committee's report, as a reliable guide to the content of that missing Ottoman document. Nonetheless, because scholars and commentators have assumed that the Italian and English documents are reliable translations of the missing Ottoman document, and because their analysis of the underlying substantive issue—did the Ottomans grant Elgin prior permission?—is based on an interpretation of the Select Committee's English document, my inquiry into this issue will proceed on the assumption that the Select Committee's English document defined the activities that Ottoman officials in

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<sup>35</sup> See *infra* notes 62-89 and accompanying text.

<sup>36</sup> See *infra* notes 41-61 and accompanying text.

<sup>37</sup> See *infra* notes 76-83 and accompanying text.

<sup>38</sup> See *infra* notes 84-89 and accompanying text.

Constantinople permitted Lord Elgin's artisans to conduct.

### A. *Elgin's Request*

Let's first consider the scope of Lord Elgin's request. From the beginning Elgin wanted his Athens artisans to draw, paint, mold, and measure the works of the Parthenon. There is no hint, no suggestion, no implication that Elgin ever imagined that his artisans could or should remove sculptures from the Parthenon walls. The only change that occurred in Elgin's ambitions between the time when the artisans first arrived in Athens in 1800 and July of 1801 is that in July Elgin wanted permission for his men to "dig" around the foundations of the Parthenon. A memorandum prepared by Hunt on July 1, a few days before Elgin directed Pisani to do what he could to secure a new directive from the Ottoman authorities, seems to have embodied Elgin's hopes for his artisans. The memorandum provides:

July 1, 1801. Mr. Hunt recommends that a Ferman should be procured from the Porte, addressed to the Voivode and Cadi of Athens, as well as to the Disdar, or Governor of the Citadel; stating that the artists are in the service of the British Ambassador Extraordinary, and that they are to have not only permission, but protection in the following objects: —

- (1) to enter freely within the walls of the Citadel, and to draw and model with plaster the Ancient Temples there.
- (2) to erect scaffolding, and to dig where they may wish to discover the ancient foundations.
- (3) liberty to take away any sculptures or descriptions which do not interfere with the works or walls of the Citadel.<sup>39</sup>

As Hunt's memorandum indicates, Elgin, as of July, was contemplating asking for permission "to dig" in the hope of uncovering "ancient foundations." The power to dig was new and different and constituted an expansion of the prior activities that were limited to drawing, measuring, molding, and painting. There is nothing in Hunt's memorandum suggesting that Elgin was hoping to gain permission to remove sculptures from the Parthenon walls. To the extent that the third paragraph seeks

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<sup>39</sup> Smith, *supra* note 1, at 190. Two terms that appear in this memorandum, Ferman and Voivode, appear in other parts of this Article as Firman and Vaivode, respectively. The words Ferman and Firman, and Voivode and Vaivode, are different spellings that refer to the same terms. The different spellings for these words were both used in the early part of the nineteenth century, and the spelling used in this Article is the spelling used by the author in the text that is quoted.

permission to “take away any sculptures or descriptions,” it is qualified by the prohibition that removals not “interfere with the works or walls of the Citadel,” which rules out the possibility that Hunt meant to encompass the removal of sculptures from the Parthenon walls.<sup>40</sup>

### B. *The Text*

Although the text of the July 1801 document is not the only critical evidence pertaining to the question of whether Elgin obtained prior permission to remove sculptures from the Parthenon walls, it is the most central piece of evidence. As already reviewed, the original 1801 Ottoman document is missing, and given the evidence available to us today, there are substantial reasons to believe that Hunt’s Italian document was not a translation of the final July 1801 Ottoman document. Nonetheless, for reasons already noted, I will assume that the activities permitted by the final Ottoman document were the activities defined in the Italian document from which Parliament’s English document was derived.

To begin with, the English document described the activities that Lord Elgin wanted his workers to conduct, and they were limited to:

fixing scaffolding round the ancient Temple of the Idols there; and in moulding the ornamental sculpture and visible figures thereon, in plaster or gypsum; and in measuring the remains of other old ruined buildings there; and in excavating when they find it necessary the foundations, in order to discover inscriptions which may have been covered in the rubbish . . . .<sup>41</sup>

There is not one word in the document suggesting, intimating, or implying that Lord Elgin sought permission to remove sculptures off the temple walls. The claim that the 1801 document was ambiguous and could in good faith be interpreted to permit the removal of sculptures from the temple walls<sup>42</sup> rests on a handful of words. They provide that no one should “hinder them

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<sup>40</sup> Even Lord Elgin’s biographer, William St. Clair, who claims that the Ottomans gave Lord Elgin permission to remove the Parthenon sculptures concludes that “[t]here is nothing in the . . . document about seeking permission to take sculptures, or indeed anything, from the ruins of the buildings, as distinct from taking detached pieces lying on the ground or dug up in excavations.” ST. CLAIR, *supra* note 7, at 87.

<sup>41</sup> Report from the Select Committee on the Earl of Elgin’s Collection of Sculptured Marbles, ordered by the House of Commons (Mar. 25, 1816), at 69 [hereinafter Report from the Select Committee].

<sup>42</sup> See ST. CLAIR, *supra* note 7, at 90.



[Elgin's agents] from taking away any pieces of stone with inscriptions or figures."<sup>43</sup> By themselves these few words fail to authorize removal of marble statuary from the Parthenon edifice. When they are read in the context of the entire document, the assertion that they permitted Lord Elgin to remove metopes, friezes and statues from the pediments is specious. If there is any doubt that the authority to remove "any pieces of stone with inscriptions and figures" was limited to stones already on the ground or discovered while excavating, it vanishes because of a line in the middle of the second paragraph emphasizing that the local Athens officials should honor the firman given to Lord Elgin, "*particularly as there is no harm in the said figures and edifices being thus viewed, contemplated, and designed.*"<sup>44</sup>

In short, the 1801 document not only fails to support the claim that Elgin had good title to the marbles, it is not ambiguous. By insisting that the activities of Elgin's artisans would inflict "no harm in the said figures and edifices," the document negated the idea that the Ottomans gave Elgin permission to remove sculptures from the walls. Thus, any contention that the Ottomans gave Elgin permission to denude the Parthenon must be based on a document other than the 1801 document, and it must overcome the prohibition embedded in the 1801 document that Elgin's workmen would inflict "no harm" on the marbles.<sup>45</sup>

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<sup>43</sup> Although the Select Committee translated the Italian words "*qualche pezzi di pietra*" to mean "any pieces of stone," many have claimed, as did Harold Nicolson, that the correct translation is "a few pieces of stone." Harold Nicolson, *The Byron Curse Echoes Again: Re-emergence of the Elgin Marbles, Taken from Greece in 1800, Awakens an Old Controversy*, N.Y. TIMES, Mar. 27, 1949, § VI (Mag.), at 12, 33. The difference between "any" and "few" is noteworthy, but the analysis in this essay is not dependent on which English word is a better fit for the Italian.

<sup>44</sup> ST. CLAIR, *supra* note 7, at 69 (emphasis added).

<sup>45</sup> Although Elgin's statements to the Select Committee that the Ottomans "attached no importance" to the Parthenon were reflective of what many said and perhaps believed at the time, *id.* at 20, the idea that the Ottoman government so honored the Parthenon that it insisted that Elgin's artisans inflict "no harm" on the Parthenon and its sculptures was in keeping with a longstanding Ottoman tradition.

Since the days of Mehmed the Conqueror in the fifteenth century, who had a "great predilection for the 'city of the philosophers,' as the Ottomans called Athens, and for its sights," and who, according to his biographer Franz Babinger, "admired the vestiges of classical antiquity, particularly the Acropolis," Ottoman authorities in Constantinople had respected the achievements of the classical Greeks and had protected the Parthenon from wholesale desecration. FRANZ BABINGER, *MEHMED THE CONQUEROR AND HIS TIME* 160 (William C. Hickman ed., Ralph Manheim trans., 1978). Thus, the Ottomans had refused all requests, including those of France, their late eighteenth century ally, to remove sculptures from the Parthenon walls. But the respect accorded the Parthenon by Ottoman officials in Constantinople did not guarantee that local Ottoman officials in Athens responsible for daily oversight of the Parthenon and the Acropolis as a whole would extend comparable respect towards the ruins of ancient Greece.

There is irrefutable evidence that Ottoman officials in Athens permitted travelers

### C. *Understandings of the Text*

Elgin's understanding of what the 1801 Ottoman document permitted adds further support to the claim that the Ottoman authorities did not grant Elgin prior permission to denude the Parthenon. On July 10, 1801, just two days after he likely received the Ottoman directive, Lord Elgin wrote to Giovanni Battista Lusieri, who he had hired to lead his team of artisans in Athens: "Besides, you have now the permission to dig, and there a great field is opened for medals, and for the remains both of sculpture and architecture."<sup>46</sup>

What Elgin considered "extraordinary" about the permission he had secured was that his artists now had permission to "dig," or to excavate, which gave rise to the exciting possibility that they might discover buried marble sculptures. If Elgin believed that his men had been given a green light to denude the Parthenon of its famous sculptures, which would have guaranteed him the finest collection of classical Greek sculptures in the world, he would have celebrated that extraordinary power, not the prospect of tedious

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and others to remove bits and pieces of the statues on the two pediments of the Parthenon during the last decades of the eighteenth century. This damage was done piecemeal, but the overall consequence was serious and irreparable harm, and today it is often claimed that if Elgin had not removed the remaining sculptures, they would have been nibbled to death as travelers and others yanked off legs, arms, heads, and torsos as souvenirs. But as severe as this harm was—and it was serious and irreparable—the friezes that ringed the Parthenon's walls and that eventually formed the core of Elgin's collection were mainly unmolested by travelers. This was true because they were carved on the face of enormous pieces of marble weighing hundreds of pounds which formed an integral part of the Parthenon's structure and could not be removed without first removing a top row of heavy marble blocks and breaking the pins that steadied the structure.

Even contemporary researchers favoring the British position have concluded that the English document did not authorize Elgin's artisans to remove the sculptures from the Parthenon walls. For example, John Henry Merryman, a prominent legal academic who generally favors an open market for cultural artifacts, including antiquities, wrote a frequently cited article in 1985, *see Merryman, supra* note 15, in which he favors the British Museum's retention of the marbles. At one point in the article, after quoting a clause from the Select Committee's English document which is often cited to support the claim that the Ottoman's gave Elgin prior permission to remove the sculptures, Merryman writes:

The language of this last clause, even when taken in context with that of the third paragraph of Elgin's request to the Sultan, is at best ambiguous. While it is possible to read the firman as a flowery concession of everything for which Elgin asked, it is more reasonable to conclude that the Ottomans had a narrower intention, and that the firman provides slender authority for the removals from the Parthenon . . . . The reference to 'taking away any pieces of stone' seems incidental, intended to apply to objects found while excavating . . . . It is certainly arguable that Elgin exceeded the authority granted in the firman . . . .

Merryman, *supra* note 15, at 1898-99.

<sup>46</sup> Letter from Lord Elgin, to Giovanni Battista Lusieri (July 10, 1801) *quoted in* Smith, *supra* note 1, at 192.

speculative excavations.

The Reverend Philip Hunt, who was part of Lord Elgin's entourage in Constantinople and who played a critical role in having the marbled sculptures lowered from the walls, also formed a highly relevant understanding of the meaning of the 1801 document. In a letter to Hamilton dated July 8th, the date Elgin likely obtained the Ottoman letter to the Athens officials, Hunt wrote William Richard Hamilton, Lord Elgin's secretary: "[A]nd as I shall carry a Ferman to enable our Artists to prosecute without interruption their researches in the Acropolis of Athens, I will take care to see it put properly into execution."<sup>47</sup> Although brief, the reference is significant. Though surely not definitive of Hunt's understanding of what the Ottomans permitted, it is noteworthy that Hunt's words—"prosecute without interruption their researches"—describing the scope of activities permitted by the Ottoman letter were mundane. These words contain no trace of excitement, surprise, or elation one might expect if Hunt had learned that day—and he wrote Hamilton within hours of obtaining the Ottoman letter—that he would carry to Athens the news that the artists would be able remove sculptures that had adorned the Parthenon for 2,200 years. There is no trace in Hunt's letter that he thought the Ottomans had permitted what they had long denied the French: the stripping of sculptures from the Parthenon walls. Instead, Hunt's satisfaction seems to have been based solely upon obtaining an Ottoman letter reaffirming to the Athens officials that Elgin's artisans should be permitted to carry on with activities such as drawing, painting, measuring, and molding.<sup>48</sup>

The Ottoman officials in Athens, to whom the July 1801 letter was addressed, also formed an impression of the meaning of the Ottoman document relevant to whether the Ottomans granted Elgin prior permission to remove sculptures from the Parthenon. Although surviving sources are limited and although, all we know is their titles—the Voivode, in effect the governor of Athens, and the Disdar, who was inferior to the Voivode—letter exchanges between Lusieri and Elgin in 1802 offer some insight into what

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<sup>47</sup> *Id.* at 194.

<sup>48</sup> Hunt's testimony before the Select Committee also helps establish that Hunt did not understand the 1801 document to permit the denuding of the Parthenon. When asked whether the "tenor" of the July 1801 document was "so full and explicit as to carry upon the face of it a right to displace and take away whatever the artists might take a fancy to," Hunt answered: "Not whatever the artists might take a fancy to." Hunt continued: "but when the original was read to the Vaivode of Athens, he seemed disposed to gratify any wish of mine with respect to the pursuit of Lord Elgin's artists." Report from the Select Committee, *supra* note 41, at 56.

these local Ottoman officials thought in 1802 of their decision to permit the stripping of the Parthenon the year before. The letters reveal that these Ottoman officials were afraid for their physical safety because they had permitted Elgin's artisans to remove the marbles from the walls, and they were hopeful that Elgin would be able to protect them from recriminations or punishments that might be imposed upon them because of what they had done. Elgin both assured the Disdar that he had "the means of watching over his interests," and tried to secure his future cooperation with additional bribes: "So long as he is my friend he will have solid proofs of my friendship."<sup>49</sup>

The letters establish two critical points. Local Ottoman officials in Athens did not believe that they had power to permit the denuding of the Parthenon. They knew that such authority rested with the highest officials in Constantinople, not with local officials in the provinces. Second, the 1801 document did not authorize the removal of the marbles from the walls and its language was not so vague as to permit such an interpretation. If it had been, the Athens officials would not have been so fearful because of what they had permitted Elgin's men do, and there would have been no need for Elgin to use his money, power, and influence to protect them from being punished for their transgressions.

Lastly, when the Parliament's Select Committee inquired into the circumstances surrounding the removals, it had every reason to construe the evidence, within the bounds of plausibility, to support the conclusion that Elgin had prior permission to remove the sculptures.<sup>50</sup> But the committee did not so find. Instead, the key finding of the committee placed great weight on the fact that the removals, which went on "for months, and even years," were not opposed by Greeks or Turks living in Athens. As the committee report stated: "not the least obstruction was ever interposed."<sup>51</sup> Although one may take issue with the factual assertion that there was no opposition to the removals, or with what meaning should be attached to that fact, assuming it were true, there can be little doubt that by relying upon the absence of local opposition to imply that Elgin had implicit permission from local Ottoman authorities in Athens to remove the sculptures, the Select Committee conceded that Elgin did not have prior permission to remove the sculptures.

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<sup>49</sup> Smith, *supra* note 1, at 234.

<sup>50</sup> Rudenstine, *supra* note 25, at 1878.

<sup>51</sup> Report From the Select Committee, *supra* note 41, at 4, 5.

#### D. *Elgin Unaware*

There is a hidden, important, and surprising story in these events that provides substantial additional force to the claim that Elgin did not obtain prior permission to remove sculptures from the Parthenon walls. Secreted away in the traditional view is a conception of Elgin as a planner and doer who conceived of the idea of stripping the Parthenon of its sculptures and implemented it. Accordingly, the idea of Elgin having prior permission assumes that Elgin actually entertained the idea of removing sculptures from the Parthenon walls; that he sought permission from Ottoman officials in Constantinople to remove the sculptures from the edifice; that he instructed Hunt to do what he could to remove the sculptures; that Hunt's conduct in Athens was consistent with Elgin's instructions; and that ultimately the removal of metopes from the high walls was not a surprise to Elgin. But there is no evidence to support this traditional view.

In fact, as already suggested, the evidence establishes a reality that turns these suppositions on their head. It did not occur to Elgin to remove sculptures from the Parthenon walls,<sup>52</sup> and he did not ask Ottoman officials in Constantinople in early July 1801 for permission to do so.<sup>53</sup> When Hunt actually departed for Athens, Elgin remained in Constantinople and there was no plan to strip the sculptures off the walls.<sup>54</sup> When Hunt visited the Voivode in Athens, Elgin was in Constantinople.<sup>55</sup> When Hunt threatened and bribed the Voivode to permit the lowering of the first metope, Elgin was in Constantinople.<sup>56</sup> When Hunt watched the first metope lowered to the ground, Elgin was in Constantinople.<sup>57</sup> During the weeks following, when Lusieri and his men lowered many other marble sculptures, Elgin was in Constantinople.<sup>58</sup> In fact, Elgin did not visit Athens until the following year.<sup>59</sup> Thus, when the first marble sculptures were lowered, Elgin had no idea that such a deed was being done in his name.

Elgin learned of this development for first time, when letters from Hunt and Lusieri arrived in Constantinople in August giving him a report.<sup>60</sup> Thus, the question arises as to whether Elgin's

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<sup>52</sup> See *supra* Part I.A.

<sup>53</sup> See *supra* Part I.A.

<sup>54</sup> See *supra* Part I.A. Lord Elgin visited Athens for the first time in 1802.

<sup>55</sup> See *supra* Part I.A.

<sup>56</sup> See *supra* Part I.A.

<sup>57</sup> See *supra* text accompanying notes 39-40.

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

<sup>60</sup> See Smith, *supra* note 1, at 196. Hunt wrote Lord Elgin on July 31, 1801, and Lusieri

reply evidenced any surprise and elation, as we might expect. There is, although it may have been muted perhaps by Elgin's sense of ambassadorial decorum. Elgin confessed in a letter to Lusieri that these startling developments "now seems to promise a success *beyond our most ardent hopes*."<sup>61</sup>

## II. RETROACTIVE RATIFICATION

The second part of the question of whether appropriate Ottoman officials gave Elgin permission to denude the Parthenon focuses on the issue of retroactive ratification. If the Ottomans did not give Elgin prior permission to remove the sculptures, it is alternatively argued that they gave him permission after the fact, and that such later-in-time consent granted Elgin legal title to the collected antiquities, which he then conveyed to the British government.<sup>62</sup>

### A. *The Alleged Factual Predicate*

There are two episodes that arguably form the factual predicate for the argument that Ottomans officials in Constantinople gave retroactive approval to Elgin's taking.

#### 1. 1802 Episode

The first incident relied upon allegedly occurred in September or October 1802, shortly after Elgin returned to Constantinople from Athens. As Cook's British Museum's guide to the Parthenon collection summarily states:

On his return to Constantinople Elgin obtained documents from the Turkish Government approving all that the Voivode and the Disdar (local Ottoman officials in Athens) had done in Athens to assist Lusieri's work on behalf of Elgin. Lusieri seems to have handed them over to the two officials and no copies have survived. Had they done so, they would no doubt support Elgin's claim that everything he did had been approved by the Turkish authorities.<sup>63</sup>

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wrote Lord Elgin on August 6, 1801.

<sup>61</sup> Smith, *supra* note 1, at 201 (emphasis added).

<sup>62</sup> See ST. CLAIR, *supra* note 7, at 135-36, 156; Merryman, *supra* note 15, at 1899; COOK, *supra* note 3, at 75.

<sup>63</sup> COOK, *supra* note 3, at 75.

Although he agrees with Cook with regard to the legal significance of this episode, St. Clair provides a fuller discussion of the episode, describing it twice in strikingly different terms.<sup>64</sup> In the first passage, St. Clair claims that the two letters gave the officials in Athens “official legitimation . . . of any illegalities.” In the second, however, St. Clair cuts the ground out from under the significance of these documents by stating that the “exact status of these documents is unclear.” In the first passage, St. Clair unequivocally indicates that he believes that the later-in-time documents approved and condoned all prior illegalities, whereas in the second passage he characterizes the 1802 documents as providing the Voivode and the Disdar merely “some protection,” “some official approval” of the prior illegalities. In addition to these inconsistencies, it is clear that St. Clair never had the opportunity to examine the two documents he claims warrant the conclusion that the Ottomans gave retroactive approval. St. Clair did not have such an opportunity because Lusieri gave the documents to the Voivode and the Disdar in Athens, and they probably have not survived.<sup>65</sup>

No one knows who authored the documents referred to by Cook and St. Clair, whether the author knew the full details of what Elgin’s agents in Athens had done, or whether the author was even authorized to grant retroactive ratification. We have no

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<sup>64</sup> St. Clair’s first description is as follows:

On his return to Constantinople Elgin obtained from the Ottoman government letters which confirmed that the Government approved of all that the Voivode and Disdar had done. Elgin thus obtained an *official legitimation, after the event, of any illegalities perpetrated under the terms of the firman of July 1801*. Although in a constantly changing political situation there were no guarantees, the documents provided a measure of protection to the Voivode and Disdar that, if and when official policy changed, they would not be blamed, dismissed, imprisoned, sent to the galleys, summoned to Constantinople for public beheading, or quietly done away with by official assassins. Lusieri handed over the documents to the two men, much to their relief, in October 1802.

ST. CLAIR, *supra* note 7, at 110-11 (emphasis added).

St. Clair is more cautious in his second characterization. He writes:

In the autumn of 1802, when Elgin was preparing to leave Constantinople at the end of his appointment, he obtained two documents from the Vizier aimed at giving [the Voivode and the Disdar] some protection if circumstances should change. The exact status of these documents is unclear. They were not, it would seem, firmans addressed to the officials concerned but letters to Elgin from the Ottoman government which commended the two officials for what they had done. They thus gave some official approval from the central government, after the event, to any stretching of the legal powers of the second firman with which they had co-operated. The two documents were sent by Elgin to Lusieri, who gave them to the officials concerned.

*Id.* at 135-36.

<sup>65</sup> Lusieri wrote to Elgin on October 28, 1802, stating that he “thought it necessary to give” the documents to the Voivode and the Disdar. Smith, *supra* note 1, at 236.

summary of the content of these documents nor any surviving secondary source that claims to quote critical language from them.

Furthermore, St. Clair's claim that these later-in-time documents were so compelling and of such unequivocal force that they constituted a complete and total ratification and approval of earlier illegalities is based on A.H. Smith's *Lord Elgin and His Collection* published in *The Journal of Hellenic Studies*. But Smith did not claim to have examined these missing Ottoman documents. Also, Smith made no extravagant claims about their content as did Cook and St. Clair. Smith did characterize a letter from Lusieri to Elgin dated October 28, 1802, as indicating that Lusieri gave "thanks for the firmans and other documents" which Elgin had sent.<sup>66</sup> Smith also quoted Lusieri as having written: "The Voivode and the Disdar have been much pleased with the letters that your Excellency has procured and sent to them, and I have thought it necessary to give them to them today, in order to encourage them . . . ."<sup>67</sup> The fact that the Athens officials were pleased indicates that the documents obtained by Elgin must have contained at least some words or reassurance for the Athens officials. But we do not know what the words were or how much comfort they in fact gave.

A revealing letter by Elgin to Lusieri dated October 8, 1802, however, strongly suggests that Elgin himself did not believe that the Voivode and the Disdar were out of danger even as the ink was drying on those so-called retroactive ratification letters. The passage, which was only partially quoted above, reads in full:

The Disdar has nothing to fear on the part of P[rince] Dol[gorouki]. I have had some conversation with the ministers on these subjects since my return, and if the least threat is made (which I altogether doubt) be sure that the result will be favourable to him. The new ministers have spoken to me with much interest about my occupations and pursuits at Athens. I have the means of watching over his interests. So long as he is my friend he will have solid proofs of my friendship.<sup>68</sup>

Elgin knew that the Disdar was in danger because he (the Disdar) had permitted Elgin's artisans to remove marbles from the Parthenon edifice. Elgin wanted the dismantling to continue and to help guarantee that the Disdar would continue to brave the dangers, Elgin offered additional bribes. Thus, the contention that in 1802 the Ottomans legitimated Elgin's past illegal acts is negated by Elgin's own words.

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<sup>66</sup> *Id.* at 235.

<sup>67</sup> *Id.* at 236.

<sup>68</sup> *Id.* at 234.



## 2. The 1810 Episode

The second episode central to the claim that Elgin eventually obtained legal title to the marbles occurred in 1810. In February of that year, the British ambassador to the Sublime Porte, Robert Adair, wrote to the Foreign Secretary in London that: "I have at length succeeded in obtaining an order from the Caimacam<sup>69</sup> to the Voivode of Athens, for the embarkation without further detention of the antiquities collected by Lord Elgin and now lying at Athens."<sup>70</sup> It is asserted that because the Ottomans permitted the shipment of Elgin's collection to London, they must have condoned the stripping of the sculptures from the Parthenon walls. Thus, Cook's guide to the collection states the position with unabashed brevity: "This firman to remove the marbles must imply that any irregularities that may have occurred in interpreting the powers granted by the previous document were at least condoned if not fully approved."<sup>71</sup> St. Clair agrees that Adair's obtaining of the directive "allowing the marbles to leave Ottoman jurisdiction implied condonation, if not approval, of all the actions and abuses committed under the authority of other firmans granted earlier."<sup>72</sup> Indeed, within a page of this declaration, St. Clair offers the following sweeping conclusion:

Although the actions of the various Ottoman officials were, to a large extent, arbitrary, politically driven, and, in many cases, decisively influenced by threats and by bribery, modern experts in international law who have studied the case have usually agreed that Elgin's actions were probably technically lawful in the circumstances of the time, that his claim to personal ownership and right to sell were valid in law, and that any action by Greece, as successor government, to try to recover the marbles in an international court would probably fail.<sup>73</sup>

Several important issues arise out of the claim that the order obtained by Adair constituted retroactive ratification of all actions committed by Elgin's artisans. First, because no order permitting the shipment of the marbles has been found, the only document

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<sup>69</sup> The two words Caimacam and Kaymacam are different spellings referring to the same term. The two different spellings were both used in the early part of the nineteenth century, and the spelling used in this Article is the spelling used by the author in the text that is quoted.

<sup>70</sup> ST. CLAIR, *supra* note 7, at 156.

<sup>71</sup> COOK, *supra* note 3, at 79.

<sup>72</sup> ST. CLAIR, *supra* note 7, at 156.

<sup>73</sup> *Id.* at 157.

available to Cook and St. Clair is Adair's brief letter, which in substance states that he obtained an order permitting the shipment of the Athenian antiquities that Elgin collected. Thus, the claim that the order "implies condonation, if not approval of all the actions and abuses" Elgin committed, is a surmise, unsupported by any words or phrases in Adair's brief letter. There is certainly nothing about the isolated fact that the Ottomans permitted the shipment of marbles which had already been removed that implies or suggests that the Ottomans condoned or approved of the removal. The only fact that is certain is that the shipment to England was permitted.

Second, the legal importance of the order obtained by Adair depends on what the Caimacam knew about the antiquities and on that score we know nothing. If the Caimacam was deceived or misled as to the nature and scope of the shipment, that fact would undermine the utility of the permit as a vehicle for strengthening Elgin's legal title. We do not know what the Caimacam knew about the shipment; and, it is plausible that the Caimacan was unaware of the magnitude of the shipment. The Ottoman officials in Athens had no incentive to provide a detailed report of the antiquities in question given their fear that they had gone too far in permitting the removal of the marbles. Adair had no reason to provide the Caimacan with a complete catalogue—assuming he had one—of the antiquities in question. The Caimacan may have had little time for this issue given the truly monumental issues of state with which he was confronted.<sup>74</sup> Yet, St. Clair and Cook assume that the Caimacam knew that the permission sought by Adair to ship antiquities pertained to as many as fifty crates, or roughly one half of Elgin's total collection.<sup>75</sup>

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<sup>74</sup> See generally LORD KINROSS, *THE OTTOMAN CENTURIES: THE RISE AND FALL OF THE TURKISH EMPIRE* (1977); ALAN PALMER, *THE DECLINE AND FALL OF THE OTTOMAN EMPIRE* (1992); ANDREW WHEATCROFT, *THE OTTOMANS: DISSOLVING IMAGES* (1995); STANFORD J. SHAW, *HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY-VOL. I EMPIRE OF THE GAZIS* (1997); STANFORD J. SHAW & EZEL KURAL SHAW, *HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY-VOL. II REFORM, REVOLUTION AND REPUBLIC* (1995); PHILLIP MANSEL, *CONSTANTINOPLE: CITY OF THE WORLD'S DESIRE, 1453-1924* (1995); JOHN FREELY, *ISTANBUL THE IMPERIAL CITY* (1996).

<sup>75</sup> Although a careful analysis of the surviving evidence does not support the claim of retroactive ratification, some may continue to find it difficult to dispel the belief that Elgin must have had some permission to do what he did. That residue of lingering doubt may well emerge from the common sense reaction to the magnitude of the taking and the time it took to complete it. But giving voice to the doubt makes apparent its Achilles' Heel. No one claims that Elgin's men silently walked off undetected with tons of antiquities in the middle of the night. Instead, what is certain is that Elgin obtained legal title to his collection because proper Ottoman officials, fully cognizant of the scale of the undertaking and invested with authority to approve of it, gave Elgin retroactive ratification. Once

## B. *Bribes*

The retroactive ratification contention must confront the meaning of the bribes extended on Elgin's behalf to Ottoman officials in Athens and Constantinople, including Constantinople officials in 1809 and 1810. As St. Clair has written: Adair gave "[p]resents amounting to 1,480 piastres, over £100 . . . to Ottoman officials in addition to a present to the Kaymacam the size of which is not recorded."<sup>76</sup>

Whether the bribes tainted Elgin's entire operation, including the 1810 shipping order, so as to undermine its legitimacy as a vehicle for conveying valid legal title to Elgin is an important question. John Henry Merryman met this issue head on:

The Ottomans who were bribed were the responsible officials. Whatever their motivation may have been, they had the legal authority to perform those actions. At a time and in a culture in which officials routinely had to be bribed to perform their legal duties (as is still true today in much of the world), the fact that bribes occurred was hardly a significant legal consideration.<sup>77</sup>

William St. Clair reached a similar conclusion: "[M]odern experts in international law who have studied the case have usually agreed that Elgin's actions were probably technically lawful in the circumstances of the time . . . ."<sup>78</sup>

For his proposition, St. Clair relies solely upon Merryman, and Merryman<sup>79</sup> offers the following reference for his statement that "the fact that bribes occurred was hardly a significant legal consideration":

The text statement of course refers to the law in force at the time. Recent legal developments would make the use of bribery a more serious issue, at least in the United States. See *Jiminez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962); Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (1982).<sup>80</sup>

As is apparent from Merryman's reference, Merryman offers

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these carefully phrased claims are put into focus and once the evidence supporting them is assessed, it is apparent that the common sense residue one may experience is not a reliable guide to a legal assessment.

<sup>76</sup> ST. CLAIR, *supra* note 7, at 156.

<sup>77</sup> Merryman, *supra* note 15, at 1902.

<sup>78</sup> ST. CLAIR, *supra* note 7, at 157.

<sup>79</sup> St. Clair writes: "See especially the various books and articles by John Henry Merryman noted in the Bibliography." *Id.* at 365 n.18. St. Clair's bibliography includes the article by Merryman, *supra* note 15.

<sup>80</sup> Merryman, *supra* note 15, at 1902 n.75.

no support whatsoever for the conclusion that “the fact that bribes occurred was hardly a significant legal consideration.” As a result, we have a circumstance in which one scholar relies upon another whose references do not support the questionable proposition.

The important, unsupported legal claim asserted by Merryman and St. Clair is also quite limited. Merryman and St. Clair only claim that the bribing of officials within the Ottoman empire to induce them to perform otherwise lawful acts was legally insignificant under Ottoman law. What they seem to mean by this claim is that it was no crime under Ottoman law for a person to bribe an Ottoman official to perform an otherwise lawful act. Note that Merryman and St. Clair do not claim that a bribe to induce an illegal act was legally insignificant. Nor do they seem to claim that the bribing of Ottoman officials to induce an otherwise lawful act was legally insignificant under British law at the time.

Moreover, the claim itself—“the fact that bribes occurred was hardly a significant legal consideration”—is ambiguous, and could mean at least five different things: (1) the person extending a bribe to an Ottoman official to induce the performance of an otherwise lawful act did not violate Ottoman criminal law; (2) the Ottoman official accepting a bribe in his official capacity as an inducement to perform an otherwise lawful act did not violate Ottoman criminal law; (3) for purposes of Ottoman civil law, as opposed to its criminal law, a bribe was legally insignificant in terms of affecting the legality of the transaction or transfer it induced, provided that the bribed Ottoman official had the legal authority to perform the transaction in question; (4) British criminal or civil law considered a bribe offered by a British official or citizen to an Ottoman official that induced a transaction as legally insignificant, even assuming that the bribed official had the legal authority to perform the act in question; or (5) perhaps a combination of all of the above. Instead of parsing out these separate issues and supporting his conclusions with references, Merryman assumes, as does St. Clair, that both Ottoman and British law considered bribery legally insignificant and therefore of no relevance to whether good title was passed in a transfer induced by bribery.

But no matter how one regards the contention that bribery was legally insignificant under Ottoman law, bribery was not legally insignificant under British law during the first part of the nineteenth century.<sup>81</sup> Moreover, Merryman does not claim it was. As noted, Merryman does not directly address the question of how British law would regard a transaction induced by a bribe tendered

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<sup>81</sup> See *bribery*, in 4 *ENCYCLOPEDIA BRITANNICA* 516-17 (11th ed. 1910).

by a British ambassador, assuming that the bribed Ottoman official had the authority to perform the challenged transaction. There is no warrant for this failure. At least from the time of the Magna Carta, bribery had serious consequences in certain circumstances in Britain.<sup>82</sup> Whether a British court in the early 1800s would invalidate a transaction because of a bribe is an important open question that cannot be ignored by those who argue that British law considered a bribe insignificant. After all, even assuming as Merryman does, that the bribed Ottoman officials had the authority to perform the acts in question, that does not mean that the bribed Ottoman officials were compelled under Ottoman law to perform the acts in question. In other words, bribed Ottoman officials may have had discretion to perform the acts or not to perform them, in which case it becomes an essential ingredient to the exercise of discretion that the law did not require be exercised at all, let alone in the manner induced by the bribe. In short, a bribe in these circumstances does not merely grease a wheel that is otherwise turning; it creates the wheel, provides the grease, and commences the spinning. Thus, the idea that British law turned a blind eye towards a British ambassador tendering a bribe to a foreign official so that that official would exercise discretionary authority in favor of the ambassador's private gain is an important and seemingly specious claim. Absent a more careful and thorough presentation of all the relevant evidence, there is no reason to accept the claim that bribery was legally insignificant.

There is yet one more fundamental flaw with Merryman's analysis. Merryman assumes that the Ottomans who were bribed "had the legal authority to perform those actions." Upon close scrutiny, there seems little reason to grant Merryman his assumption. Some of the bribed Ottoman officials were in Athens and, contrary to Merryman's assertion, we know that they did not believe that they had the authority to permit the denuding of the Parthenon. As we have seen, because they accepted bribes and permitted the destruction of the temple, they feared for their lives, a reaction they would not have had if they had had authority to permit the dismantling of the Parthenon. Other bribed officials were in Constantinople, and as to them, except for the Grand Vizier, we do not know (and neither does Merryman) who they were or their positions within the government or the scope of their authority. How one can claim with unqualified certainty, as Merryman does, that these officials had the legal authority to

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<sup>82</sup> *Id.*

permit the stripping of sculptures from the Parthenon walls in the absence of any identifying characteristics is, to put it mildly, a mystery.

As for the Grand Vizier, who next to the Sultan was the most powerful figure within the empire, it is possible that he had, as Merryman wrote, "the legal authority to perform those actions." But even in this case, which one might consider an easy case, there is doubt. The Parthenon and the other classical Greek structures on the Acropolis were respected by the Ottoman officials in Constantinople, and it is possible that within the matrix of the Ottoman government their fate lay solely with the Sultan. That is at least the view of some scholars.<sup>83</sup> If that were the case—and it seems at least as likely to have been the case as not—then the Grand Vizier did not have, as Merryman assumed, "the legal authority to perform those actions." Since Merryman's claim that bribes were legally insignificant is based entirely on his explicit assumption that the bribed officials had the legal authority to permit Elgin to denude the Parthenon, the vitality of Merryman's legal analysis of the significance of the undisputed bribery is totally dissipated with the recognition that the bribed Ottoman officials lacked the authority Merryman assumed they possessed.

#### D. *Ottoman Condemnations*

The lack of evidence supporting the ratification theory is only its most obvious problem. At least twice during the first decade of the nineteenth century, Ottoman officials in Constantinople condemned Elgin's activities on the Acropolis. In 1804 and then again in 1809, Constantinople officials ordered Elgin's workers to cease work and asserted that the work done was done without permission. We know next to nothing about these two incidents. St. Clair reports the 1804 incident in his biography of Elgin,<sup>84</sup> but we lack information about the content of any order that was issued or the identity and the intention of the person issuing it.<sup>85</sup> A few

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<sup>83</sup> See, e.g., MOLLY MACKENZIE, *TURKISH ATHENS: THE FORGOTTEN CENTURIES 1456-1832*, at 28 (1992).

<sup>84</sup> See ST. CLAIR, *supra* note 7, at 136.

<sup>85</sup> Given our almost total ignorance about this incident, St. Clair has no warrant to conclude that the person who issued the order intended to imply that Elgin's prior activities were legal. Oddly, even St. Clair concedes that he does not know the "form" of the Ottoman order and he does not know if the order was issued by Ottoman officials in Athens or Constantinople. He writes: "But, to judge from the form of the ban on removing statues and columns which followed not long afterwards, it may have been a communication from the Ottoman government to the British Ambassador, who then

pages after St. Clair discusses the 1804 rescission, St. Clair writes:

In 1806 forty cases containing many of the best of the Parthenon sculptures as well as the results of all Lusieri's labours in 1804 and 1805 lay at Piraeus, a perpetual invitation to Fauvel [a French archaeologist] and to any other person who thought he could organize the necessary mixture of political influence, local permission, threats, bribes, and shipping. Lusieri dutifully mounted guard over this second Elgin collection.<sup>86</sup>

Apart from the fact that St. Clair is focused in this passage on 1806 and not 1804 and 1805, and apart from the evident concern about a theft by private parties, St. Clair implies that the legal status of the crated marbles was sufficiently in doubt that Lusieri was worried that Ottoman officials might take possession of the crated marbles or grant permission to a third party to take possession of the marbles. Such acknowledged legal ambiguity hardly fits comfortably alongside St. Clair's assertion that the Ottomans gave Elgin legal title to the marbles.<sup>87</sup> The second incident occurred in 1809, when the Ottomans informed the British Ambassador, Robert Adair, that, in the words of St. Clair, "Lord Elgin had never had permission to remove any marbles in the first place."<sup>88</sup> This statement would seem fatal to the general position that the Ottomans legally ratified retroactively Elgin's taking of the sculptures.<sup>89</sup>

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passed it by letter to the British Consul Logotheti." *Id.*

<sup>86</sup> *Id.* at 139.

<sup>87</sup> St. Clair's conclusion that the rescission "threw no doubt on the legality of the removals made previously," *id.* at 136, is made without any factual predicate whatsoever.

<sup>88</sup> *Id.* at 155.

<sup>89</sup> St. Clair brushes aside the Ottoman claim.

But such discussions [referring to Adair's efforts to secure permission from the Ottomans to permit the shipment of marbles, collected by Elgin's agents, which were still in Greece] could always be relied upon to produce surprises. The Turks now declared that Lord Elgin had never had permission to remove any marbles in the first place. The activities of his agents at Athens that had been going on, with interruptions, for over eight years had, they declared, been illegal from the start.

*Id.* at 155. St. Clair's meaning in this passage is not clear. He seems to reject the Ottoman claim that Elgin never had permission to remove the marbles because "discussions" with the Ottomans "could always be relied upon to produce surprises."

What St. Clair means by this statement is uncertain. But the most plausible interpretation is as follows: Because discussions with the Ottomans could "always be relied upon to produce surprises," the Ottomans were being deceitful when they made this charge. But St. Clair offers no examples of other Ottoman "surprises," and he does not allege or prove that Adair was surprised by the Ottoman charge or that Adair believed that the Ottomans made the charge in bad faith. St. Clair also implies that the Ottomans' charge cannot be taken seriously because the Ottomans had notice "for over eight years" that Elgin had been removing the marbles.

This contention obviously rests on the assumption that high Ottoman authorities in

## III. CONCLUDING OBSERVATIONS

Although possession is often nine-tenths of the law, this is one dispute in which more than possession matters. Because the Greek claim for the return of the marbles has broad international support, the European Parliament's being only the latest and most prominent, Britain has never defended its possession of the marbles by claiming it is keeping them merely because it prizes them. Instead, Britain has consistently tried to strengthen its political position by asserting that it has no moral or legal obligation to Greece because the Ottomans gave Elgin permission to take Phidias' masterpieces. As a recent Parliamentary Report has stated, "the Parthenon sculptures were legally and properly acquired."<sup>90</sup>

No one expects Britain to roll over and play dead with the undermining of the moral and legal high ground it has sought to occupy. But correcting historical misconceptions and fallacious legal judgments does strengthen Greece's hand in the debate.

Of course, the conventional wisdom is that Britain will not return the marbles. But few imagined that Britain would surrender India to an old man clothed in a sheet. Currently the pressure on Britain to repatriate Lord Elgin's antiquities collection seems to be increasing, and if the current trend continues, Britain may well return the marbles to Athens. If that occurs, Britain will be acknowledging, whether it wishes to or not, that what was acceptable during the age of empire must give way to the demands of an ever-shrinking world that aspires to the rule of law.

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Constantinople knew in some detail what Elgin's agents did to the Parthenon. Again St. Clair offers no evidence to support his conclusion that the highest officials in Constantinople knew in some detail what Elgin's agents had done. Thus, he presents no communications from Ottoman officials in Constantinople indicating that the Constantinople officials were aware that Elgin had removed the metopes, friezes, and statuary. He offers no references to any written minutes or written summaries of meetings among high Ottoman officials in Constantinople indicating that they had specific and concrete knowledge of what Elgin's agents had done. He fails to refer to any evidence that the Ottoman officials in Athens ever reported on the work of Elgin's agents to the Ottoman officials in Constantinople.

<sup>90</sup> Parliamentary Report, Commons (June 1, 1998), *quoted in* DESTINY OF PARTHENON MARBLES, *supra* note 13, at 32.



