

Antique Tribal Art Dealers Association,<sup>1</sup> John Molloy, President  
Written Testimony submitted to U.S. Senate Committee on Indian Affairs, on the  
Safeguard Tribal Objects of Patrimony Act of 2016 (STOP Act), S. 3127/H. 5854.  
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**The Safeguard Tribal Objects of Patrimony Act of 2016 is unlikely to achieve its primary goal, the return of important cultural objects to Native American tribes and Native Hawaiian organizations. If enacted, the STOP Act would instead create dangerous legal uncertainties for private owners of a wide range of American Indian art and artifacts, violate the 5<sup>th</sup> Amendment due process clause of the U.S. Constitution, generate consumer confusion that would damage legitimate art dealers and tribal artisans, and create a bureaucratic nightmare for the tribes.**

**Summary**

It is the position of the tribes that they, and no one else, should determine which cultural objects are inalienable from their communities. This is a legitimate position, and intrinsic to tribal sovereignty. At the same time, many tribes believe strongly that photographs, identifying characteristics, and descriptions of ceremonial objects cannot be disclosed to persons who do not have the right and authority to know about such sacred matters, not even to all tribal members. Therefore, tribes refuse to make information public that would enable an outsider or unauthorized person to know whether he or she possesses a ceremonial object considered inalienable to the tribe.

It is also the tribes' position that although non-tribal members may have some knowledge of Indian culture, that knowledge is not complete. So, while certain examples of cultural objects such as masks may be generally acknowledged as ceremonial items, others are not. Some objects deemed ceremonial to a tribe are very similar to non-ceremonial objects, and may include commonly traded objects such as ceramics. Knowledge regarding these items is also considered inappropriate to make public.

Tribal secrecy may be well-justified as necessary for the health and well-being of the tribe. However, the lack of specific, public information about what makes a cultural object inalienable – when it may have entered the stream of commerce decades or even a hundred years before - is a legal barrier to the exercise of due process and to the return of many sacred objects.

This information gap would certainly be an issue in the enforcement of the STOP Act, if it is enacted. The U.S. legal system is premised on the idea that a citizen must have fair notice of our laws. As our Supreme Court has stated, "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."<sup>2</sup>

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<sup>1</sup> The Antique Tribal Art Dealers Association, ATADA, is a professional organization established in 1988 in order to set ethical and professional standards for the art trade and to provide education for the public. ATADA membership has grown to include hundreds of antique and contemporary Native American and ethnographic art dealers and collectors, art appraisers, and a strong representation of museums and public charities across the U.S., dedicated to the promotion, study and exhibition of Native American history and culture. [www.atada.org](http://www.atada.org). email [director@atada.org](mailto:director@atada.org), PO Box 45628, Rio Rancho, NM 87174.

<sup>2</sup> *Connally v. General Constr. Co.*, 269 U. S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

The items that tribes most urgently seek to repatriate from non-tribal possessors are ceremonial objects and objects of cultural patrimony that tribes claim as inalienable tribal property<sup>3</sup>. These objects are claimed regardless of the geographic and time limitations and grandfathering-in of older, non-tribal private collections under the 1979 Archeological Resources Protection Act (ARPA),<sup>4</sup> and the 1990 Native American Graves Protection and Repatriation Act (NAGPRA)<sup>5</sup>. Sacred items are also precisely the objects that many tribes say it is impossible to identify or discuss according to established tribal customary law. Therefore, notice of what items are claimed by the tribes cannot be given to non-tribal owners. The lack of fair warning means that a criminal prosecution or forfeiture of property would be based upon information that cannot be disclosed, which would be a clear violation of due process of law. The STOP Act therefore cannot legally achieve its primary goal of returning to the tribes the items they most seek.

While a failure to provide for due process, which is discussed in greater detail below, is a fatal flaw, the STOP Act has other serious weaknesses. The STOP Act is unnecessary because export for sale of unlawfully acquired artifacts is already illegal; ARPA specifically penalizes trafficking in unlawfully acquired objects in interstate and foreign commerce<sup>6</sup> and NAGPRA has criminal penalties for unlawful transportation and sale<sup>7</sup> and enables civil claims for sacred and communally owned artifacts.

The STOP Act creates no framework for administration or enforcement of tribal claims. It does not provide for management of cultural objects, or have a permitting system for objects deemed lawful to export, or provide funding. It does not provide a standard for identification of items of cultural patrimony – for example, a list or database of ceremonial items. It does not set forth standards of evidence for tribal claimants or means of appeal for the owners of disputed objects.

The STOP Act is grossly overbroad as a result of adopting multiple definitions of a “cultural object” from other laws that serve completely different purposes. As discussed below in greater detail, the STOP Act defines a “cultural object” by combining definitions from three existing U.S. statutes: ARPA, NAGPRA, and 18 USC § 1866(b). The definition of a “cultural object” under these statutes include a wide variety of non-ceremonial objects that tribes have not expressed any interest in repatriating.

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<sup>3</sup> Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013, Nov. 16, 1990, §3001(3)(c-d).

<sup>4</sup> Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-mm; Congressional findings and declaration of purpose, § 470aa(b), “(b) The purpose of this chapter is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before October 31, 1979,” and 16 U.S.C. § 470ee, Prohibited acts and criminal penalties. Prospective application. “(f) Nothing in subsection (b)(1) of this section shall be deemed applicable to any person with respect to an archaeological resource which was in the lawful possession of such person prior to the date of the enactment of this Act.”

<sup>5</sup> Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 and 18 U.S.C. § 1170, Nov. 16, 1990.

<sup>6</sup> 16 U.S.C. § 470ee, Prohibited acts and criminal penalties. Trafficking in interstate or foreign commerce in archaeological resources the excavation, removal, sale, purchase, exchange, transportation or receipt of which was wrongful under State or local law, “(c) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.”

<sup>7</sup> 18 U.S.C. § 1170.

For example, under NAGPRA, human remains and sacred items are cultural items that the tribes feel are essential for repatriation. However, some museums routinely deem very common objects that are widely traded without objection from tribes to be “unassociated funerary objects” under NAGPRA<sup>8</sup>. Under ARPA, virtually everything made by humans over 100 years old is covered by the term “archaeological resource”<sup>9</sup>, but only the age and original location of an object makes it lawful or unlawful to own. Sacred associations are irrelevant. Claims under ARPA would be especially difficult to succeed in, since the original location of the majority of cultural objects in circulation is unknown. These multiple definitions expand the STOP Act’s reach far beyond the ceremonial objects whose return is important to the tribes.

A grant of short term immunity to anyone who “repatriates” an unlawfully obtained cultural object to the “appropriate” Indian tribe or Native Hawaiian organization, is one of the most insidious elements of the STOP Act. Since the original provenance of most cultural items is unknown, the non-tribal owner is stuck between a rock and a hard place. He can “repatriate” what might be a lawful object, losing his investment and taking the chance that he has given it to the right tribe, or he can hold on to it, possibly risking a later arrest or claim from a tribe. The unavoidable uncertainty about the status of artifacts, not knowledge of unlawful origins, is what most worries collectors and the art trade.

The STOP Act not only threatens art dealers and collectors with prosecution without having had notice of wrongdoing – the legal uncertainty surrounding Native American cultural objects is likely to cause serious economic damage. It will taint both the antique and contemporary Indian art markets, which are major contributors to local economies and irreplaceable sources of income to tribal artisans, particularly in the American West. The total Indian art trade is estimated to be valued between \$400-800 million a year. The annual Santa Fe Indian Art Market brings over 170,000 tourists to New Mexico a year. The city of Santa Fe estimates that the market brings in 120 million each year in hotel and restaurant revenue alone. Native artisans, many of whom rely on the Indian Art Market for as much as half their yearly income, are also concerned that such a vague law will “taint” the entire American Indian art market in the eyes of the public.

### **Background on the distribution and circulation of Native American artifacts.**

There are millions of Native American “cultural objects” in private ownership today; many have no ownership history, or “provenance.” Many objects have circulated for decades in the marketplace, or even for the last 140 years. For most of the 140 years in which there has been an active trade in Indian artifacts, provenance and ownership history had no legal or practical effect on the market. In the last 25 years, awareness of tribal concerns and the harmful destruction of archaeological sites has changed everything. Today, a “good” provenance can make the difference between a valuable object and one of little worth, or that cannot be sold at all.

The best records of early collections of Native American cultural objects are from museum sources. Harvard's Peabody Museum expeditions included the Hemenway Southwestern Archaeological Expedition (1886-1894), which brought thousands of Zuni and Hopi artifacts from Arizona and New Mexico. In 1892, the leader of

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<sup>8</sup> See, for example, the 2007 NAGPRA repatriation of 10,857 cultural items in the control of the Burke Museum: Federal Register: May 24, 2007, Volume 72, Number 100, Notices, Page 29174-29177, From the Federal Register Online via GPO Access, [wais.access.gpo.gov](http://wais.access.gpo.gov), DOCID:fr24my07-88.

<sup>9</sup> 16 U.S.C. 470bb(1).

the Hemenway Expedition paid the trader Thomas Keam \$10,000 for a huge collection that included over 3000 ceramics.<sup>10</sup> The materials in the collection were either bought by Keam and his assistant Alexander Stephen from Hopi or found in explorations of abandoned Hopi towns. Smaller, but still very substantial collections were also made by Keam for the Berlin Ethnological Museum, The Field Museum in Chicago, and the National Museum of Finland. Keam also sold widely from his trading post to collectors and tourists from across the United States.<sup>11</sup> The materials collected by Keam and sold to the Peabody Museum were sourced from "throughout Arizona, the San Juan region of the southern confines of Colorado and Utah. They were exhumed from burial places, sacrificial caverns, ruins and from sand dunes in the localities of ancient gardens."<sup>12</sup> During the same years and throughout the early 20<sup>th</sup> century, private collectors purchased from the same sources that supplied museum collectors.

Thus, tens of thousands of cultural objects entered the stream of commerce decades before the first U.S. cultural property legislation was enacted, the American Antiquities Act of 1906 (Antiquities Act).<sup>13</sup> Experts such as the Reverend Dr. Henry Baum testified regarding the enormous numbers of artifacts that had entered the market at Congressional hearings on the Antiquities Act.<sup>14</sup> Department Archeologist and Superintendent of Mesa Verde National Park Jesse L. Nusbaum, writing in 1929, called the 1880s and 1890s "the heyday of the commercial pothunter."<sup>15</sup>

Artifacts without provenience were dug up and sold to good faith purchasers long after enactment of the Antiquities Act in 1906. Superintendent Nusbaum reported when seeking funding for putting signs prohibiting looting on ancient ruins, a task barely begun in 1929:

*"I may add, the majority of tourists are potential pothunters... The few scattered settlers of that period are replaced by the thousands of motorists and visitors today, many of whom are potential pothunters... Several years ago... warning signs were posted on and in the vicinity of some of the more important ruins... To the average visitor, only ruins so posted are the property of the United States and protected by the act of June 8, 1906..."*<sup>16</sup>

Regrettably, the U.S. government is directly responsible for the loss of numerous sacred and ceremonial objects to the tribes. In 1883, Secretary of the Interior Henry Teller issued rules establishing Courts of Indian Offenses that prohibited Native American ceremonial activity under pain of imprisonment. Teller ordered Indian agents to

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<sup>10</sup> Edwin Wade et al., *America's Great Lost Expedition: The Thomas Keam Collection of Hopi Pottery from the Second Hemenway Expedition, 1890-1894*, p 9, Harvard, Cambridge (1980) (See also pages 18, 25, 26, 39) and Edwin Wade et al., *Historic Hopi Ceramics*, 84 Harvard, Cambridge (1981).

<sup>11</sup> Edwin Wade et al., *America's Great Lost Expedition: The Thomas Keam Collection of Hopi Pottery from the Second Hemenway Expedition, 1890-1894*, p 2, Harvard, Cambridge (1980).

<sup>12</sup> Id. at 15.

<sup>13</sup> American Antiquities Act of 1906, 16 U.S.C. §§431-433, 34 Stat. L. 225. The Antiquities Act of 1906 was held to be unconstitutionally vague and legally unenforceable in the Ninth Circuit, which includes Arizona, where Navajo, Hopi and Zuni lands are located. *U.S. v. Diaz*, 499 F.2d 113, 114 (9<sup>th</sup> Cir. 1974). The *Diaz* decision, coupled with a rise in illicit excavations on public and Indian lands in the 1970s, prompted new legislation to protect archaeological resources, ARPA. H.R. REP. 96-311, \*8, 1979 U.S.C.C.A.N. 1709, \*\*1710.

<sup>14</sup> Hearing of the Subcommittee of the Committee on Public Lands of the United States Senate, 58th Cong., 2d Sess., 14 (1904), testimony of Reverend Dr. Henry Baum.

<sup>15</sup> Annual Report of Jesse L. Nusbaum, Department Archeologist and Superintendent of Mesa Verde National Park, to the Secretary of the Interior for Fiscal Year Ended June 30, 1929 6-7.

<sup>16</sup> Id. at V, 6-7.

compel medicine men to discontinue their practices and prohibited anyone less than 50 years old from being present at feasts and dances. Missionaries also encouraged the destruction of paraphernalia used in tribal religious celebrations. At various times in the early 20<sup>th</sup> C, Native Christian groups encouraged people to destroy relics. It was only in 1978 that the American Indian Religious Freedom Act gave native religions the same rights given to others in the U.S.

Today, the sources of cultural objects in the market and in private collections vary greatly. While many objects were taken from tribes by the U.S. government, or sold after individuals adopted Christianity, others were sold in the 1960s-1980s, when Indian ceremonial objects were avidly collected by non-Indians who admired Native American social and environmental perspectives, or who responded to the aesthetic and creative qualities of Indian objects. Indian artifacts were sold (with or without permission of the community) because of the increasing economic values of tribal artifacts and the comparative poverty of many tribal communities.

In the last twenty or thirty years, attitudes have changed very much among art collectors, museums, and the general public. There is increased respect for both the sovereign rights of tribal communities and the importance of retaining sacred objects for the health of these communities. Most recently, there is a commitment on the part of art dealers and organizations such as ATADA, the Antique Tribal Art Dealers Association, to work directly with tribal representatives to find solutions that truly serve Native American interests.

### **Congress Intended Private Collections to Remain a Resource for Preservation and Study of Native American Culture**

Art traders and the collecting community have been accused in the media of exploiting Indian culture, especially in light of recent Paris auction sales that were deeply offensive to tribal communities. But it should be remembered that the vast majority of the trade in Indian artifacts is completely legal, and that Congress deliberately excluded pre-existing privately held collections of artifacts from ARPA's prohibition on trafficking, in part because they formed a valuable resource for academic study. ARPA's Findings and Purpose states:

*“The purpose of this chapter is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before October 31, 1979.”<sup>17</sup>*

ARPA's legislative history reinforces this policy:

*“The Committee is concerned that greater efforts must be undertaken by the Secretary and professional archaeologists to involve to the fullest extent possible non-professional individuals with existing collections or with an interest in archaeology. The potential benefit of this increased cooperation is*

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<sup>17</sup> 16 U.S.C. § 470aa(b).

*enormous; there is a wealth of archaeological information in the hands of private individuals that could greatly expand the archaeological data base on this country.”*<sup>18</sup>

Only objects excavated subsequent to 1979 or unlawfully possessed prior to 1979 are impacted by ARPA. Congress expressly intended private collections to serve as open resources: *"Nothing in subsection (b)(1) of this section shall be deemed applicable to any person with respect to an archaeological resource which was in the lawful possession of such person prior to October 31, 1979."*<sup>19</sup>

### **Definitions of Cultural Objects Under the STOP Act Are Too Broad and Do Not Prioritize the Cultural Objects Most Desired by the Tribes**

The STOP Act penalizes export of any Native American cultural object obtained in violation of NAGPRA, 18 USC 1170, ARPA, or 18 USC 1866(b).

The STOP Act defines a cultural object as fitting one of three categories:

- (1) “cultural items as described in NAGPRA, 25 USC 3001”<sup>20</sup>
- (2) An “archeological resource as defined under section 3 of ARPA, 470bb(1)”<sup>21</sup>
- (3) And an “object of antiquity protected under section 1866(b).”<sup>22</sup>

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<sup>18</sup> H.R. REP. 96-311, \*12, 1979 US.CC.A.N. 1709, \*\*1714

<sup>19</sup> 16 U.S.C. § 470ee(f).

<sup>20</sup> “cultural items” means human remains and— (A) “associated funerary objects” which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects. (B) “unassociated funerary objects” which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe, (C) “sacred objects” which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and (D) “cultural patrimony” which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group. 25 USC 3001(3)(3).

<sup>21</sup> “(1) The term “archaeological resource” means any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.” 16 U.S.C. §§ 470aa-mm, section 470bb(1).

<sup>22</sup> “(b) ...any historic or prehistoric ruin or monument or any other object of antiquity that is situated on land owned or controlled by the Federal Government without the permission of the head of the Federal agency having jurisdiction over the land on which the object is situated...” 18 U.S.C. 1866(b).

The combined definitions under these statutes encompass virtually every object made by human hands. Since the vast majority of Native American cultural objects have little or no ownership history, there is enormous potential for confusion about what is lawful and what is unlawful to own, trade, or export.

Some supporters of the STOP Act have said that only “serious” violations of the law would actually be prosecuted and this broader category of objects would not be affected. However, as Scalia and Garner have explained, “Ordinarily, judges apply text-specific definitions with rigor.”<sup>23</sup> It is not a valid defense of flawed legislation to say, as some supporters of the Act have, that a law will only be selectively enforced.

There is no denying the fact that the STOP Act requires repatriation to federally recognized tribes of a vast number of cultural objects that the tribes don’t appear to want back in the first place. Tribal members have stated in public fora that their tribes want a much smaller and more limited number of items back.<sup>24</sup> A number of tribal representatives have also stated that only the tribes can determine whether an object is ceremonial.<sup>25</sup> If more limited repatriation of essential objects, based upon tribal criteria alone, is what the tribes want, then the only proper legislation is legislation that supports those goals – not the STOP Act.

#### **NAGPRA Does Not Provide Adequate Guidance to Determine Status of an Artifact**

The tribes’ experience with NAGPRA illustrates the poor results that follow on inconsistent definitions and standards. Twenty-six years after its enactment, there are still no standard criteria under NAGPRA among museums that could provide guidance to the public about what should be repatriated. Even more importantly, museums and tribes often do not agree on which items in museum collections are subject to repatriation to tribes under NAGPRA. After 26 years, there is no publicly accessible list of items in the category of ceremonial objects under NAGPRA for each of the 567 federally recognized tribes to provide private citizens with guidance regarding which cultural objects are subject to claims for repatriation.

Only about one-third of human remains in U.S. museums, which are unquestionably subject to repatriation, have been repatriated to tribes. An even higher percentage of objects of material culture, whether for ceremonial or for ordinary usage, remains in museum collections and has not yet been cataloged for purposes of NAGPRA. Although many museums have worked diligently to set standards for repatriation – and although museums have significant institutional, academic and scientific resources, there is still not agreement even among museums regarding the types of objects subject to repatriation claims under NAGPRA.

Federal agencies have not begun to investigate the number of human remains or cultural objects that were exported from the U.S. with permits issued under the American Antiquities Act, but whose permits

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<sup>23</sup> Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* § 36 at 225-233, (Thompson/West 2012).

<sup>24</sup> This point was made by Acoma Pueblo’s Jonathan Sims and Navajo Cultural Specialist Timothy Begay, speaking at the panel, *Private Auction Houses & Repatriation*, at the Indigenous International Repatriation Conference: *Shifting the Burden* held at Isleta Pueblo, September 26-27, 2016, under the auspices of the Association on American Indian Affairs (AAIA).

<sup>25</sup> *Id.*

enabled the U.S. to request their return.<sup>26</sup> Yet if the STOP act is enacted, the federal government will expect U.S. citizens, who rarely have any records pertaining to cultural objects in their private collections (and which almost never contain human remains, as do museum collections), to independently determine what should be returned to tribal communities. If federal agencies have not started a process for repatriation based upon existing, written agreements with foreign institutions, why should private citizens be obligated to an even higher standard regarding cultural objects without known provenance?

### **Tribes May be the Best Judges, But in Many Cases, Tribes Are Not Willing to Make Public Their Criteria for Identifying Sacred or Ceremonial Objects**

One response to questions about the process for the public to determine what objects would be subject to repatriation has been that it would be best to “ask the tribes,” and the “tribes intend to set up a hotline.”<sup>27</sup> On its surface, this seems a direct and reasonable proposal. However, when one remembers that there are hundreds of thousands of Native American objects in private circulation at any one time, and there are 567 federally recognized tribes, then such a solution has obvious flaws. Who is the average American going to call?

Although a few (mostly northeastern U.S.) tribes have created lists of items that they wish repatriated, most feel it is not appropriate to do so. Many southwestern U.S. tribes, including the Acoma, Laguna, Hopi, and Navajo, have stated that they will not reveal such information: the only persons who are permitted to have such knowledge are those within the tribal community with specific religious authority to possess it. It is their right and their choice to withhold information that is not proper to share with outsiders. It is improper, however, for Congress to give the tribes (or anyone else) a pass on the fair notice that due process requires. The drafters of the STOP Act should have realized that delegating authority to the tribes would require not just due process, but also transparency or “sunshine” requirements under federal law.

Further, the STOP Act covers far more than ceremonial objects. Tribal decision-makers are no better able than a private citizen is to determine whether or not an item without provenance came from federal or Indian lands, or when, over the last 140 years, it was removed. The STOP Act does not address how tribes and federal agencies would split the authority to deal with objects deemed unlawful to export under ARPA’s time-and-place based criteria.

### **A 2-Year Grant of Immunity from Prosecution Will Frighten Collectors, Harm Museums and Substantially Burden the Tribes, Without Bringing Important Objects Home**

“The STOP Act’s 2-year “amnesty” window for the return of “unlawful” tribal cultural objects by private collectors implies that possession of all cultural objects is unlawful. Its effect is coercive and threatening. The STOP Act’s immunity from prosecution provision could easily result in consumer confusion and cause unwarranted returns of thousands of lawfully owned objects to tribes which do not want them.

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<sup>26</sup> Melanie O’Brien, Program Manager, National NAGPRA Program, U.S. National Park Service, personal communication and at the panel, *Federal Tools in International Repatriation*, at the Indigenous International Repatriation Conference, Isleta Pueblo, September 27, 2016.

<sup>27</sup> Ann Rogers, Esq., made this suggestion when speaking at CLE International Visual Arts & the Law Conference, Santa Fe, NM, July 28-29, 2016.



Collectors may be pressured to give up objects simply out of an abundance of caution. Alternatively, the STOP Act's lack of clear criteria or of any process for repatriation could result in virtually no returns at all.

Regardless of the practical effect, by directing current owners to repatriate "all of the Native American cultural objects (as defined in section 1171(a)) in the possession of the person" to "the appropriate Indian tribe or Native Hawaiian organization," the STOP Act clearly makes Native tribes and organizations the arbiters of what is lawful or unlawful and which tribe is an "appropriate tribe" to return objects to. This would impermissibly subject non-tribal U.S. citizens to tribal jurisdiction and grant extra-territorial authority over U.S. citizens to the tribes.

By broadly including the definitions of cultural objects under ARPA and NAGPRA within the STOP Act, by imposing implicit obligations on the public as well as museums to return cultural objects, and by failing to establish basic evidentiary standards for claimant tribes, the STOP Act sweeps away constitutional and legislative protections for grandfathered objects under ARPA and NAGPRA, and departs from Congress' intent to preserve scientific and academic access for the public benefit through private collections of Native American cultural objects.

The STOP appears to require a *de facto* reversal of the burden of proof from the government to a private owner to show that an object is lawfully held, exported or otherwise transferred. A private owner generally does not know when and where an object was originally acquired, does not have tribally-held secret knowledge regarding the ceremonial character of an object, and cannot reasonably be expected in many cases, even to know which tribe is the "proper" tribe to return it to.

An allegation by the government that an owner failed to timely repatriate a cultural object to the proper tribe would impermissibly shift the burden of proof to a defendant's detriment and sanction a *per se* violation of his or her due process rights.

### **The Stop Act Would Violate the Fifth Amendment Due Process Clause of the U.S. Constitution**

Under the circumstances described above, one can only conclude that S. 3127/H. 5854 could not be implemented without raising legal challenges for denial of due process to U.S. citizens in possession of cultural objects potentially subject to forfeiture. Due process requires fair notice of conduct that is forbidden or required. If a non-tribal U.S. citizen owner of a cultural objects has no notice that a particular object is claimed, then due process is not met. If a cultural object is claimed as an inalienable object by a tribe that deliberately withholds information on how sacred objects can be identified, then due process is not met.<sup>28</sup>

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<sup>28</sup> In *U.S. v. Tidwell*, 191 F.3d 976 (9th Cir. 1999), the Ninth Circuit Court of Appeals held that NAGPRA was not unconstitutionally vague in defining "cultural patrimony" which may not be stolen and traded, and that a knowledgeable dealer in the specific circumstances of that case had adequate notice of its prohibitions. However, the range of objects claimed as ceremonial now claimed by certain tribes is unprecedented, and a dealer could not be expected to have knowledge as to which objects acquired prior to passage of NAGPRA could be deemed inalienable, much less a private owner. "The court [in *U.S. v. Corrow*, 119 F.3d 796, (10th Cir. 1997)] acknowledged conflicting opinions, between orthodox and moderate Navajo religious views, regarding the alienability of these particular adornments." "Validity, Construction, and Applicability of Native American Graves Protection and Repatriation Act (25 U.S.C.A. §§ 3001–3013 and 18 U.S.C.A. § 1170)"

The U.S. Supreme Court held in *Federal Communications Comm'n v. Fox Television Stations, Inc.*,<sup>29</sup> that due process requires “fair notice” of applicable regulations. In so doing, the Court observed, “A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” The Supreme Court held in *Papachristou v. Jacksonville*, “Living under a rule of law entails various suppositions, one of which is that “[all persons] are entitled to be informed as to what the State commands or forbids.”<sup>30</sup>

This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.<sup>31</sup> It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”<sup>32</sup> As the Supreme Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved.<sup>33</sup>

The void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.<sup>34</sup>

This requirement for fair notice is deeply embedded in the history of the common law, a fine and early example being Blackstone’s criticism of Caligula “who (according to Dio Cassius) wrote his laws in a very small character, and hung them up on high pillars, the more effectively to ensnare the people.”<sup>35</sup> The STOP Act unquestionably falls short of the mandate for fair notice and clarity in the law.

Before cultural objects may be forfeited, whether under the STOP Act or other U.S. domestic cultural property legislation, the government must show that fair notice was given and the requirements of due process were met. This simply may not be possible, given the lack of criteria for determining the ceremonial nature of an object belonging to any one of 567 federally recognized tribes and absence of provenance for almost all Native American cultural objects in circulation.

It has been suggested that a 30-day Customs hold be placed on Native American Ancestors and cultural

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Deborah F. Buckman, J.D., 173 A.L.R. Fed. 765 (originally published 2001).

<sup>29</sup> *Federal Communications Comm'n v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2012 U.S. LEXIS 4661 (June 21, 2012). In that case, the Supreme Court held that because the FCC failed to give Fox Television Stations or ABC, Inc. fair notice that fleeting expletives and momentary nudity could be found to be actionably indecent, the FCC’s standards as applied to these broadcasts were vague.

<sup>30</sup> *Papachristou v. Jacksonville*, 405 U. S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 453 S. Ct. 618, 83 L. Ed. 888 (1939)).

<sup>31</sup> See *United States v. Williams*, 553 U. S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).

<sup>32</sup> *Ibid.*

<sup>33</sup> See *id.*, at 306, 128 S. Ct. 1830, 170 L. Ed. 2d 650.

<sup>34</sup> See *Grayned v. City of Rockford*, 408 U. S. 104, 108-109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

<sup>35</sup> Quoted in *United States v. Burgess*, 1987 U.S. Dist. LEXIS 11227 (N.D. Ill. Dec. 1, 1987)

items prior to export.<sup>36</sup> Such a proposal raises, with respect to “cultural objects” the same issues of fair notice and due process.

Before objects may be forfeited, the government must establish that they are:

- (1) types of objects designated as inalienable ceremonial cultural objects subject to export restrictions, or
- (2) unlawfully removed federal or Indian lands after NAGPRA or ARPA went into force.

Again, the public’s inability to access information on what exactly constitutes a cultural object would cause the STOP Act to fail. Due process would be offended because an exporter could not be given fair notice of the conduct that is forbidden or required before his property could be seized and be subject to forfeiture.

### **Evidentiary Issues**

Evidentiary issues inevitably arise when key information about what makes a ceremonial object inalienable is deliberately withheld. In order to prevail in a prosecution, the government must establish some nexus between the property to be forfeited and the forbidden activity defined by the statute.<sup>37</sup> For example, it would be expected that the government would use expert testimony to identify the original site of an unprovenanced object on federal or Indian land, or the approximate date in which it was removed.<sup>38</sup>

Similarly, in a prosecution for failure to timely repatriate a sacred or ceremonial object, the government would be required to provide expert testimony to establish that an object was sacred or ceremonial in nature – but many tribes insist that this knowledge remain secret. In any trial resulting from the STOP Act, the fact that certain tribes decline to share information on ceremonial and inalienable objects would result in the government’s inability to provide fact witnesses who could clearly explain the rationale for the detention and seizure of private property, which would be fatal to the government’s case.

Tribes have stated that only they have the true knowledge regarding ceremonial objects. Nonetheless, the Federal Rule of Evidence 702 governs the issue of the standards for admission of expert testimony for every federal trial.<sup>39</sup> The proponent must establish the admissibility of testimony by a preponderance of the evidence standard. The Judge, acting as gatekeeper, must keep in mind two overarching but competing goals.<sup>40</sup> “First, Rule 702 was intended to liberalize the introduction of relevant expert testimony and thus encourages courts to rely on vigorous cross-examination and contrary evidence to

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<sup>36</sup> Written Testimony submitted on October 18, 2016 to the U.S. Senate Committee on Indian Affairs by Ms. Honor Keeler, Director of the International Repatriation Project of the Association on American Indian Affairs.

<sup>37</sup> *United States v. \$506,231 in United States Currency*, 125 F.3d 442, 451-52 (7th Cir. 1997).

<sup>38</sup> See *United States v. 328 “Quintales” of Green Coffee Beans*, 21 F. Supp. 3d 122, 129 (D. P.R. 2013) (government’s and claimant’s experts contest origin of coffee beans); *United States v. One Tyrannosaurs Bataar Skeleton*, 2012 U.S. Dist. LEXIS 165153\*4 (S.D.N.Y. November 14, 2012) (government uses expert testimony to establish that Bataar skeleton almost certainly came from the Nemegt Formation in Mongolia and was most likely excavated between 1995 and 2005); *Three Burmese Statues*, 2008 U.S. Dist. LEXIS 48474\*7 (government’s experts identify statues as Burmese); *United States v. Eighteenth Century Peruvian Oil on Canvass*, 597 F. Supp. 2d 618, 623 (E.D. Va. 2009) (CPIA case; government experts state painting originated in Peru).

<sup>39</sup> *Foster v. Legal Sea Foods, Inc.*, 2008 U.S. Dist. LEXIS 57117\*25-28, at 25(D. Md. 2008) (Blake, J.).

<sup>40</sup> *Id.*

counterbalance expert opinions of uncertain veracity... Simultaneously, however, a trial court must mind the high potential for expert opinions to mislead, rather than enlighten, the jury.” “Qualified” experts “must have ‘knowledge, skill experience, training or education’ in the subject area...”<sup>41</sup> Even where an expert is qualified, however, his underlying methodology must also satisfy Rule 702, i.e. that methodology must satisfy a two prong test for (1) reliability and (2) relevance.<sup>42</sup> Certainly, tribes could provide knowledgeable experts, but expert testimony would be subject to challenge and cross-examination that might reveal information tribes are unwilling to make public.

### **French law**

Finally, there is a serious weakness in the STOP Act supporters’ arguments that a U.S. law prohibiting export would not only be recognized in France, but would require French authorities to halt auctions and return items to the U.S. and to the tribes. France is a signatory of the 1970 UNESCO Convention,<sup>43</sup> but France’s ratification of UNESCO 1970 has not prevented it from being a major market center in Europe for ancient, antique, ethnographic and tribal art.

To provide a single example, the most important ethnographic and tribal art fair in the world, the *Parcours des Mondes*,<sup>44</sup> is held every year in September, in St. Germain des Pres, Paris. This year, eighty art dealers came to the fair from around the world, and artworks from Africa, Oceania, Asia, and South and “Indigenous America” were displayed. The catalog of exhibitors showed, among many other objects from countries with laws prohibiting export, pre-Columbian works from Mexico, an Amazonian shrunken head, and a wide variety of African and Southeast Asian sculptures. No art dealers were stopped at the border, and no one’s art was detained or forfeited.

The existence or lack of an “export law” is not the issue; it is a filing of an actual claim of theft. The key event which resulted in the withdrawal of the disputed Acoma shield from auction in Paris took place in New Mexico. An affidavit was filed in federal district court by a family member who identified the shield as having been stolen from the family home many years before. This specific claim of ownership made all the difference in France, and is likely to result in the object’s return.

It is hoped that tribes will take steps to strengthen their hand in future claims. Tribes are presently considering enacting internal tribal legislation that establishes title to cultural objects under codified tribal law, and delegating authority to tribal authorities to make claims as they feel it is appropriate. Some form of internal documentation that tribes consider suitable for themselves would likely be more effective than any “export law,” since France and several other European countries have not yet implemented international treaties such as UNESCO into practice, even after several decades.

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<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> France ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property on January 7, 1997.

<sup>44</sup> <http://www.parcours-des-mondes.com/index.php?lang=en>

## Recommendations for future action

1. **The U.S. government should clean its own house prior to placing unreasonable burdens on private citizens.** The U.S. government should locate and seek repatriation of cultural objects under permitting agreements with foreign museums executed after the 1906 Antiquities Act.<sup>45</sup>
2. **A thorough and accurate study of the Indian art market should be undertaken in order to define the scope and scale of problems any proposed law is to address.** Despite public statements by some supporters of the STOP Act that important tribal cultural objects are currently at risk of looting and that significant traffic in stolen objects continues, this is emphatically not the experience of contemporary traders in Native American art. On the contrary, most art dealers and collectors are better educated about and far more sensitive to tribal concerns than ever before.
3. **Due process should be assured - not obscured** - by clearly setting forth the regulatory process and administrative structure for implementation of any proposed law. Any law must have provisions for fair notice that adequately inform the American public of what constitutes a violation of law, and what steps must be taken to stay within the law.
4. **The costs to the American taxpayer, to local governments, and to tribes should be clearly identified,** with respect to loss of tax and tourism revenue and the costs of regulatory systems and activities before considering passage of the STOP Act.
5. **There must be good faith, effective consultation with all federally recognized tribes,** since all are covered by the proposed legislation, to ensure that legislation accurately reflects the goals of the tribes and honors tribal sovereignty.
6. **There must be adequate funding** to establish and sustain the administrative structure envisioned by any proposed legislation.

ATADA believes it is crucial to honor Native American traditions, to ensure the health and vitality of tribal communities, and to respect the tribes' sovereign rights. We also believe it is important to preserve the due process rights of U.S. citizens and to promote the trade in Native American arts that sustains many tribal and non-tribal communities in the American West. The STOP Act is an ill-conceived law that will achieve neither goal.

ATADA is working diligently to meet with tribal officials and to work directly together to craft more realistic and effective solutions that bring us together in mutual respect and understanding. We are committed to learning from the tribes and pursuing a path that meets their primary goal of repatriation of key ceremonial objects as well as maintaining a legitimate trade, academic access, and preservation of the tangible history of the First Americans.

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<sup>45</sup> Some permitting agreements under the 1906 Antiquities Act with foreign museums and institutions vested permanent ownership in cultural objects in the U.S., and returns of cultural objects could be demanded, but has not yet been sought, according to a presentation by Melanie O'Brien, Program Manager, National NAGPRA Program, U.S. National Park Service, at the panel, *Federal Tools in International Repatriation*, Indigenous International Repatriation Conference, Isleta Pueblo, September 26-27, 2016.