



ASSOCIATION ON AMERICAN INDIAN AFFAIRS

Protecting Sovereignty • Preserving Culture
Educating Youth • Building Capacity
SINCE 1922

April 22, 2021

Letter in Support for the Safeguard Tribal Objects of Patrimony (STOP) Act

Dear Senators and Representatives,

On behalf of the Association on American Indian Affairs, I write to express our support for the Safeguard Tribal Objects of Patrimony (STOP) Act and its intent to better protect Native American cultural heritage from illicit trafficking. However, it must also be understood that, in addition to the STOP Act, more legislation must be passed to amend the Native American Graves Protection and Repatriation Act, as well as mechanisms to protect access to Sacred Places regardless the status of the land.

The Association on American Indian Affairs is the oldest non-profit serving Indian Country protecting sovereignty, preserving culture, educating youth, and building capacity. Since its earliest beginnings assisting Pueblo Peoples defend their aboriginal lands and water rights in 1922, the Association was formed to change the destructive path of federal policy from assimilation, termination, and allotment—to sovereignty, self-determination, and self-sufficiency. For nearly 100 years, the Association has worked tirelessly to protect Native American cultural sovereignty – the things that make us who we are as indigenous peoples – through Cultural Heritage Protection, Repatriation, and Sacred Sites initiatives, as well as ensuring the inter-generational transmission of culture through our Youth initiatives. As a vital part of our efforts, the Association works hand in hand with Tribes, Tribal organizations, museums, lawyers, academics, auction houses and the general public to secure the safe return of tangible cultural heritage such as our Ancestors, their burial items, sacred objects and cultural patrimony.

Despite some protections in current law, the illicit trade in Tribal tangible cultural heritage continues to pose a grave threat to our cultural survival and health of our Nations. Our Ancestors, their burial belongings, sacred objects and cultural patrimony have been and continue to be illegally taken, threatening the maintenance of our cultures and traditions and depriving us of the important belief systems and cultural legacy we seek to leave our future generations. Meanwhile, a lucrative black market in our cultural heritage thrives, and without explicit export restrictions many of our Ancestors, their burial belonging, sacred objects and cultural patrimony end up all over the world. Once abroad, we have had very little success in

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efforts to bring them home. **Already this year, the Association has investigated 32 foreign auctions selling at least 60 items that are potentially cultural patrimony owned by Tribal Nations that no individual would have had the right to take or sell.**

The Association supports the STOP Act's goal of making it more difficult to export and easier for Tribes to regain their cultural heritage. To that end, the STOP Act creates an explicit prohibition on exporting cultural heritage obtained in violation of current law, including the Native American Graves Protection and Repatriation Act (NAGPRA), the Archaeological Resources Protection Act (ARPA), or the Antiquities Act (as well as any other applicable law),¹ and it puts in place an export certification system to accompany the prohibition. Together, these measures make it possible for Tribes to access other countries' domestic laws and law enforcement mechanisms to regain their cultural heritage, as certain countries, such as France, restrict import of cultural heritage illegally exported from a country that provides export certificates.

The Association further supports strengthening the 1983 Convention on Cultural Property Implementation Act (CPIA), which implements the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The STOP Act will allow the President to proactively enter into agreements with other countries protecting our cultural heritage from import into those countries and providing mechanisms for their return. The U.S., through the U.S. Department of State and the CPIA, spends a lot of resources working with other countries to protect their cultural heritage, but little to nothing to protect Native American cultural heritage. This must be reversed - how can we support the protection of other countries cultural heritage if we are unable to do the same in our own backyard?

Though we support the STOP Act's increased penalties for violations of NAGPRA, this amendment will not offer the deterrence necessary to stop illegal trafficking. It could, however, provide stronger deterrence against trafficking and improper export if the intent requirement was amended. Currently, 18 USC § 1170 requires an individual to "know" that the act is illegal: "Whomever knowingly sells...". This intent requirement is difficult to prove, and therefore a higher criminal penalty will not prove a deterrence effect for the trafficking of cultural items. Revising the penalty to include a general level of intent, such as merely an intent to sell (instead of the knowledge that the selling is illegal), as well as no requirement of intent (strict liability), would support Congress' efforts to end trafficking. These lower or no intent crimes could

¹ Unfortunately, NAGPRA, ARPA and the Antiquities Act provide only checkerboard protections for Native American cultural heritage. For example, cultural items defined by NAGPRA - human remains, funerary objects, sacred objects and objects of cultural patrimony - express how these objects are communally owned and secured by traditional or religious caretakers. In other words, no individual had/has the authority (at any point in time) to remove the item from its original Nation. Yet, if one of those items is claimed to have been taken before NAGPRA was enacted (November 16, 1990) there is no protection for that item under NAGPRA. This is a schizophrenic system of protection contrary to many other countries' schemes to protect cultural heritage. In addition, dealers and collectors are widely known to invent origin information to protect their commercial interests in an object. Unless federal law provides a comprehensive and complete protection for all of Native American sensitive cultural heritage, legislation like NAGPRA and the STOP Act will never end the ongoing harm and trauma caused when our Ancestors, their burial items and our sacred and cultural patrimony are placed beyond our reach, in violation of our civil, human and religious rights.

provide misdemeanor or 1-2 year penalties, depending on scope of the crime, and would have a higher deterrence effect on trafficking than merely increasing the current penalty.

Another concern in the current draft of the STOP Act is the definition of "Native American" under NAGPRA, which was weakened by the Ninth Circuit case of *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004). NAGPRA's definition of "Native American" "means of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). The Ninth Circuit found that "is indigenous" meant that human remains must be affiliated with a present-day tribe. The Association, in concert with the NAGPRA Review Committee, NAGPRA practitioners and Indian Tribes have sought to amend this definition, which is used expressly in the STOP Act, to state that Native American **"is or was"** indigenous to the United States in order to effectuate the intent of NAGPRA to protect graves and repatriate human remains.

Finally, we support the STOP Act's provisions that facilitate more coordination within the federal government, and between the federal government and Tribes.

Thank you for your attention on this important matter that supports Tribal self-determination and self-sufficiency, as well as the government-to-government relationship that, the Association would argue, obligates the U.S. to correct the harm it has caused from failed policies that sought to assimilate, terminate and remove Indian Tribes from their homelands, and outlaw the practice of their religions, languages and cultures. If you have any questions, please do not hesitate to contact me at (240)314-7155 or Shannon@indian-affairs.org.

Sincerely,



Shannon Keller O'Loughlin, Esq. (Choctaw)
Chief Executive & Attorney