

The Safeguard Tribal Objects of Patrimony (STOP) Act of 2021¹ provides welcome protection to Native American cultural items and archaeological resources in international markets. Tribes can best speak as to what their own cultural heritage is, and whether it should be returned.

Many Native cultural items that are now in the international marketplace were never intended for commercial use. International law allows each nation state to protect national cultural property from illicit transfer within international trade, primarily through the 1970 UNESCO Convention.² The United States became a party to the Convention in 1983 and Congress enacted the Cultural Property Implementation Act of 1983 (CPIA) to enforce select provisions of the Convention.³ Yet, in its 1983 implementation, the U.S. Congress *did not* designate any items as cultural property or authorize export controls on cultural property.⁴ In effect, while the U.S. has agreed to honor the import and export cultural heritage protections of other nation states, the U.S. asks for no reciprocity to protect the cultural heritage of the Native American tribes to which the U.S. owes a trust responsibility.⁵ Meanwhile, the U.S. does recognize and protect tribal cultural property, at least within its borders.⁶ There is therefore a gap. International law will not prevent the export of tribal cultural heritage until the U.S. extends that protection to exports. U.S. federal legislation is required.

The STOP Act fills this gap. The STOP Act seeks to stop the export and facilitate the international repatriation of tribal cultural heritage items already protected under federal law. It essentially extends the inter-state trafficking prohibitions regarding “cultural items”⁷ under NAGPRA and “archaeological resources”⁸ under ARPA to an international export prohibition. Items prohibited from being trafficked as defined by NAGPRA and ARPA would also be prohibited from export under the STOP Act.⁹ Meanwhile, cultural items and archaeological resources that are not prohibited from trafficking are eligible for export, so long as the exporter obtains an “export certificate.” Critically, in addition to federal requirements, an export certificate must include a written confirmation from the Department of Interior in consultation with tribes.¹⁰

In December 2016, citing the continued removal and international export of tribal cultural items for sale in both public and black markets in violation of federal and tribal laws, Congress passed a resolution condemning the trafficking of Native American cultural items.¹¹ The resolution also called on certain federal agencies to take affirmative action to stop illegal trafficking and secure the

¹ The Safeguard Tribal Objects of Patrimony (STOP) Act of 2021, H.R. 2930 and S. 1471, 117th Con. (2021).

² UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 823 UNTS 231 (adopted on 14 November 1970, entered into force 24 April 1972).

³ Cultural Property Implementation Act of 1983, 19 U.S.C. §§ 2601–2613 (2011).

⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-537, NATIVE AMERICAN CULTURAL PROPERTY: ADDITIONAL AGENCY ACTIONS NEEDED TO ASSIST TRIBES WITH REPATRIATING ITEMS FROM OVERSEAS AUCTIONS 6 (Aug. 2018).

⁵ Cohen’s Handbook § 5.04(3)(a), *supra* note 21, at 412-15; see, e.g., President Barack Obama, Memorandum on Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009) (“The United States has a unique legal and political relationship with Indian tribal governments . . .”).

⁶ Namely through the Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001–3012, 18 U.S.C. § 1170 and the Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm.

⁷ 25 U.S.C. § 3001(3) (defining “cultural items” to include “associated funerary objects,” “unassociated funerary objects,” “sacred objects,” and “cultural patrimony”).

⁸ 16 U.S.C. § 470bb.

⁹ H.R. 2930 117th Con. (2021), Sec. 5.(a)(1).

¹⁰ *Id.* at Sec. 5(b)(3)(D).

¹¹ H. Con. Res. 122, 114th Cong. (2016) (enacted).

repatriation of Native American cultural items.¹² The STOP Act is the answer to that call. And because of NAGPRA and ARPA, the STOP Act can accomplish this by merely domesticating the rights of protection for tribally determined sacred objects and cultural patrimony.

The STOP Act is an intuitive and modest extension of existing tribal cultural heritage protection under U.S. law. But in doing so, it is also a robust endorsement of tribal self-determination. It is a domestication of international human rights and Indigenous rights law. The 2007 U.N Declaration on the Rights of Indigenous Peoples, (Declaration),¹³ which the U.S. has endorsed, includes rights to cultural heritage and calls upon nation states to implement these rights through domestic laws. Articles 11, 12 and 31 of the Declaration are explicitly directed toward the right of Indigenous peoples to protect their cultural heritage, traditional knowledge, and traditional cultural expressions. Indigenous people are entitled to govern their own cultural heritage as one very important feature of the right of self-determination. Moreover, the nation state has an obligation to effectively protect the rights of Indigenous peoples within its domestic law, and ensure that those rights are respected within international accords.¹⁴

Critics have argued that cultural heritage should not be given preferential treatment. Those who value it most will simply buy it.¹⁵ Others argue that the world, our collective commons, has a superior interest to tribes to access Indigenous cultural heritage,¹⁶ and to ensure the dynamic and free movement of culture.¹⁷ Despite the enthusiasm of some non-Native collectors to acquire all Native objects, the STOP Act provides definitive assurance that the plundering of tribal culture is no longer permissible, including within international markets. The STOP Act specifically clarifies the fundamental distinction between “cultural property” and “commercial products”. Harm to Native cultural property threatens the core survival of a living people and is not merely a harm to the “cultural heritage of all mankind.”

Meanwhile, the STOP Act also promotes a robust commercial market that can flourish with its own assurance that the items are appropriately available. The STOP Act only regulates the exportation of cultural items and archaeological resources. Under the proposed legislation, items made solely for commercial purposes are presumed not to require an export certificate.¹⁸ This support for contemporary art carries forward a long trajectory of statutes designed to stem the illicit plunder of cultural sites and trafficking across international borders while promoting contemporary expressions.¹⁹ Native people have the right to profit from their cultural expressions, if they choose to do so.

¹² Id.

¹³ GA Res. 61/295 (UN Doc. A/61/L.67 and Add.1) (adopted on 13 September 2007).

¹⁴ Rebecca Tsosie, *International Trade in Indigenous Cultural Heritage: An Argument for Indigenous Governance of Cultural Property*, in *INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE*, 228 (Christoph Beat Graber, Karolina Kuprecht, & Jessica Christine Lai eds. 2012).

¹⁵ Kristen A. Carpenter, Sonia K. Katyal, and Angela R. Riley, *In Defense of Property*, 118 *YALE L.J.* 1022, 1040, *citing* Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 *Chi. J. Int'l L.* 213 (2007).

¹⁶ Id. at 1044-45, *citing* KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* 115-35 (2006).

¹⁷ Id. at 1041-43, *citing* MICHAEL F. BROWN, *WHO OWNS NATIVE CULTURE?* (2003), LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2002), and Naomi Mezey, *The Paradoxes of Cultural Property*, 107 *COLUM. L. REV.* 2004, 2005 (2007).

¹⁸ H.R. 2930 117th Con. (2021), Sec. 5.(b)(1)(B)(ii)(I).

¹⁹ See e.g. National Stolen Property Act of 1934, 18 U.S.C. §§ 2314–2315.

It is and should be the domain of Native people to differentiate symbols and items as “cultural property” or as “commercial products”.²⁰

²⁰ Tsosie at 237-38.