

ATADA's Position Regarding the Safeguard Tribal Objects of Patrimony Act (STOP Act) – S. 1400

A new and revised version of the Safeguard Tribal Objects of Patrimony or STOP Act (S. 1400) was introduced by Senator Martin Heinrich on June 21, 2017. While the new STOP Act (STOP II) is an improvement on the 2016 bill in some ways, it remains seriously flawed.

ATADA representatives have been meeting directly with tribal leaders for months to discuss both legislation and voluntary returns. ATADA will make every effort to work closely with lawmakers to improve the bill. However, as written, STOP II would create dangerous legal uncertainties for private owners of a wide range of American Indian art and artifacts. By failing to provide adequate notice of what items would be illegal to export, STOP II, like its predecessor, would violate the due process guaranteed by the U.S. Constitution.

Due Process Issues

The U.S. legal system is premised on the idea that a citizen must have fair notice of our laws. 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. These objects are claimed regardless of the geographic and time limitations and grandfathering-in of older private collections under the 1979 Archeological Resources Protection Act (ARPA), and the 1990 Native American Graves Protection and Repatriation Act (NAGPRA). 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. STOP II therefore cannot legally achieve its primary goal of returning to the tribes the items they most seek.

No lists of items of inalienable cultural patrimony exist, because the restriction of privileged information is important to tribal traditions. Nonetheless, in Senator Heinrich's June 21 introduction of the 2017 STOP Act at a meeting with Santa Fe Indian School students in Washington, DC, the senator said, "we can also recognize a clear difference between supporting tribal artists or collecting artifacts ethically and legally as opposed to dealing or exporting items that tribes have identified as essential and sacred pieces of their cultural heritage. We need to take all possible action to stop the latter and help repatriate stolen culturally significant items to their rightful owners."

Unfortunately, tribes have not identified specific objects as essential and sacred pieces of their cultural heritage, leaving a knowledge gap that, while respectful of tribal needs for secrecy, fails to provide proper notice to collectors and art dealers.

Lack of Definition Will Result in Error or Abuse

STOP ACT II fails to explicitly place the burden of proof on the federal government, providing Customs with broad discretion which in the past has led to due process abuses.

STOP II also gives Customs wide, unspecified authority to create and enforce regulations, a practice that has led to due process abuses in the past.

There is no way to visually differentiate between Native American objects lawfully collected over the last 140 years and objects obtained in violation of NAGPRA and ARPA. Under ARPA and NAGPRA, items could look the same but be unlawful if they were collected in certain geographic locations or time frames. An item sold by a tribal member could be later claimed by a tribe as inalienable cultural patrimony that couldn't be sold lawfully, even if the person who sold it was its custodian, and if no theft was reported.

Voluntary Returns

ATADA's Voluntary Returns program has now successfully returned dozens of important items from private collections to tribes on a purely voluntary basis.

ATADA's program was specifically designed to bring lawfully owned items of important current, sacred, communal use from long-held collections back to tribes. All the items so far returned by the ATADA Voluntary Returns program were returned to tribes for ethical reasons alone.

Many such items were sold at the time when the federal government encouraged tribes to give up traditional religious practices. (Native American religions were not recognized as religions until passage of the American Indian Religious Freedom Act (AIRFA) in 1978.) Other items were sold by tribal members for reasons of economic pressure or substance abuse. Thus, many sacred, communally objects entered both museum collections and the legal market.

Unfortunately, the language in the proposed federal voluntary returns program is not narrowly defined. It is so broad that it would affect all Native American made objects. STOP II makes it U.S. government policy to encourage the return of all "*significant objects, resources, patrimony, or other items,*" and "*items affiliated with a Native American*

Culture.” This list would cover virtually everything made by Native Americans from the beginning of time to today. It would include commercial jewelry, textiles and rugs, to say nothing of items such as *kachina* dolls, ceramics, and other items that have been legally collected over the last 140 years.

ATADA believes that adoption of this language as federal policy would send a message not to collect Indian art that would damage not only art dealers and Indian artists, but also private collectors and the collections of America’s museums and cultural institutions. STOP Act II would potentially have the same insidious impact as a regulatory taking by destroying the value of Americans private property and threatening the commercial viability of many businesses and Native American artisans.

STOP II Creates an Unnecessary Federal Bureaucracy

Furthermore, STOP II does not simply create a liaison Between the Department for federal voluntary returns – or invite assistance from the Internal Revenue Service to encourage donation of lawfully held items to tribes.

STOP II invites in the Department of Justice, Homeland Security, the Department of State, the Cultural Property Advisory Committee (which, by law, only deals with requests by foreign nations for import restrictions on foreign art and artifacts).

This unnecessary federal bureaucracy will discourage participation, and put in place a “Trojan Horse” bureaucracy that might at a future date implement a mandatory return program to enforce the STOP Act’s aggressive new U.S. policy calling for the return of any, and all, items associated with Native American culture.

Alternative Solutions

Senator Tom Udall has stated that, “Native Americans have been the victims of theft and looting for generations.” ATADA agrees. In the past, thefts from tribal and federal lands and exploitation were responsible for many items leaving tribal communities. However, sale of stolen items is already unlawful, under both federal and state law. ATADA has maintained a stolen art database for decades in order to fight traffic in stolen art. Indeed, ATADA has already gone

beyond the requirements of the law, by establishing internal rules prohibiting its members from selling known sacred objects essential for current religious practices, even if lawfully owned.

ATADA believes that art dealers, auction houses, and art fairs can work together to regulate and improve the market, providing security to both dealers and consumers. It is sound business practice to complete appropriate steps in due diligence and to weed out stolen or highly sensitive items. ATADA businesses represent the top level of the market. A responsible art market will strongly discourage, and in the end, eliminate the market for stolen items and objects that are important for current, sacred, communal use.

Conclusion

Senator Heinrich and others who support STOP II assert that the bill will halt the export of communally owned sacred objects. They don’t point out, however, that STOP Act II’s provisions eclipse the legislation’s stated intent for an export ban on items covered by ARPA and NAGPRA as other portions of the law apply to much more than sacred items or cultural patrimony.

ATADA supports returning important objects needed for current tribal spiritual activities. However, ATADA believes that STOP II will not achieve the tribes’ goals of bringing back important sacred objects from overseas.

STOP II’s passage would discourage the legitimate market, and its ill-considered language setting federal policy will harm Native artists as well as art dealers, museums, and private collectors.

ATADA is firmly committed to working with tribes and legislators to improve this and other legislation impacting tribal communities. Based upon the serious issues which remain with STOP II as written, ATADA has no choice but to oppose it at this time.

Co-sponsors on STOP II are Sen. Jeff Flake (R-AZ), Sen. Tom Udall (D-NM), Sen. John McCain (R-AZ), Sen. Steve

You can support the efforts of ATADA to increase awareness, continue constructive dialogues and find practical, mutually beneficial solutions to these issues.



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