Committee for Cultural Policy[1]
Written Testimony submitted to U.S. Senate Committee on Indian Affairs,
on the Safeguard Tribal Objects of Patrimony Act of 2017 (STOP Act)
S. 1400
November 8, 2017

Mr. Chairman, my name is Kate Fitz Gibbon and I am the Executive Director of the Committee for Cultural Policy, a non-profit organization dedicated to educating the American public and urging an open discourse as the foundation of a balanced cultural policy in the US. The Committee for Cultural Policy supports museums and the museum mission to preserve, research, and display art and artifacts for the public benefit. We support the lawful circulation of art and artifacts, as Congress did in enacting the 1983 Convention of Cultural Property Act and the 1979 Archaeological Resources Protection Act (ARPA).

The Committee for Cultural Policy (CCP) has identified a number of key concerns with the STOP Act:

- The STOP Act will discourage collecting and trade of lawfully owned Native American objects, undermine cultural tourism, which is an economic mainstay of several Western states, and create legal uncertainties for the hundreds of thousands of Americans who have collected Native American art and artifacts for generations.

- The STOP Act fails to define the difference between ceremonial and non-ceremonial objects, and it leaves the definition of "*Native American cultural objects"* subject to export prohibitions open to new tribal interpretation for each Native American object seeking export. The knowledge of what is communally owned and inalienable is privileged information, and may be known only to initiates within each tribe.

- The Stop Act would violate the individual right to due process under the Fifth Amendment by making it illegal to export certain items without giving the individual proper notice of what items are illegal to export.

- The STOP Act is unnecessary because 'trafficking" in violation of NAGPRA or ARPA is already unlawful, and 18 U.S.C. § 554 already prohibits export from the

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United States of any object contrary to any law or regulation of the United States, and imposes ten years' jail time for a first offense.

- The STOP Act establishes as official U.S. government policy the return of all "*items affiliated with a Native American Culture"* to the tribes, which would include millions of objects currently in lawful circulation in the US, and millions more in American museums.

We have highlighted the following issues in the STOP Act that are of particular interest to American museums and the collectors that support them.

1. **The STOP Act makes it federal policy to encourage the return of *all* Native American-affiliated objects to tribes. This could damage cultural tourism, particularly in the West, eliminate a major form of art collecting and art appreciation, and destroy hobbyist activities that are legal, educational and give pleasure to hundreds of thousands of Americans.** `

The STOP Act's federal returns program is based on a new and dangerous federal policy to encourage the return of all Native American-affiliated items to tribes, even when ownership and trade in such objects is perfectly legal. STOP Act fails to address what the repercussions will be for "collectors, dealers, and other individuals and non-Federal organizations that hold such heritage" who do *not* to engage in the returns program and attempt to sell or donate these legally-owned objects to a museum or other organization.

The "tangible cultural heritage" protected by the STOP Act's returns policy extends beyond any individual's reasonable expectations because this policy seeks to curb the trade of *any* "culturally, historically, or archaeologically significant objects, resources, patrimony, or other items that are affiliated with a Native American culture,"[2] regardless of an object's legal title, cultural significance, economic value, or even the tribes' desire to have the object returned. Is the STOP Act truly seeking to have every miniscule potsherd and arrowhead returned to Native American tribes? Every Native American ceramic pot, rug or bracelet?

To give just one example of the type of legal material affected by this provision of the STOP Act, the prohibition against trafficking in archeological resources in ARPA specifically excludes arrowheads found on the surface of the ground. President Jimmy Carter was just one of thousands of American hobbyists who have collected arrowheads legally since they were children. There are now hundreds of hobbyist groups of arrowhead collectors, with hundreds of thousands of members, who like President Carter,

[2] H.R.3211, 115th Cong. § 3(5) (2017).

are enthusiastic collectors of arrowheads. These clubs may be found in every state in the U.S.

The adverse effects of the STOP Act's "voluntary" returns program and Tribal Working Group will affect not only private dealers and collectors, and private individuals, but also the Native American artisans who rely on the sale of their artworks to support their livelihood. Is that truly the outcome that the STOP Act seeks to achieve?

2. **The creation of a federal policy that encourages the return of *all* Native American-affiliated objects to tribes could deprive legally owned objects of their fair market value, amounting to a regulatory taking.**

The STOP Act's adoption of a federalized return policy applying to all Native American affiliated objects policy will likely result in an insidious regulatory taking by destroying the value of American private property and threatening the collections of America's citizens, museums and cultural institutions, as well as the viability of many businesses and Native American artisans.

Supreme Court precedent recognizes two forms of takings for Fifth Amendment purposes: First, where the government requires permanent physical invasion of individual's private property, however minor, there must be just compensation.[3] Second, and more relevant to the STOP Act's dangerous effects, is where regulations completely deprive an owner of "*all* economically beneficial us[e]" of his or her property.[4]

In the seminal case on government takings, *Penn Central Transp. Co. v. New York City*, the Supreme Court outlined three main factors to determine whether there has been a taking within the scope of the Fifth Amendment: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with investment-backed expectations and (3) the character of the government action.[5] Later, in *Lingle v. Chevron*, the Court applied the *Penn Central* and other 'takings' jurisprudence to conclude that any taking inquiry "turns in large part. . . upon the magnitude of the regulation's economic impact and the degree to which it interferes with legitimate property interests."[6]

There is no disputing that individuals, ranging from private collectors to tribal artisans

[3] Lingle v. Chevron USA Inc., 544 U.S. 528, 538 (2005).
[4] Lingle v. Chevron USA Inc., 544 U.S. 528, 538 (2005) (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992)
[5] Penn Central Transp. Co. v. New York City, 438, U.S. 104, 124 (1978);
[6] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539–40 (2005) (citing Penn Central Transp. Co. v. New York City, 438, U.S. 104 (1978); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)).

have legitimate private property interests in these objects. No regulations at the time of acquisition of this property would put the individual on actual or constructive notice that these objects would be subject to such broad oversight.[7] Thus, their investment-backed expectations would reasonably include the rights to buy, sell, and *possess* the item so long as the object was not illegally acquired in contravention of state or federal law, such as ARPA and NAGPRA. These are some of the most fundamental "sticks" that form legitimate property interests under United States law.

The impact on the economic value of these objects is both predictable and deleterious. The proposed federal voluntary returns policy fails to address what the repercussions will be for the individuals who do not to engage in the voluntary returns program and attempt to sell their property or even donate it to a museum or other organization. Instead, this policy creates a stigma on objects and individuals who do not comply with this "voluntary" returns program — a stigma that can completely diminish the market value of that object, denying the property owner of the right to earn a "reasonable return" on his or her property.[8]

The STOP Act's institution of a Tribal Working Group to provide recommendations regarding "the return on tangible cultural heritage by collectors, dealers, and other individuals and non-Federal organizations"[9] is further problematic. The Act creates an oversight group that is not limited to recommending the return of illegally removed or trafficked objects in violation of federal law. Rather, the Act delegates to this Tribal Working Group the right and responsibility to recommend the return of any and all *legally* owned objects, regardless of whether those objects were part of the voluntary returns program. Collectors, museums, dealers, hobbyist groups, etc. have no voice.

How else will this Tribal Working Group find out about objects owned by collectors, dealers, and other private individuals, except by closely supervising the trade of Native American-affiliated items? Not only is this an exceptionally overbroad delegation of power, it will also contribute to a stagnation in the trade of Native American objects, as individuals will no longer be able to trade in these objects without constant fear that the Tribal Working Group may intercede and recommend the object be returned.

With such power granted to this Tribal Working Group, Native American-affiliated objects will likely become unsellable, as individuals and institutions will likely refuse to purchase or accept these objects because of the stigma now attached to these otherwise lawfully-owned objects. Such an adverse economic impact would eventually amount to a

[7] See e.g., Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999), cert. denied, 529 U.S. 1053 (2000.
[8] Penn Central Transp. Co. v. New York City, 438, U.S. 104, 129 (1978).
[9] H.R.3211, 115th Cong. § 5, (2017).

regulatory taking because the policy will deprive numerous collectors, dealers, and individuals of the fair market value of their property without any just compensation.

3. The STOP Act's Returns Program's Policy Also Contradicts ARPA's Intention That Private Collections Remain a Resource for Preservation and Study of Native American Culture

While the intentions of the STOP Act's voluntary returns program are understandable—even admirable—the policy directly contravenes the very policies of ARPA and NAGPRA, which undergird the STOP Act itself. This policy acknowledges that American tribes do not have a superior right to all Native American-affiliated objects, simply because these are Native American in origin. Our country has had a long history of protecting private property rights. Native American art and artifacts collected by American citizens have long been interpreted as private property, and our constitution requires that certain due process requirements be met before they are taken away.

Art traders and the collecting community have been accused in the media of exploiting Indian culture, especially in light of the 2015 auction sales in Paris of sacred masks and statues belonging to the Native American Hopi tribe. The major Native American art trade organization ATADA has adopted bylaws forbidding trade in items in current ceremonial use,[10] established due diligence guidelines to protect buyers and sellers,[11] and initiated public education programs[12] as well as a truly voluntary returns program that has brought dozens of important ceremonial items back to tribes in the last year.[13]

But it should be remembered that the vast majority of the trade in Indian artifacts - virtually *all* the trade in current market - is completely legal, and that Congress deliberately excluded pre-existing privately held collections of artifacts from ARPA's prohibitions 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*

[10] ATADA Bylaws, Article X, Trade Practices, Ethics, And Guarantees. https://www.atada.org/bylaws-policies/
[11] ATADA Bylaws, Article XI, Due Diligence Guidelines. https://www.atada.org/bylaws-policies/
[12] ATADA Symposium, Understanding Cultural Property: A Path to Healing Through Communication. May 22, 2017, Santa Fe, NM.
[13] ATADA Bylaws, Article X, ATADA Guidelines Regarding the Trade in Sacred Communal Items of Cultural Patrimony. https://www.atada.org/bylaws-policies/

archaeological resources and data which were obtained before October 31, 1979."[14]

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 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."*[15]

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."*[16]

As applied in Section 4(a) of the STOP Act, the implementation of a voluntary returns program of *all* Native American-affiliated objects supports a blanket federal policy to completely end the trade, collection, preservation in institutions, museum holdings and any other form of possession of Native American art of all kinds by US citizens.

4. **STOP Is Unprecedented and Untested Legislation as an "Export Law." It is Radically Different from All Other Export Laws and Cultural Property Laws Around the World**.

Typically, export laws in developing nations prohibit export of *all* cultural property, which includes everything from paintings to postage stamps over 50-100 years old. This is often the case where a nation has a history of colonial exploitation and also, very importantly, where the local economy is too weak to retain important art or manage resources. The US is by far the largest market in the world for Native American art. Laws in some totalitarian nations prohibit *all* export as a means of centralizing and controlling movement of property and sometimes as a means of limiting free expression of ideas. So, for example, books and historical documents are considered cultural property under these laws.

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[14] 16 U.S.C. § 470aa(b).
[15] H.R. REP. 96-311, *12,1979 US.CC.A.N. 1709, **1714
[16] 16 U.S.C§470ee(f).

Laws in some developed nations (such as Great Britain or Canada) require a permit for export of items over a certain age and value. Permits are almost always granted, and when they are not granted, the law provides for systems (government grants, special purchases) to acquire the art for the nation at Fair Market Value. To be subject to export review, objects considered 'ethnographic material' must have a fair market value of $3,000 if made by an "Aboriginal person."

In the UK, an exporter is required to obtain a permit in order to export artworks and historic objects meeting criteria based on Fair Market Value, archaeological status or origin. The Arts Council's Committee on the Export of Works of Art and Objects of Cultural Interest (RCEWA) advises the government on whether to retain an artwork or grant an export license. Permission to send the item out of the UK may be refused in order to allow time for repurchase of the artwork by a UK museum or charitable fund. Repurchases are usually supplemented by public donations.

Laws in other developed nations regulate export of all art in a national inventory, based on a specific list of identified objects that are restricted from permanent or temporary export. Each object subject to export restriction is individually cataloged. This is the case in Japan, where cultural property of different degrees of importance is documented and classified into categories from freely exportable to lawful for temporary export for exhibition purposes (just over 10,000 items in the entire history of Japanese art), to unlawful to export under any circumstances (about 1400 individual items, many in the Imperial collections).

Industrial nations also prohibit trade in very specific non-art commodities, either to protect industry or limit access to technology, for example nuclear or weapons technology.

STOP does not fit into any of these categories of existing laws. It's not based on value, not on a list of objects, or defined types of items that cannot be exported. That means that there are no similar models, in the US or internationally, that we can look to and compare how other laws have worked in the past. That no such system has ever been tried in any other country should discourage the broad imposition of highly restrictive policies affecting virtually all Native American art.

5. Conclusion

The Committee for Cultural Policy urges that the Senate Indian Affairs Committee seriously consider alternatives to the STOP Act to find a cure for the serious concerns of

the tribes. The answer cannot be found in the flawed legislation of the STOP Act. Instead, this Committee should consider as alternatives:

- legislation to more efficiently bring objects and ancestral remains already under federal government control back to the tribes, to ensure adequate funding for National NAGPRA, to fund tribal cultural offices, and to develop tribal legislation to ensure that important cultural resources remain permanently in tribal hands;
- educating the public on tribal values;
- facilitating truly voluntary returns of important cultural objects;
- building tribal government capacities and cultural heritage institutions, and creating tribal organization(s) to accept voluntary donations.

I would like to thank the Senate Indian Affairs Committee for the opportunity to present testimony. The Committee for Cultural Policy respectfully requests the Senate Indian Affairs Committee to carefully consider all the concerns raised regarding this legislation and to reject the STOP Act as written.