ATADA,[1] John Molloy, President
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 John Molloy and I am President of ATADA. Our organization, formerly known as the Antique Tribal Art Dealers Association, represents antique and contemporary art dealers, art collectors, and private museums. I am taking this opportunity to share the concerns of all ATADA members, especially the 52 who are constituents of the Committee's members, with S. 1400, The STOP Act.

The revised Safeguard Tribal Objects of Patrimony Act of 2017 (S.1400, H.R.3211) ("STOP Act") will not achieve its primary goal—the return of important cultural objects to Native American tribes and Native Hawaiian organizations - because the proposed legislation is fatally flawed. The problem of loss of tribal cultural heritage will not be solved by passing constitutionally suspect legislation or creating a new, unwieldy, and expensive federal bureaucracy. It will be solved on the community level, through education and the promotion of cultural understanding.

ATADA, the primary organization for art dealers and collectors of Native American art in the United States, has taken important steps to formalize changes to accepted business practices (which most Native American art dealers had already independently adopted), and began intensive community educational work to build understanding and respect for Native American concerns over the loss of cultural heritage. In 2016-2017, ATADA adopted bylaws forbidding trade in items in current ceremonial use,[2] established due diligence guidelines to protect buyers and sellers,[3] and initiated public education programs[4] as well as establishing a truly voluntary return program for lawfully owned ceremonial objects that has already brought dozens of important ceremonial items from collectors back to tribes in the last year.[5] [6]

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[1] ATADA, formerly known as the Antique Tribal Art Dealers Association, 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. email director@atada.org, PO Box 45628, Rio Rancho, NM 87174.

[2] ATADA Bylaws, Article X, Trade Practices, Ethics, And Guarantees. https://www.atada.org/bylaws-policies/

[3] ATADA Bylaws, Article XI, Due Diligence Guidelines. https://www.atada.org/bylaws-policies/

[4] ATADA Symposium, Understanding Cultural Property: A Path to Healing Through Communication. May 22, 2017, Santa Fe, NM.

[5] ATADA Bylaws, Article X, ATADA Guidelines Regarding the Trade in Sacred Communal Items of Cultural Patrimony. https://www.atada.org/bylaws-policies/

This entirely voluntary program was initiated by ATADA before any federal proposal was suggested, and is the model from which the flawed federal program in the 2017 STOP Act was conceived. Even vocal proponents of the STOP Act have publicly acknowledged that ATADA's Voluntary Returns Program will probably do more to bring sacred objects back to tribes than any federal interdiction program.[7]

II. The STOP Act: A Summary of Issues

The STOP Act does not identify what items would be blocked from export. Tribes hold that identification of sacred items is proprietary knowledge and may not be shared. Governor Riley of the Acoma Pueblo made this fact crystal clear in his testimony to this Committee last year when he stated: *The cultural objects Acoma is attempting to protect are difficult to fully describe and publicly identify because of their sacred and confidential ceremonial use.* The result is that the STOP Act makes it illegal to export certain items without identifying them, so a citizen has to guess whether his actions were legal or illegal, which would **violate the Fifth Amendment's due process clause of the U.S. Constitution** and create dangerous legal uncertainties for private owners of a wide range of American Indian art and artifacts.

The STOP Act states that it is **official U.S. government policy** to return ALL "*items affiliated with a Native American Culture"* to the tribes, which would include commercial jewelry, ceramics and other legal possessions.

The STOP Act will discourage the sale of all Indian art and artifacts, generate consumer confusion that will damage legitimate art dealers and tribal artisans, and create a bureaucratic nightmare for the tribes and their collaborators. It will **harm regional economies**, especially in Southwest. In New Mexico, for example, cultural tourism accounts for approximately 10% of jobs and about the same revenue as mining, a major state industry. Acoma Governor Kurt Riley acknowledged in testimony submitted in regard to the earlier STOP Act, that "the vast majority of inventories held by dealers or collectors are of no interest to the Pueblo," yet he proposes a pre-purchase certification system for persons who wish to collect Indian art, "establishing a method for

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[6] A Journey with Ceremonial Objects, https://committeeforculturalpolicy.org/a-journey-with-ceremonial-objects/

[7] For example, the comments of Gregory Smith, speaking on a panel, "At the Forefront of Repatriation: New Policy and Impact Beyond the United States," School for Advanced Research (SAR), April 19, 2017, https://sarweb.org/?2017iarcss_repatriation-p:past_events, Santa Fe, New Mexico, and again at the ATADA Symposium, Understanding Cultural Property: A Path to Healing Through Communication. May 22, 2017, Santa Fe, NM.

collectors…to receive a referral to a cultural representative of a tribe likely to be knowledgeable or aware of an object the collector is considering purchasing."[8]

The STOP Act is unnecessary and redundant. "Trafficking" in violation of NAGPRA or ARPA is already unlawful, and 18 U.S.C. § 554 already **prohibits export** from the United States of any object contrary to any law or regulation of the United States, while maintaining the Due Process protections that are likely voided by enforcement of the STOP Act.

ATADA's Voluntary Returns Program is a better, more effective model, which has **returned dozens of important ceremonial items** to tribes in its first year.

III. Background

It is the legitimate policy of the tribes that they, and no one else, should determine which cultural objects are inalienable from their communities, as this right is intrinsic to tribal sovereignty. But many tribes also believe 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, many tribes refuse to make information public that would enable outsiders to know whether he or she possesses a ceremonial object considered inalienable to the tribe.

Tribes also acknowledge that non-tribal members only possess a fragmented understanding of sacred objects of Indian cultural heritage. So, while some objects, such as certain ceramics and masks may be deemed sacred to a tribe and therefore inalienable cultural property, a nearly-identical ceramic or mask may not be considered sacred, and therefore may be freely traded by tribal members and non-tribal members alike. But still, the knowledge necessary to delineate between these sacred and non-sacred object can remain a closely guarded secret and inappropriate to publicize.

Tribal secrecy may be well justified as necessary for the health and well-being of the tribe. But when enacting legislation that hinges upon the definition of "What is inalienable because it is sacred?" and imposing severe penalties, the lack of specific, public information about what makes an object inalienable is a prohibitive legal barrier to both the exercise of due process and the STOP Act's goal to return sacred objects.[9]

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[8] Written Testimony of Governor Kurt Riley, Pueblo of Acoma, Before the Senate Committee on Indian Affairs Field Hearing on the Theft, Illegal Possession, Sale, Transfer and Exportation of Tribal Cultural Objects, Albuquerque, NM, October 18, 2016, p.8.

[9] There is no question that certain items are regarded by tribes as inalienable precisely because they are 'sacred' objects. This circumstance raises potential Establishment Clause issues with the STOP Act. Should the federal government be involved in determining what is 'sacred' to any religion? The First Amendment's

There is no question that certain items are regarded as inalienable precisely because they are sacred to the tribal community. This circumstance raises potential Establishment Clause issues with the STOP Act. Should the federal government be involved in determining what is 'sacred' to any religion? It is accepted as a fundamental principle of government in the U.S. that the federal government is a secular government and does not affiliate with or advance a specific religion.

The information gaps about objects' cultural relevance and when these objects entered the stream of commerce pose impossible constitutional and practical challenges to the enforcement of the STOP Act. The United States legal system is premised on the idea that a citizen must have fair notice of our laws and an opportunity to be heard. As the 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, violate the first essential of due process law."[10]

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.[11] These sacred items are also precisely the objects that many tribes say it is impossible to identify or discuss publically according to tribal customary laws. As such, notice of what items are claimed by the tribes cannot be divulged to non-tribal owners. The lack of fair warning means that a seizure or forfeiture of property would be based upon information that cannot be disclosed, which would be a blatant violation of due process of laws.

While a failure to provide for due process is a fatal flaw, the STOP Act has other serious weaknesses. The STOP Act creates no framework for administration or enforcement of tribal claims. It does not provide for management of cultural objects, nor does it include a permitting system for objects deemed lawful to export, nor does it provide any funding. It provides no standard for identification of items of cultural patrimony, such as a list or database of ceremonial items. Nor does it set for any standards of evidence for tribal claimants or means of appeal for the owners of disputed objects.

The STOP Act's suggested voluntary returns program also adopts a grossly overbroad definition of "cultural heritage." It establishes a federal policy of encouraging the return

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Establishment Clause prohibits the government from making any law "respecting an establishment of religion," not only forbidding the government from establishing an official religion, but also prohibiting government actions that unduly favor one religion over another.

[10] Connally v. General Const. Co., 269 U.S. 385, 391 (1926).

[11] Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013, § 3001(3)(c)–(d) (1990).

of countless legally and rightfully owned objects purely because they have some association with Native American culture. Not only does this infringe upon traditional notions of private property rights, it is also expected to overwhelm governmental and tribal resources, as many objects may be returned that Native American tribes did not wish to repatriate in the first place.

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 publicly traded without tribal objections as "unassociated funerary objects" under NAGPRA,[12] as there are no clear legal definitions. Some museums return multitudes of very common objects. Other museums continue to display items that the museums themselves catalog as 'ceremonial' and resist returning them as not justified under NAGPRA. **There simply is no standard under NAGPRA**.

Exacerbating the existing lack of definition, the voluntary returns program outlined in the STOP Act encourages the return of any and all objects to tribes, regardless of whether they are covered by NAGPRA or ARPA, calling upon tribes to consult and accept anything that is returned. The STOP Act's call for return of "*items affiliated with a Native American Culture"* would include everything sold by Native American artisans in the past – and today.

Under ARPA, virtually everything made more than 100 years ago is covered by the term "archaeological resource,"[13] but only the age and original location of an object makes it lawful or unlawful to own. Moreover, ARPA's rolling date continually expands the number of items covered under it. **Sacred associations are irrelevant under ARPA**.

The STOP Act's voluntary returns program taints both the antique and contemporary Indian 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 of 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. The recent experience of

[12] See, for example, the 2007 NAGPRA repatriation of 10,857 cultural items in the control of the Burke Museum, including groundstone tools, stone beads, stone carvings, knives, mortars, pestles, pipes, stone chisels, sculptures, and pendants and one bag containing over 200 seeds. Notice of Intent to Repatriate Cultural Items: Thomas Burke Memorial State Museum, University of Washington, Seattle WA 72 Fed. Reg. 29,174 (May 24, 2007).
[13] 16 U.S.C. § 470bb(1).

Alaska Natives, in which sales of Native-carved walrus ivory dropped by as much as 40% following the elephant ivory ban, offer ample evidence of the significance of the threat the STOP Act poses to Native American artisans and many tribal economies.[14]

But the damage to native artisans and the legitimate markets inflicted by the the U.S. policy outlined in the voluntary returns program extends beyond mere reputational harm– it could also open the federal government to due process claims of taking private property without just compensation. Instituting a policy that encourages the return of *all* Native American objects could severely diminish the fair market value of any Native American object, and make such objects unsellable, as buyers and sellers of Native American objects may become fearful of the repercussions should they not abide by the United States policy. Today, a "good" provenance can make the difference between a valuable object and one of little worth, or that cannot be sold at all. By instituting a policy that calls for the return of all objects with a Native American provenance, the United States government could make *all* objects of Native American origin unsellable and therefore commercially worthless.

IV. The Distribution and Circulation of Native American artifacts.

There are millions of Native American "cultural objects" in private ownership today; but 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.

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 the Hemenway Expedition paid the trader Thomas Keam $10,000 for a huge collection that included over 3000 ceramics.[15] 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

[14] Zachariah Hughes, "Ivory Ban Hurts Alaska Natives Who Legally Carve Walrus Tusks," http://www.npr.org/2016/11/24/503036303/ivory-ban-hurts-native-alaskans-who-legally-carve-walrus-tusks.

[15] Edwin Wade et al., America's Great Lost Expedition: The Thomas Keam Collection of Hopi Pottery from the Second Hemenway Expedition, 1890-1894, 9, (1980) (See also pages 18, 25, 26, 39) and Edwin Wade et al., Historic Hopi Ceramics 84 (1981).

across the United States.[16] 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."[17] During the same years and throughout the early 20th century, private collectors purchased from the same sources that supplied museum collectors, with the 1880s and 1890s being referred to as "the heyday of the commercial pothunter. "[18]

Tens of thousands of cultural objects have entered the stream of commerce decades before the first U.S. cultural property legislation was enacted, the American Antiquities Act of 1906 (Antiquities Act).[19] Artifacts without provenience were dug up and sold to good faith purchasers long after enactment of the Antiquities Act in 1906.

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-five years, awareness of tribal concerns and the harmful destruction of archaeological sites has changed everything, as 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 professional organizations such as ATADA, to work directly with tribal representatives to find solutions that truly serve Native American interests.

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[16] Edwin Wade et al., America's Great Lost Expedition: The Thomas Keam Collection of Hopi Pottery from the Second Hemenway Expedition, 1890-1894.
[17] Id. at 15
[18] Annual Report of Jesse L. Nusbaum, Department Archeologist and Superintendent of Mesa Verde National Park to the Secretary of the Interior, Dep't of Interior, 6–7 (1929).
[19] American Antiquities Act of 1906, 16 U.S.C. §§ 431–433. The Antiquities Act of 1906's undefined use of the term "object of antiquity" was held to be unconstitutionally vague and legally unenforceable in the Ninth Circuit, which includes Arizona, where the Navajo, Hopi, and Zuni lands are located. U.S. v. Diaz, 499 F.2d 113, 114 (9th Cir. 1974) (discussed infra).

STOP Act II is redundant legislation, already covered under U.S. law

In fact, the increase in NAGPRA penalties for illegal export in the STOP Act is not a new idea. Proponents of the STOP Act ignore laws already on the books that completely meet their needs. Existing law, 18 U.S.C. § 554(a), already provides that:

> *Whoever fraudulently or* ***knowingly exports*** *or sends from the United States, or attempts to export or send from the United States, any merchandise, article, or* **object contrary to any law or regulation of the United States** *or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise, article or object, prior to exportation, knowing the same to be intended for exportation contrary to any law or regulation of the United States,* ***shall be fined under this title, imprisoned not more than 10 years****, or both*.[20]

This existing law applies the same scienter as the STOP Act ("knowingly"), covers objects protected by NAGPRA and ARPA ("object contrary to any law or regulation of the United States")[21] and already employs the same heightened penalty that STOP seeks to impose (fine or imprisonment not to exceed 10 years). This is precisely the goal that STOP was meant to achieve.[22]

The penalty for violating any federal law has a long legal history of requiring due process. STOP will shift the enforcement and penalty to the unique nature of cultural property enforcement where burden of proof is shifted from the government to the importer or exporter.

In contrast to 18 U.S.C. § 554(a), the existing law, the STOP Act represents a step further in advocating enforcement that rejects the fundamental principles of Due Process.

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[20] 18 U.S.C. § 554(a) (emphasis added).

[21] As previously discussed, nothing in the language of ARPA or NAGPRA suggests that "trafficking" or "transport" of covered items does not include export.

[22] The STOP Act's desire to impose a 10-year jail sentence for violations of less than $1 value, is grossly disproportionate to the offense. While proportionality is often rejected as the basis for a claim of excessive fines or cruel and unusual punishments, it seems impossible to conceive that the Federal Government would wish to impose such harsh penalties. Not to mention that the Federal Government is inviting a bureaucratic nightmare by failing to provide a minimum value threshold for such violations or any other such procedures to protect against selective enforcement of its own overly broad legislation.

The STOP Act's Export Prohibition Violates Due Process Because Its Drafting Does Not Provide Adequate Notice or Procedures for an Individual to Be Heard When Their Property is Being Deprived.

Before an individual is deprived of their property right, Due Process requires that the Government grant an individual both (1) Notice and (2) Opportunity to be heard.[23] But the STOP Act provides no such notice of prohibited conduct or procedures controlling the export controls of Native American-affiliated objects. As a result, we must assume that the default statutory standards apply.[24]

The STOP Act's definitions fail to provide any sort of notice of what conduct is prohibited because it fails to provide any clarity as to what is considered "sacred."

The STOP Act's export prohibition fails to adequately clarify for both private individuals and CBP agents of what objects are "sacred" and therefore prohibited from export and fails to provide any guidance as to how the definitions and export controls can be enforced without becoming arbitrary and discriminatory.

If a statute is overbroad, then it is unconstitutionally void for vagueness and therefore a denial of due process because it fails to provide sufficient notice of the prohibited conduct: "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[25]

The STOP Act and its underlying legislation fail to provide any clarification to differentiate between ceremonial and non-ceremonial objects, and would presumably leave the definition of "Native American cultural items" up to the U.S. Customs and Border Protection ("CBP") and most likely tribal consultants for each and every Native American-affiliated object sought to be exported.

There is a long history of finding broad definitions of "cultural heritage" and "antiquity" unconstitutionally vague. The Ninth Circuit found the Antiquities Act of 1906's definition of "antiquity" to be unconstitutionally vague because "the word "antiquity" can have reference not only to the age of an object but also to the use for which the object was made and to which it was put, subjects not likely to be of common knowledge."[26] The complexity of determining protected "ceremonial objects" under NAGPRA goes

[23] Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950).
[24] 19 U.S.C. § 1600.
[25] Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983).
[26] United States v. Diaz, 499 F.2d 113, 115 (9th Cir. 1974).

beyond a mere minimum age threshold like ARPA and many of international legislation.[27] Instead, in some tribes, objects of antiquity include objects that are no more than three or four years old. [28]

NAGPRA's definition of "cultural item" has been met by many criticisms as unconstitutionally vague in its twenty-seven-year history. [29] To determine what is considered a "ceremonial object" under NAGPRA, there is still no standard criteria among the tribes and/or museums that could provide the public or the CBP with any guidance about what should be repatriated.

Outlining a list of protected objects may provide a more fair and reasonable notice to individuals, but would be nearly impossible to employ under the STOP Act. For example, the Convention on Cultural Property Implementation Act ("CPIA") requires the Secretary of the Department of the Treasury, upon entering into an agreement with a State Party or emergency action, to publish a descriptive list designating categories of archaeological or ethnological material subject to import restrictions under a specific agreement, so long as each listing is "sufficiently specific and precise to ensure that:

> *(1) the import restrictions under section 2606 of this title are applied only to the archaeological and ethnological material covered by the agreement or emergency action; and (2)* ***fair notice is given to importers and other persons as to what material may be subject to such restrictions****.*[30]

But the closely guarded nature of many Native American sacred traditions prevent the creation of a similar list. Although a few (mostly northeastern U.S.) tribes have created list of items that they wish to have repatriated, most feel it is not appropriate to do so. Many southwestern U.S. tribes, including the Acoma, Laguna, Hopi, and Navajo, have

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[27] For example, ARPA, Egypt and Afghanistan protect objects greater than 100 years old. 16 U.S.C. § 470bb; Egyptian Law on the Protection of Antiquities, art. 1 (1983); Law of May 20, 2004 (Law on the Preservation of the Historical and Cultural Heritage) art. 2(a) (Afghanistan).

[28] *United States v. Diaz*, 499 F.2d 113, 114 (9th Cir. 1974) (there finding the

[29] 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.", Deborah F. Buckman,, 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), 173 A.L.R. FED. 765 (originally published 2001).

[30] 19 U.S.C. § 2604 (emphasis added).

stated that they cannot and will not reveal such information, as the only persons with a specific religious authority with the tribal community are permitted to possess such knowledge. As such, this information is not appropriate to share with anyone outside the tribes, including academic committees, the public, and law enforcement.[31] It is their right and choice to withhold information that is not proper to share with outsiders, but this right does not diminish the United States Constitution's requirement that individuals receive sufficient fair notice and due process when they may be deprived of their private property.

Similarly, the solution to "ask the tribes" or provide a tribal hotline,[32] though a facially reasonable proposal, would be equally unfeasible in follow through. A hotline would impose an impossible burden on tribal organizations to (expeditiously) consult on potentially hundreds of thousands of Native American objects in private circulation. And if the exporter or CBP wishes to consult on a particular object, which of the 567 federally registered tribes should they call? Should they instead call the NAGPRA committee designated under NAGPRA, [33] even though the committee does not have authority under NAGPRA and nothing is provided for such consultation in the statute? Or should they consult the "Tribal Working Group" established in STOP Act's other provisions?[34] Ultimately, it is unclear whether anyone would even be able to obtain the information necessary to understand whether the object is sacred or not, even after determining who the proper contact should be.

Under the circumstances described above, one can only conclude that the STOP Act 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.

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[31] Governor for the Pueblo of Acoma Kurt Riley notes that "Our traditions and cultural laws often restrict us from publicly discussing some of these items that are sacred and used in ceremony, known and understood for the most part by my Acoma people." The Theft, Illegal Possession, Sale, Transfer and Export of Tribal Cultural Items: Field Hearing Before the S. Comm. on Indian Affairs, 114th Cong. 27, 29 (Oct. 18, 2016) (Statement of Hon. Kurt Riley, governor, Pueblo of Acoma).

[32] As suggested by Ann Rogers, Esq., when speaking at CLE International Visual Arts & the Law Conference, Santa Fe, NM July 28–29, 2016.

[33] 25 U.S.C. § 3006(b).

[34] Safeguard Tribal Objects of Patrimony Act of 2017, H.R.3211, 115th Cong. § 5, (2017).

STOP Act II unconstitutionally violates Due Process because it provides no procedures for an individual's opportunity to be heard.

Due process requires precision and guidance so that those enforcing the law do not act in an arbitrary and discriminatory way.[35] The STOP Act presumably only permits an opportunity to be heard *after seizure*. There is nothing in the STOP Act permitting a preemptive certification process that would alleviate the administrative burden on the CBP and prevent uninformed seizures of individuals' private property.

Furthermore, the STOP Act fails to provide *any* guidelines or forethought as to either the time or manner of hearing for exporters to dispute seizure of their Native American-affiliated property. STOP sets forth no potential procedures to control administration of STOP's export prohibitions such as (1) a maximum holding period for the seized object, which was suggested in the previous incarnation of the Act;[36] (2) a licensing or certification system like the CPIA; (3) any standards of evidence (4) a list of *actual* items that are likely subject to export restrictions. All of these fail to give any advance notice of an opportunity to be heard so they may proactively avoid seizure or argue against seizure of their property.

The STOP Act will not pass constitutional muster, nor can it reasonably be administered. ATADA is committed to working with tribes for better solutions.

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 and across the country. The STOP Act is ill-conceived legislation that will achieve neither goal and it should not be passed into law.

ATADA is working diligently with tribal officials 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.

[35] See United States v. Williams, 553 U.S. 285, 306 (2008).
[36] 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.

I would like to thank the Committee on behalf of the over fifty ATADA members in the states that Committee members represent for the opportunity to present testimony. ATADA requests the Committee to focus on and to carefully consider all the concerns raised regarding the impact of this legislation before proceeding further.