

S. HRG. 114-535

THE THEFT, ILLEGAL POSSESSION, SALE,
TRANSFER, AND EXPORT OF TRIBAL CULTURAL
ITEMS

FIELD HEARING
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ONE HUNDRED FOURTEENTH CONGRESS
SECOND SESSION

OCTOBER 18, 2016

Printed for the use of the Committee on Indian Affairs



U.S. GOVERNMENT PUBLISHING OFFICE
23-535 PDF WASHINGTON : 2017

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

COMMITTEE ON INDIAN AFFAIRS

JOHN BARRASSO, Wyoming, *Chairman*
JON TESTER, Montana, *Vice Chairman*

JOHN McCAIN, Arizona	MARIA CANTWELL, Washington
LISA MURKOWSKI, Alaska	TOM UDALL, New Mexico
JOHN HOEVEN, North Dakota	AL FRANKEN, Minnesota
JAMES LANKFORD, Oklahoma	BRIAN SCHATZ, Hawaii
STEVE DAINES, Montana	HEIDI HEITKAMP, North Dakota
MIKE CRAPO, Idaho	
JERRY MORAN, Kansas	

T. MICHAEL ANDREWS, *Majority Staff Director and Chief Counsel*
ANTHONY WALTERS, *Minority Staff Director and Chief Counsel*

C O N T E N T S

	Page
Field hearing held on October 18, 2016	1
Statement of Senator Udall	1
Statement of Senator Heinrich	3
 WITNESSES	
Andrews-Maltais, Cheryl, Senior Advisor to the Assistant Secretary—Indian Affairs, U.S. Department of the Interior	5
Prepared statement	8
Begaye, Hon. Russell, President, Navajo Nation	36
Prepared statement	38
Keeler, Honor, Director, International Repatriation Project, Association on American Indian Affairs	47
Prepared statement	49
Riley, Hon. Kurt, Governor, Pueblo of Acoma	27
Prepared statement	29
Rodriguez, Waldemar, Special Agent In Charge, Homeland Security Investigations, El Paso, U.S. Immigrations and Customs Enforcement, U.S. Department of Homeland Security	17
Prepared statement	18
Schaaf, Gregory, Ph.D., Historian; Professor of Native American Studies, University of California (Retired)	40
Prepared statement	43
Taplin, Mark, Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs	14
Prepared statement	16
Torres, Hon. E. Paul, Governor, Pueblo of Isleta	34
Toulou, Tracy, Director, Office of Tribal Justice, U.S. Department of Justice	10
Prepared statement	12
 APPENDIX	
Armijo, Hon. Myron, Governor, Pueblo of Santa Ana, prepared statement	68
Chavarria, Hon. J. Michael, Governor, Santa Clara Pueblo, prepared statement	69
Gallegos, Robert V., from Albuquerque, NM, prepared statement	71
Molloy, John, President, Antique Tribal Art Dealers Association, prepared statement	59
Owens, Jim, from Corrales, NM, prepared statement	74
Yepa, Hon. David R., Governor, Pueblo of Jemez	72

THE THEFT, ILLEGAL POSSESSION, SALE, TRANSFER, AND EXPORT OF TRIBAL CULTURAL ITEMS

TUESDAY, OCTOBER 18, 2016

**U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
*Albuquerque, NM.***

The Committee met, pursuant to notice, at 10:16 a.m. at the Indian Pueblo Cultural Center, Hon. Tom Udall, presiding.

OPENING STATEMENT OF HON. TOM UDALL, U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Good morning, and I call this hearing to order. Today the Committee will hold an oversight hearing on the theft, illegal possession, sale and transfer and export of tribal cultural items.

And I would, first of all, just like to welcome everybody to Albuquerque, especially our out-of-state visitors, and welcome to Indian Country. And I'd like to thank the Pueblo Governors for hosting us here at the beautiful Indian Pueblo Cultural Center.

I felt it was very important to have this discussion in New Mexico. We are home to 23 tribes. And I'm very pleased that we were able to hold this important hearing here, with as many tribal leaders in attendance.

I also would like to thank my colleague, Senator Heinrich, for joining me today. Senator Heinrich has been working very hard on this issue. I appreciate his work. And I appreciate his leadership. And I appreciate our partnership on this topic.

In New Mexico, we have a rich cultural history rooted in Native American tradition. It is the bedrock of who we are as New Mexicans.

We celebrate Native American culture in our food, language, architecture, and art. We even celebrate the contributions of New Mexico's Native Americans in Washington.

New Mexico is represented in the Capitol building by a statue of Po'Pay, the Tewa religious leader from Ohkay Owingeh Pueblo who led the Pueblo revolt of 1680. The statue is one of two selected by the New Mexico State Legislature to be displayed in Washington.

Although we celebrate our Native American contributions to our culture and heritage, we also must work together to address challenges facing Indian Country.

We must do more to provide an excellent education and quality health care for our tribal members. And we must help tribes protect their cultural identity, by preserving Native languages tribal languages, tribal religion, and lands.

I take my responsibility for representing Indian Country in Washington very seriously. I work hard to facilitate a government-to-government relationship, and to help preserve cultural identity for future generations of tribal members.

That is why we are all very disturbed about the ongoing problems posed by the theft and sale of cultural items. Over many years, people have looted and sold important tribal artifacts for financial gain.

Looters have even taken the human remains of the ancestors of many tribal members across the country.

Over the last 30 years or so, we have become more aware of this problem. And we have made meaningful progress to pass laws to stop it, like the Native American Graves Repatriation Act, and the Archaeological Resources Protection Act, which have built on what was done with the Antiquities Act.

But the problem still exists. The enforcement of those laws has not been strong enough. Some people are exploiting the loopholes in our current laws, laws that are meant to stop the theft of important cultural items. And they have exported deeply important sacred objects to other countries, to be sold as art.

These items are not pieces of art—they are spiritual objects—deeply important for tribal identity. And we need to put a stop to the trafficking of these objects.

In the Senate, I introduced a resolution that strongly condemns the theft, illegal possession or sale and export of tribal cultural items.

It calls on Federal agencies to take affirmative action to stop the aforementioned practices, and to work to secure repatriation of tribal cultural items back to the tribes.

It also encourages state and local governments, along with groups and organizations, to work cooperatively to deter these practices.

My resolution is the companion to a House resolution introduced by Congressman Steve Pearce. We successfully passed it out of the Senate with minor changes. And I hope that we'll see it finalized quickly in November when we return for the lame-duck session.

I also join Senator Heinrich on his legislation, the Safeguard Tribal Objects of Patrimony Act, the STOP Act. It would prohibit the exporting of sacred Native American items and increase penalties for stealing and illegally trafficking tribal patrimony.

This is an important piece of legislation. I appreciate his leadership. I hope it will provide the agencies the tools they need to prevent the export of sacred objects and items of cultural patrimony.

I will work with this Committee to make sure this legislation gets a hearing soon. Earlier this year, I raised this issue with Secretary Jewell. I asked for the Department of Interior to work on this issue as part of its trust responsibility. Secretary Jewell assured me that the administration is committed to dealing with this problem. And she highlighted her efforts with her French counterparts.

We have reason for hope, with an example involving the Pueblo of Acoma.

An upcoming auction of the Acoma Shield in Paris was canceled after outreach to the auction house and the French government by myself, Senator Heinrich, and other U.S. government officials, including Secretary Jewell.

This is a problem that affects all of us, and we need to work collectively to put a stop to it.

This hearing is an opportunity to discuss the issue, to talk about its impact on tribal communities, and to discuss what the Federal Government can do to put a stop to the theft and sale of important tribal cultural items. My hope is that this hearing will shine a light on this problem, and result in strong action on this very important issue.

And, again, I appreciate the administration and other witnesses for working with us on this issue, and would like to turn it over to Senator Heinrich for his opening statement.

**STATEMENT OF HON. MARTIN HEINRICH,
U.S. SENATOR FROM NEW MEXICO**

Senator HEINRICH. Thank you, Senator Udall. Good morning, everybody. I want to say how much I appreciate all of you being here this morning. And I take great pride in working with New Mexico's tribal communities. I want to especially thank my colleague, Senator Udall, for his really critical leadership on this issue, and the Senate Indian Affairs Committee on which he sits, for holding this field hearing on tribal patrimony.

This is an issue that I have heard raised far too many times from too many tribes and pueblos here in the state of New Mexico, and from around the nation.

I also want to say thank you to the Indian Pueblo Cultural Center for hosting this important conversation, this hearing, and thank all of our witnesses for traveling here today and for your testimony, especially, our tribal leaders from New Mexico, including President Russell Begay of the Navajo Nation, Governor Paul Torres of Isleta Pueblo, and Governor Kurt Riley of the Pueblo of Acoma.

Earlier this year, when looking through a list of tribal artifacts up for bid at an art auction house in Paris, the Pueblo of Acoma discovered that the Acoma shield, a sacred ceremonial object, had been stolen and was about to be sold to the highest bidder. The word I've actually heard used by many of the tribal members in our audience to describe this, they used the word, "ransom."

After Acoma Governor Kurt Riley notified me of this sale, I wrote letter to Secretary of State John Kerry, urging that the U.S. State Department take all possible action to help repatriate the shield and other stolen cultural items to American Indian tribes.

Thankfully, in this particular case, intense public outcry, and diplomatic pressure were enough to postpone the illegal sale of the tribe's cultural patrimony. And the U.S. Department of Justice has issued a warrant to retrieve the Shield from France.

This is incredibly welcome news. But the Shield has still not been recovered from Paris. And in hundreds of other cases, tribes across the nation have been unable to stop similar theft and sale

of their priceless religious and cultural items in international markets.

Under Federal law, it's a crime to steal and sell these types of Native American and cultural items.

Unfortunately, the penalties in the Native American Graves Protection and Repatriation Act are not as high as other similar Federal statutes, like the National Stolen Property Act.

Therefore, prosecutions are too infrequent to deter criminals from smuggling and selling these objects.

And there is no explicit ban on exporting these items to foreign countries, where they might be sold at auction.

Just last month, I attended the White House Tribal Nation Conference, which brought together tribal leaders from the 567 federally recognized tribes.

These conferences have been important opportunities to bring tribal leaders together and I called on the next administration to continue this tradition. It was an honor to attend this year's conference and have the opportunity to listen to tribal leaders and to discuss issues critical to Indian Country, including the STOP Act.

The STOP Act is a bill that I introduced to prohibit the exporting of sacred Native American items, increase penalties for stealing and illegally trafficking tribal cultural patrimony.

The STOP Act will also create a tribal working group to help Federal agencies better understand the scope of the problem, and how we can work together to solve it.

I'm proud of my work with tribes in New Mexico and across Indian Country to craft this legislation.

And I'm thankful to Senator Udall for his cosponsorship and his incredible leadership on the resolution that the Senate recently passed. I announced the bill's introduction alongside tribal leaders here at the Indian Pueblo Cultural Center in Albuquerque and on Capitol Hill in July.

I'm pleased that the STOP Act has been endorsed by the Navajo Nation, the Jicarilla, Mescalero, and San Carlos Apache Nations, the Pueblos of Acoma, Santa Ana, Isleta, Zuni, Laguna, Nambe, Jemez and Ohkay Owingeh, as well as the All Pueblo Council of Governors, the Eight Northern Indian Pueblos Council, the National Congress of American Indians, the United South and Eastern Tribes Sovereignty Protection Fund, and most recently, the National Parks and Conservation Association.

I'm also proud to welcome growing bipartisan support for this legislation in the United States Senate. Senators Jeff Flake, Tom Udall, John McCain, Jon Tester, Lisa Murkowski, Steve Daines, Brian Schatz, Cory Gardner, and Michael Bennett, have all signed on as cosponsors of this legislation.

This hearing on the bill is an important step for us to take to continue to build a momentum towards passing this into law. And I'm very grateful for the witnesses here from Federal agencies who will tell us about their work to protect and repatriate tribal patrimony, and I look forward to hearing from them about additional tools that would aid them in those efforts.

While we must improve Federal law to create stronger legal deterrence, we also need to change the hearts and minds of art collectors and dealers who may have engaged in this activity.

The STOP Act includes an immunity period for collectors who may have illegal items in their possession to voluntarily repatriate those items to the tribes without the threat of prosecution.

All of us recognize the incredible beauty of Native American art, especially when you're from a place like New Mexico, where you can explore and admire the remnants of ancient wonders in places like Chaco Canyon and the Gila Cliff Dwellings, and discover the traditional and modern art masterpieces created by our contemporary Native artists.

But 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 all need to take all possible action to stop the latter and to help repatriate stolen culturally significant items to their rightful owners.

Thank you.

Senator UDALL. Senator Heinrich, thank you for that excellent statement, and we will now hear from our first panel of witnesses. Ms. Cheryl Andrews-Maltais, Senior Advisor to the Assistant Secretary of Indian Affairs, at the U.S. Department of the Interior; Mr. Tracy Toulou, Director of the Office of Tribal Justice at the U.S. Department of Justice; Mr. Mark Taplin, Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs the U.S. Department of State; Mr. Waldemar Rodriguez, Special Agent in Charge, Homeland Security Investigations, Immigrations and Customs Enforcement at the U.S. Department Homeland Security in El Paso, Texas.

And I want to remind witnesses that your full written testimony will be made a part of the official hearing record.

Please keep your statements to five minutes so that we may have time for questions.

And I look forward to hearing your testimony, beginning with Ms. Maltais. Please proceed.

STATEMENT OF CHERYL ANDREWS-MALTAIS, SENIOR ADVISOR TO THE ASSISTANT SECRETARY—INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Ms. ANDREWS-MALTAIS. Thank you. And good morning, Senator Heinrich and Senator Udall, and members of the Committee that are here.

My name is Cheryl Andrews-Maltais, and I am the Senior Advisor to the Assistant Secretary for Indian Affairs. I'd like to thank you for holding this field hearing, for the opportunity to provide testimony before the Committee on the theft, illegal possession, sale, transfer, and export of tribal cultural items.

As we know, the United States Trust responsibility includes providing for the education, health, and overall well-being of tribes. We'd like to acknowledge that this field hearing demonstrates a true commitment to that responsibility and we sincerely thank you.

By way of background, I'm the former chairwoman of my tribe, as well as the former tribal historic preservation officer responsible for our cultural resources and repatriation.

American Indian cultural traditions and heritage is the foundation of our identity. It defines tribes as distinct peoples and is a vital link to the tribal community, spiritual help, and well-being.

Too many tribes' ancestors' human remains, associated funerary items, sacred items, sacred items, and items of cultural patrimony or tribal cultural heritage, is being held in museums or sold or traded in the open and black markets, both domestically and abroad.

This is having a devastating effect on tribes, as well as affecting our future generations. When we say "cultural heritage," we mean not only the ancestors' funerary items, and sacred items, and items of cultural patrimony, but also the relationship of these items to the community, both tangible and intangible.

Tribal cultural heritage belongs to the tribal community of its origin as a whole. And by tribal custom, cannot be alienated from that community by any individual or group without the expressed free, prior, and informed consent of that tribe.

No individual person in a group has a right to possess, transfer, trade, tribal cultural heritage. And to do so is against tribal customs, and practices, and laws.

Unfortunately, tribal cultural appropriation and a desire for the collection of items that are uniquely Indian and have had cultural significance to tribes, has become a very lucrative industry. These influences have opened the door for illegal activities regarding the acquisition, transfer, and sale of these items.

They are being stolen on a regular basis, and are turning up on the Internet, in auction houses, both domestically and abroad, as well as in private collections.

This activity must be stopped, and we are committed to doing that.

The Department is committed to combating the theft and illegal possession, sale, and transfer, as well as export of cultural items. And also committed to helping tribes repatriate their cultural heritage from abroad.

For instance, there are ancestors still being held in museums in foreign countries, despite repeated requests from the tribes as well. And also including when the tribes have the assistance of the United States Government, we're still finding challenges.

Additionally, since 2013, there have been a series of sales by Paris auction houses involving tribal cultural heritage, including sacred items. At the request of the tribes, and in some cases, the Federal Government has intervened with the auction houses and the government.

We have seen some progress, but continue to face many challenges.

We've assisted the Department of State with efforts to raise awareness of the sensitivities of these items with the museums, auction houses, and foreign governments, and the public at large. However, more work is needed to be done.

As noted in my testimony, in December of 2015, Secretary Jewell met with France's Minister of Justice to seek cooperation in preventing such sales, and to begin a dialogue to repatriate these sacred items back to their proper homes.

This past May, she issued a public statement objecting to a scheduled auction of cultural items, and called upon the French government to work with the United States government and tribes to address the problem.

Illustrating the challenges before us, only this last May, did a tribe succeed in delaying the sale of an item of concern. However, it's our understanding, another auction is scheduled for December.

In light of these continued activities, Secretary Jewell has instructed the Department to coordinate with tribes and other Federal agencies to review the circumstances by which sacred items and other important tribal cultural patrimony are making their way into foreign markets, and to explore ways of improving Federal support for tribes' repatriation efforts.

To this end, in addition to several listening sessions, the Department has launched government-to-government consultations with tribes on international repatriation issues, beginning at the White House Tribal Nations Conference in Washington D.C., and a second session was last week at the National Congress of American Indians in Phoenix, Arizona.

Additional sessions are planned for October 21st at the annual convention of Alaska Federation of Natives, in Fairbanks, Alaska. And October 26th, at the United South & Eastern Tribes meeting in Cherokee.

I'm pleased to report that other Federal agencies, such as the Department of State and Justice are involved in this process.

We're seeking input, ideas, information, and views relating to Native American tribal cultural heritage, as well as that of the Native Hawaiians.

Thus far, the tribes have provided some consistent comments and ideas at our listening sessions and consultation, which include the creation of a formal multi-agency task force or working group to address this issue, changing the definition regarding ownership impropriety in favor of the tribes, seeking bilateral agreements with key foreign countries, developing a tool kit for tribes to know how to access U.S. assistance, developing a guidance publication for customs officials and foreign governments to help them recognize potentially sensitive items, as well as very importantly raising the sensitivity and public awareness about the difference between tribal cultural heritage and authentic artworks produced and marketed for sales by artisans, who are members of federally-recognized tribes.

We realize that this is a very complicated issue requiring a multi-faceted and interagency approach. All tribes are unique and have their own cultural beliefs, traditions, and practices relative to their cultural heritage. We understand there's no magic bullet or a one size fits all remedy. However, working together with the tribes and other agencies, and the Committee collectively, I'm confident that we can find a solution to this problem.

Thank you very much for the opportunity to offer a statement, and I'm happy to answer any questions you may have.

[The prepared statement of Ms. Andrews-Maltais follows:]

PREPARED STATEMENT OF CHERYL ANDREWS-MALTAIS, SENIOR ADVISOR TO THE
ASSISTANT SECRETARY—INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Senator Heinrich and Senator Udall, and members of the Committee, my name is Cheryl Andrews-Maltais, and I am the Senior Advisor to the Assistant Secretary for Indian Affairs at the Department of the Interior (Department). Thank you for holding this field hearing and for the opportunity to provide testimony before this Committee on the “Theft, Illegal Possession, Sale, Transfer and Export of Tribal Cultural Items.”

Tribal cultural heritage is at the heart of tribal identity. When we say “cultural heritage” we mean not only the Ancestors, funerary items, sacred items, and items of cultural patrimony but also the relationships of these items to the community, both tangible and intangible. Native American cultural roots are America’s deepest cultural roots. In the words of the National Historic Preservation Act, this heritage gives spirit and direction to tribes and to America.

Tribal cultural heritage belongs to the tribal community of its origin as a whole and must not be alienated from that community by any individual or group without the expressed prior and informed consent of that tribe. No individual person or group has a right to possess, transfer, or trade tribal cultural heritage and to do so is against tribal customs, practices, and laws.

Unfortunately cultural appropriation and a desire for the collection of items that are uniquely Indian and have cultural significance to tribes has become a very lucrative industry. These influences have opened the door for illegal activities regarding the acquisition, transport, and sale of tribal cultural heritage. Tribal cultural heritage is being stolen on a regular basis and is turning up on the Internet, in auction houses both domestically and in foreign countries, and in private collections.

The Department is committed to combatting the theft, illegal possession, sale, and transfer of tribal cultural heritage. We are also committed to combatting the export of illicitly acquired cultural items and to helping tribes repatriate their cultural heritage from abroad.

A number of tribes have cultural heritage of concern housed in foreign museums or being sold in foreign markets. For instance, since 2013 there have been a series of sales by Paris auction houses involving tribal cultural heritage, including sacred items. At the request of concerned tribes, the Federal Government has intervened with the auction houses and the French government in a number of these cases.

We have assisted the Department of State with efforts to raise awareness of the sensitivity of these items with auction houses, the French government, and the public. In December 2015, Secretary of the Interior Sally Jewell met with France’s Minister of Justice to seek cooperation in preventing such sales and working to repatriate these sacred items back to their proper homes. And this past May, Secretary Jewell issued a public statement objecting to a scheduled auction of cultural items, noting that “[a]uctioning off tribal sacred objects is extremely troubling not only because tribal law precludes the sale of these objects by individuals, but because items held by a dealer or collector are likely the result of wrongful transfer and may be for sale illegally.” She called upon the French government to work with the United States government and with tribes to address this problem. Illustrating the challenges before us, only this past May did a tribe succeed in delaying the sale of an item of concern.

In light of the continuing sales and holdings of tribal cultural heritage in foreign museums, Secretary Jewell has instructed Department staff to cooperate with tribes and other federal agencies, including the Departments of State, Homeland Security, and Justice, to review the circumstances by which sacred items and other important tribal cultural patrimony are making their way into foreign markets, and explore ways of improving federal support for tribes’ efforts at repatriation. Within the Department, many offices and bureaus have responsibilities relating to this effort, including not only the Office of the Assistant Secretary for Indian Affairs but also the Office of International Affairs, Office of the Solicitor, the National Native American Graves Protection and Repatriation Act (NAGPRA) Program and the cultural resources and law enforcement staff of the land management agencies.

To this end, in addition to several listening sessions, the Department has launched government-to-government consultations with tribes on international repatriation issues. The first session was held September 27, 2016, at the White House Tribal Nations Conference in Washington, D.C. and we conducted the second last week at the Annual Convention of the National Congress of American Indians in Phoenix, AZ. Additional sessions are planned for October 21, 2016, at the annual convention of the Alaska Federation of Natives in Fairbanks, AK, and October 26, 2016, at the meeting of the United South & Eastern Tribes in Cherokee, NC. I am happy to report that other federal agencies, such as the Departments of State, and

Justice, are involved in this process. We are seeking input, ideas, information and views relating broadly to Native American cultural heritage, including that of Native Hawaiians.

Examples of ideas under discussion that have been raised during these sessions include: seeking bilateral agreements with key foreign countries; developing a guidance publication for customs officials and foreign governments to help them recognize potentially sensitive items; and raising public sensitivity and awareness about the difference between tribal cultural heritage and authentic artworks produced and marketed for sale by artists who are members of federally-recognized tribes.

An essential element to combat this cultural heritage theft is vigorous enforcement of laws such as NAGPRA and ARPA. As an example, in 2009, federal law enforcement partners (Bureau of Land Management, Federal Bureau of Investigation, U.S. Marshals) concluded a two-year undercover operation that rounded up a ring of archeological grave robbers who looted pristine sites in the Southwest, desecrated ancient American Indian burials and stole priceless artifacts, selling them to dealers and collectors who were associated with the network. Departmental law enforcement worked with the Department of Justice to prosecute those found guilty of violating cultural heritage laws.

At that time this was the United States' largest investigation of archeological and cultural artifact thefts. The investigation involved officers from BLM, FBI, and the U.S. Marshals, who were joined by local and state law enforcement partners. These agencies executed nearly two dozen search warrants in four states resulting in the indictment of approximately 30 individuals from Utah, New Mexico, and Colorado. During the undercover investigations, just over 250 stolen artifacts were trafficked, with an estimated value exceeding \$335,000, including decorated pottery, burial and ceremonial masks, a buffalo headdress, and ancient sandals known to be associated with Native American burials.

The then-Assistant Secretary for Indian Affairs, Larry Echo Hawk, said at the time that “[l]ooters robbing tribal communities of their cultural patrimony is a major law enforcement issue for federal agencies enforcing historic preservation laws in Indian Country,” and the “action should give American Indians and Alaska Natives assurance that the Obama Administration is serious about preserving and protecting their cultural property.”

The ring was charged with multiple counts of violating ARPA and NAGPRA as well as theft of government property, depredation of government property, and theft of Indian tribal property. Nearly all of the defendants pled guilty to charges, and as a condition of the plea agreements, relinquished their Native American artifacts collections. Approximately 40,000 artifacts were recovered. However, no one was required to serve any jail time.

Through our ongoing outreach, listening sessions and consultations on international repatriation of tribal cultural items, the Federal Government is receiving and sharing information about existing training and models. For example, after receiving information from the Grand Ronde Tribe about how Oregon State Police are trained in looting and trafficking to improve apprehension and prosecution, that information was referred to Department of Justice training officials to incorporate into their materials. The Department also continues to provide training on compliance and enforcement of NAGPRA and ARPA internally and with other federal agencies.

It is also important to improve public awareness of why it is not only illegal to remove or traffic in cultural items and archeological resources, but also morally wrong. Examples of efforts to build awareness include a full-day seminar titled “Going Home: 25 Years of Repatriation Under the National Museum of the American Indian (NMAI) Act,” at the Smithsonian’s National Museum of the American Indian on November 19, 2014. And more recently, in May 2016, the National Museum of the American Indian hosted a panel discussion and press conference in advance of a May 2016 Paris auction that included tribal cultural items and received great media coverage. The art and museum communities are, as a general matter, more sensitive to the special nature of Native American cultural items and the constraints of federal law, but even within the museum and collections community there is a need to continually reinforce the strict requirement that no items with unknown provenance or title should be sold or brought into a collection, for any reason.

Currently, our best enforcement mechanisms to prevent theft, illegal possession, sale, transfer and export of cultural patrimony within the United States are ARPA, the Antiquities Act and NAGPRA.

We are exploring ways for the Department and Federal Government as a whole to strengthen the implementation of both ARPA and NAGPRA to protect tribal cultural items to the fullest extent under existing law. These efforts could include, for example:

- Creating more regular training opportunities for federal law enforcement officers, prosecutors, and customs agents on NAGPRA, ARPA, and the Antiquities Act, as well as the application of laws against theft and depredation of federal or Indian property;
- Requiring more robust and frequent training for federal archeologists on the preparation of damage assessment reports;
- Providing additional training for Customs officers on the recognition of Native American cultural property;
- Using tribal monitors on federal lands to provide an additional level of protection for archeological sites, and the overall increased capacity for federal agencies to monitor archeological sites on public lands;
- Developing a special panel or federal-tribal task force to evaluate the issue of international and domestic repatriation challenges and develop specific regulatory language and recommendations.

Additionally, the Department would like to work with the Committee to explore ways to address the limitations in treatment of Native American cultural heritage. Examples include:

- Exploring new ways for repatriating Native American or Native People's worldwide items of cultural heritage, and requiring documentation for items identified as potentially sacred;
- Working with the Department of State to explore potential ways that tribes could be empowered to address international repatriation issues; and
- Providing legal protection from disclosure of sensitive information that is provided by tribes to support the investigation and repatriation of culturally sensitive items.

Conclusion

Thank you for providing the Department the opportunity to provide a statement on "The Theft, Illegal Possession, Sale, Transfer and Export of Tribal Cultural Items." I am available to answer any questions the Committee may have.

Senator UDALL. Thank you very much, Mr. Maltais, and please proceed, Mr. Toulou.

STATEMENT OF TRACY TOULOU, DIRECTOR, OFFICE OF TRIBAL JUSTICE, U.S. DEPARTMENT OF JUSTICE

Mr. TOULOU. Good morning, Senator Udall and Senator Heinrich.

Senator UDALL. Good morning.

Senator HEINRICH. Good morning.

Mr. TOULOU. My name is Tracy Toulou, and I'm the Director of the Office of Tribal Justice at the Department of Justice. I'm also a proud Lobo, and I'm happy to be in Albuquerque today. It's great to be back.

Senator UDALL. Welcome back.

Mr. TOULOU. Thank you.

Senator HEINRICH. Welcome back.

Mr. TOULOU. The Department of Justice appreciates the opportunity to appear before you today to discuss the theft, illegal possession, sale, transfer, and export of tribal cultural items, and the Department's effort to combat these activities and protect Native American cultural resources.

In the audience is my colleague, Damon Martinez, a United States Attorney for the District of New Mexico. His office is exemplary in the work on these important issues, as they are in all issues that occur in Indian Country.

Unfortunately, there's a long history of looting Native American cultural sites and theft of Native American cultural resources. Congress has passed various laws in an attempt to stop the looting and

the thefts. But I thank you for holding this hearing today because there is so much work to be done.

The first significant Federal statute signed to protect archaeological and Native American culture resources was the Antiquities Act of 1906.

After decades of looting, desecration and destruction of Native American sites in the southwest, such as Chaco Canyon, the Antiquities Act was passed, in part, as an attempt to protect these sites. However, the ability of the United States to prosecute offenses under the Antiquities Act was significantly Impacted in the 1970s, when the Ninth Circuit questioned portions of the Act.

Because of the Ninth Circuit's decision, additional legislation was deemed necessary.

In 1979, Congress passed the Archaeological Resources Protection Act, or ARPA, which strengthened the preservation purposes of the Antiquity Act in several ways.

More importantly, ARPA provided more robust civil, criminal, and felony prosecution options. An ARPA violation can either be a felony or a misdemeanor, and it can be pursued civilly when appropriate.

However, for ARPA to apply, it must involve an archeological resource more than a hundred years old. And with the exception of one of the trafficking provisions that applies to violations of state and local law, the theft or looting must occur on public land for ARPA jurisdiction to attach. Such lands, include Indian lands held in trust by the United States and Indian lands subject to restriction against alienation imposed by the United States.

Although, ARPA increased protection to archeological and historical sites, it left a hole in the protection of Native American human remains and associated funerary objects that were less than a hundred years old or were not found on Federal land.

To address the gap with regards to human remains, Congress passed the Native American Graves Protection and Repatriation Act of 1990, or NAGPRA.

Most of NAGPRA establishes procedures for the return of human remains, funerary objects, sacred objects, and items of cultural patrimony from museum collections to their Native American descendants.

However, Section 4 of NAGPRA amended the United States Criminal Code and created sanctions for illegal trafficking in Native American human remains and cultural items. The penalties for trafficking are similar to those for violating ARPA. And NAGPRA includes penalties for a trafficker who knowingly sells, purchases, uses for profits, or transports for sale or profit, any Native American cultural items obtained in violation of the Act.

Sentencing guidelines provides an enhancement for cultural heritage resource crimes.

Some examples of successful prosecutions that the United States has brought pursuant to these statutes are for damaging and removing archeological resources from a historic Yakama Nation site, for the removal of petroglyphs from a sacred worship site of the Southern Paiute Tribe, located on Federal lands.

And I would also like to highlight the work of the U.S. Attorney's Office here in New Mexico for obtaining a guilty plea for a felony

violation of ARPA against an individual who excavated and removed several pieces of Mimbres pottery from BLM lands.

Despite these successes, there's still some challenges that the Department faces when prosecuting these cases.

One of the major barriers we face is the vast amount of acreage that needs monitoring on a regular basis. And the law enforcement resources are spread so thin in many of the hardest hit areas.

In addition, because most of these laws apply only to objects taken from Federal lands or tribal lands, there are often challenges proving where the theft occurred.

The Acts also require the United States to prove the defendant was aware of the facts and circumstances that constitute the crime.

In some circuits, it means that proving the defendant knew the item was an archeological resource and illegally excavated. This is a significant challenge in many cases where the cultural items may have passed through the possession of several different people, and there's difficulty in proving that the current possessor knew of the illegal conduct.

Finally, all three Acts are prospective laws which generally apply only to actions after their passage.

I want to close by quoting from former Senator Domenici's statement at the 1979 Senate ARPA hearing.

"In recent years, the rise in prices of prehistoric Indian artifacts and other archeological resources have created a large international demand. Professional looters have been active in the southwest and elsewhere pirating these on public lands, and in some cases with bulldozers. Virtually tens of thousands of dollars worth of artifacts have been taken from public lands in New Mexico. Mimbres pots are being illegally dug out on consignment and sold on the international art market."

Unfortunately, the prices have only risen since the 1978 hearing.

But more importantly, beyond any dollar value is the incredibly important religious, spiritual, and cultural importance of these items.

I applaud the efforts of Congress and the leadership of the New Mexico delegation on these important issues over the decades. But as the recent international auctions demonstrate, there is significant challenges yet to come, and we hope to work with Congress as you address those challenges.

Thank you.

[The prepared statement of Mr. Toulou follows:]

PREPARED STATEMENT OF TRACY TOULOU, DIRECTOR, OFFICE OF TRIBAL JUSTICE,
U.S. DEPARTMENT OF JUSTICE

Senators Udall and Heinrich, my name is Tracy Toulou and I am the Director of the Office of Tribal Justice at the United States Department of Justice. The Department of Justice appreciates the opportunity to appear before you today to discuss the "Theft, Illegal Possession, Sale, Transfer, and Export of Tribal Cultural Items" and the Department's efforts to combat these activities and protect Native American cultural resources. In the audience is my colleague Damon Martinez, the United States Attorney for the District of New Mexico, whose office is exemplary in their work on these important issues and on all Indian country issues.

Unfortunately, there is a long history of looting Native American cultural sites and theft of Native American cultural resources. Congress has passed various laws in an attempt to stop the looting and the thefts, but I thank you for holding this hearing because there is still work to be done.

The first significant Federal statute designed to protect archaeological and Native American cultural resources is the Antiquities Act of 1906. After decades of looting, desecration, and destruction of Native American sites in the Southwest, such as Chaco Canyon, the Antiquities Act was passed in part as an attempt to protect these sites. However, the ability of the United States to prosecute offenses under the Antiquities Act was significantly curtailed by the Ninth Circuit in the 1970s. An individual who stole several items, including twenty-three masks, from a medicine man's cave on the San Carlos Apache Indian Reservation was prosecuted under the criminal provisions of the Antiquities Act. The masks had been made a few years earlier and left in the cave as part of an Apache religious ceremony, but were considered to be objects of antiquity because they were part of the long-standing religious and social traditions of the Tribe. The Act did not define the term, however, and the Ninth Circuit found it to be unconstitutionally vague because the defendant had no notice that a relatively new object could be considered an antiquity. Because of the Ninth Circuit's decision, additional legislation was deemed necessary.

In 1979 Congress passed the Archaeological Resources Protection Act, or ARPA, which strengthened the preservation purposes of the Antiquities Act in several ways. Most importantly, ARPA provided more robust civil and criminal felony prosecution options. An ARPA violation can be either a felony or a misdemeanor and it can be pursued civilly when deemed appropriate. However, for ARPA to apply, it must involve an archaeological resource more than 100 years old, and with the exception of one of the trafficking provisions that applies to violations of state and local law, the theft or looting must occur on public lands for ARPA jurisdiction to attach. Such lands include Indian lands held in trust by the United States and Indian lands subject to the restriction against alienation imposed by the United States.

Although ARPA increased protection to archeological and historical sites, it left a hole in the protection of Native American human remains and associated funerary objects that were less than 100 years old and not found on federal land. To address the gap with regards to human remains, Congress passed the Native American Graves Protection and Repatriation Act of 1990, or NAGPRA. Most of NAGPRA establishes procedures for the return of human remains, funerary objects, sacred objects, and items of cultural patrimony from museum collections to their representative Native American descendants. However, section 4 of NAGPRA amended the United States Criminal Code and created sanctions for the illegal trafficking in Native American human remains and cultural items. The penalties for trafficking are similar to those for violating ARPA, and NAGPRA includes penalties for a trafficker who "knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation" of the Act. Sentencing guidelines provide an enhancement for cultural heritage resource crimes.

Some examples of successful prosecutions that the United States has brought pursuant to these statutes are for damaging and removing archeological resources from an historic Yakama Nation site, for the selling and transporting for sale of an Ancestral Puebloan cloud blower pipe, which was removed from public lands, and for the removal of a petroglyph from a sacred worship site of the Southern Paiute located on federal land. And I would like to highlight the work of the U.S. Attorney's Office here in New Mexico for obtaining a guilty plea for felony violations of ARPA against an individual who excavated and removed several pieces of Mimbres pottery from BLM lands.

Despite these successes, there are still some challenges that the Department faces when prosecuting these cases. One of the major barriers that we face is the amount of acreage that needs monitoring on a regular basis is so vast and law enforcement resources spread so thin that many of the hardest-hit areas remain vulnerable. In addition, because most of these laws apply only to objects taken from federal or tribal lands, there are often challenges proving where the theft occurred. The Acts also require the United States to prove that the defendant was aware of the facts and circumstances that constitute the crime. In some Circuits, this may mean proving that the defendant knew that the item was an archaeological resource and illegally excavated. This is a significant challenge in many cases where the cultural item may have been passed into the possession of several different people and there is difficulty in proving that the current possessor knew of the illegal conduct. Finally, all three of the Acts are prospective laws which generally apply only to actions after their passage. The result is that the United States cannot prosecute the theft of the masks stolen from the San Carlos Apache Reservation that I mentioned at the beginning of my statement.

I want to close by quoting from former Senator Domenici's statement at the 1979 Senate ARPA hearing:

"In recent years, the rise in prices of prehistoric Indian artifacts and other archaeological resources has created a large international demand. Professional looters have been active in the southwest and elsewhere pirating these sites on public lands, in some cases with bulldozers. Virtually tens of thousands of dollars worth of artifacts have been taken from public lands in New Mexico. Mimbres pots are being illegally dug out on consignment and sold in the international art market."

Unfortunately, the prices have only risen since that 1979 hearing. But beyond any dollar value is the religious and cultural importance of these items. I applaud the efforts of Congress and the leadership of the New Mexico delegation on these important issues over the decades, but as the recent international auctions demonstrate, there are still significant challenges and we hope to work with Congress in addressing those challenges. Thank you.

Senator UDALL. Thank you, Mr. Toulo, very much, and thank you for reminding me that the U.S. Attorney is here, Damon Martinez. I believe he's sitting right over here. I think you have reminded us, and his presence here, of the powerful message that is sent with the prosecution because I've served in the U.S. Attorney's Office for three years, late 1970s, early 1980s, and prosecutions were brought under ARPA, and I think they send a very strong message.

Please proceed, Mr. Taplin.

STATEMENT OF MARK TAPLIN, PRINCIPAL DEPUTY ASSISTANT SECRETARY, BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS

Mr. TAPLIN. Good morning, Senator Udall, Senator Heinrich, members of the Committee. Thank you for the opportunity to appear today to discuss the State Department's diplomatic role in advocating for the recovery and repatriation of Native American cultural items, including items of special cultural and religious significance to U.S. tribes that are offered for commercial sale overseas.

I am delighted to be part of a panel featuring representatives from our principal Federal Government partners in defending the interests of Native American tribes overseas. And I'm honored to meet and hear from tribal leaders and other Native American representatives who are here today.

The challenge of recovering important tribal cultural items and repatriating them, whenever possible, to tribal custody, is a subject of importance to all of us who care about preserving and protecting our own country's cultural heritage in all of its richness and diversity.

Traditionally, the State Department's emphasis in cultural heritage matters has been centered on helping other countries better preserve and protect their own cultural patrimony. The United States is an acknowledged leader internationally in this area.

And under the 1983 Conventional and Cultural Property Implementation Act, the CCPA, the United States has entered into some 15 bilateral agreements that create import restrictions on categories of cultural property from other countries, and whose cultural heritage is under threat from pillage and trafficking.

And we negotiate and implement these cultural property agreements in close partnership with the Departments of Treasury and Homeland Security, which have authority over, respectively, the

imposition and enforcement of import restrictions in the United States.

We have cultural property agreements today with countries ranging from Italy, Greece, and China, to Mali, Guatemala and Cambodia.

A common element of all our partnerships is our steadfast efforts to block the illegal importation into the United States of their irreplaceable cultural property. But what of the loss of our own cultural Heritage? And especially the endangered heritage of U.S. tribes. What can we at the State Department do to counter the trade and commercialization of U.S. tribal items in overseas markets?

This issue has been put into sharp relief since 2013 by a series of commercial auctions of Native American sacred items in Paris such as the Pueblo of Acoma Shield, which attracted considerable diplomatic and media attention earlier this year and resulted in the Shield being pulled from the auction.

The sales have put on the auction block hundreds of items representing the tribal patrimony of numerous U.S. tribes.

These auctions have rightfully raised an outcry internationally, and even within France, but have continued periodically despite our best diplomatic efforts.

The Department of State, in close coordination with the affected tribes, their legal representatives, and the Department of Interior, has encouraged consultation between private auction houses in Paris and tribal representatives in advance of these auctions.

But, unfortunately, in many cases, the auction houses have not engaged in meaningful prior consultation about the provenance of culturally significant items prior to offering them for sale.

In March of this year, the State Department proposed to the French government the formation of a bilateral working group to identify legal and policy issues, in both countries, that could be addressed in order to restrict and finally bring to an end this ongoing commercialization of U.S. tribal items.

We've raised the issue with French interlocutors at various levels, and I'm pleased to announce—and this is not reflected in the written testimony—that we heard yesterday from our Embassy in Paris, that France has agreed to a first working group meeting at the end of this month.

Meanwhile, we intend to remain vocal about our concerns, as we have been on other occasions on behalf of U.S. tribal interests, and to encourage others in the United States and internationally to speak out.

In particular, we believe that the voices of Native American tribal leaders, and their representatives, are especially compelling, including with foreign audiences, which admire Native American culture and support repatriating these items to the tribes themselves.

We appreciate the interest and support of Congress in working with the Department of State to highlight our shared concerns about the importance of protecting cultural heritage. Raising international awareness of U.S. tribal concerns about cultural heritage, and repatriation issues at every opportunity and through active public diplomacy, remains a key part of our strategy.

I want to assure you the State Department will continue to play a strong role on behalf of U.S. tribes in advocating for the recovery and repatriation of tribal cultural items illegally trafficked overseas. And, likewise, we remain committed to looking for ways to strengthen our links to U.S. tribes and Native American institutions, directly and as participants in ongoing consultative bodies chaired by other U.S. Federal agencies.

So, again, thank you for this opportunity. I look forward to answering your questions.

[The prepared statement of Mr. Taplin follows:]

PREPARED STATEMENT OF MARK TAPLIN, PRINCIPAL DEPUTY ASSISTANT SECRETARY,
BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS

Senator Udall, Senator Heinrich and members of the Committee—thank you for the opportunity to appear today to discuss the State Department's diplomatic role in advocating for the recovery and repatriation of Native American cultural items, including items of special cultural and religious significance to U.S. tribes that are offered for commercial sale overseas.

I am delighted to be part of a panel featuring representatives from our principal Federal Government partners in defending the interests of Native American tribes overseas. I am honored to meet and hear from tribal leaders and other Native American representatives who are here today. The challenge of recovering important tribal cultural items and repatriating them, whenever possible, to tribal custody is a subject of importance to all of us who care about preserving and protecting our own country's cultural heritage, in all of its richness and diversity.

Traditionally, the State Department's emphasis in cultural heritage matters has been centered on helping other countries better preserve and protect their own cultural patrimony. As a State Party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (or "the 1970 UNESCO Convention"), the United States is an acknowledged leader internationally in this area. Under the 1983 implementing legislation—the Convention on Cultural Property Implementation Act (the CCPIA)—the United States has entered into some 15 bilateral agreements that create import restrictions on categories of cultural property from other countries and whose cultural heritage is under threat from pillage and trafficking.

We negotiate and implement these cultural property agreements in partnership with the Departments of Treasury and Homeland Security, which have authority over, respectively, the imposition and enforcement of import restrictions in the United States. We have cultural property agreements today with countries ranging from Italy, Greece and China to Mali, Guatemala and Cambodia. A common element of all our partnerships is our steadfast efforts to block the illegal importation into the United States of their irreplaceable cultural property.

Under the CCPIA, including through the work of the Presidentialy appointed Cultural Property Advisory Committee, we strive to balance the interests and equities of a wide range of stakeholders, including archaeologists, museums and the private art market. We believe that fostering this type of balanced discussion of stakeholder interests should remain a key feature of the U.S. approach to cultural property protection, whether overseas or in the United States itself.

But what of the loss of our own cultural heritage, and especially the endangered heritage of U.S. tribes? What can we at the State Department do to counter the trade and commercialization of U.S. tribal items in overseas markets?

This issue has been put into sharp relief since 2013 by a series of commercial auctions of Native American sacred items in Paris, such as the Pueblo of Acoma shield, which attracted considerable diplomatic and media attention earlier this year, and resulted in the shield being pulled from the auction. The sales have put on the auction block hundreds of items representing the cultural patrimony of numerous U.S. tribes. These auctions have rightfully raised an outcry internationally—and even within France—but have continued periodically despite our best diplomatic efforts.

The Department of State, in close coordination with the affected tribes, their legal representatives, and the Department of Interior, has encouraged consultation between private auction houses in Paris and tribal representatives in advance of these auctions. Unfortunately, in many cases the auction houses have not engaged in meaningful prior consultation about the provenance of culturally significant items prior to offering them for sale. Legal challenges to the sale of Native American sa-

cred items are difficult matters, involving an attempt to recreate transfers that may have taken place decades ago. To date we do not have a successful record.

In March of this year, the State Department proposed to the French government the formation of a bilateral working group to identify legal and policy issues, in both countries, that could be addressed in order to restrict and finally bring to an end this ongoing commercialization of U.S. tribal items. We continue to raise the issue with French interlocutors at various levels and are hopeful for a reply soon.

While we are waiting for a reply, we intend to remain vocal about our concerns—as we have been on other occasions on behalf of U.S. tribal interests—and to encourage others in the United States and internationally to speak out. In particular, we believe that the voices of Native American tribal leaders and their representatives are especially compelling, including with foreign audiences which admire Native American culture and support repatriating these items to the tribes themselves. Similarly, we appreciate the interest and support of Congress in working with the Department of State to highlight our shared concerns about the importance of protecting cultural heritage. Raising international awareness of U.S. tribal concerns about cultural heritage and repatriation issues at every opportunity and through active public diplomacy remains a key part of our strategy.

Thank you again for inviting me to testify today. I want to assure you that the State Department will continue to play a strong role on behalf of U.S. tribes in advocating for the recovery and repatriation of tribal cultural items illegally trafficked overseas. Likewise, we remain committed to looking for ways to strengthen our links to U.S. tribes and Native American institutions, directly and as participants in ongoing consultative bodies chaired by other U.S. federal agencies.

I look forward to answering your questions.

Senator UDALL. Thank you very much, Mr. Taplin. Please proceed, Mr. Rodriguez.

STATEMENT OF WALDEMAR RODRIGUEZ, SPECIAL AGENT IN CHARGE, HOMELAND SECURITY INVESTIGATIONS, EL PASO U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. RODRIGUEZ. Thank you, Chairman Udall, Senator Heinrich, and other members of the Committee. Thank you for the opportunity to appear before you today to discuss the efforts of U.S. immigration and customs enforcement to protect cultural and religious items, property, art and antiquities, and mitigate their illicit trafficking both into and out of the United States.

As the Department of Homeland Security's principal investigative agency, ICE's position to leverage has brought statutory authority to investigate a wide range of domestic and international activities arising from illegal movement of people, goods, and money with a nexus to the borders of the United States.

Federal customs law regarding smuggling and trafficking, as well as customs border search authority, provide ICE Homeland Security Investigations, with the capability and responsibility to take a leading role in investigating crimes involving the import and distribution of stolen or looted cultural property, and prosecuting those individuals and organizations responsible for these crimes.

ICE is the lead investigative agency for illegal import and export of cultural property. And, for example, if—as an example, if customs officers were to discover that tribal cultural items were transported into or out of the United States in violation of existing import or export law, I would have authority and jurisdiction to conduct that investigation.

However, ICE would not typically be the lead investigatory agency for the theft and illegal transport of tribal cultural items within the United States.

These investigations can result in complex cases involving multiple domestic and international ICE offices, that can last for years.

For example, one of ICE's largest ongoing cultural property investigations, hidden idols, began in 2007 and has resulted in the seizure of more than \$150 million in artifacts.

In fiscal year 2015, ICE worked 239 domestic and 102 international cultural property investigations.

To conduct these complex investigations, ICE may collaborate with tribal, Federal, state and local law enforcement, private institutions, and foreign governments. ICE also has the ability to work directly with cultural resources practitioners to support this collaborative institution.

ICE established the Cultural Property, Art and Antiquities Program, the CPAA program, to oversee efforts related to the protection of cultural property. The program conducts training on the preservation, protection and investigation of cultural heritage and property, coordinates and supports investigations involving the illicit trafficking of cultural properties from countries around the world, and facilitate the repatriation of illicit cultural items seized as a result of HSI Investigations to the artifacts' lawful owners.

These investigations often result in the forfeiture of cultural property, which must be repatriated to its lawful owners through a legal forfeiture process.

The CPAA program oversees the cultural repatriation, which can be a small exchange after the legal process is completed, or it can include a grand ceremony that commemorates the item's return at the country's Embassy or even within the country itself.

Although most of ICE's cultural repatriations has stemmed from investigations related to import or export, the repatriation of seized and forfeited tribal cultural and religious items could occur within tribal customs and traditions. Whatever the venue, returning a piece of a country's history and heritage to its people is a celebration and an event in which ICE is particularly proud to participate.

Since 2007, ICE has repatriated more than 7,750 items to more than 30 countries.

In closing, ICE remains committed to working with this Committee and tribal governments to continue our strong relationship going forward to help prevent and combat the illicit trafficking of tribal cultural and religious items.

Thank you again for your continued—for the opportunity to testify here today, and for your continued support of ICE and its law enforcement mission. I would be pleased to answer any questions.

[The prepared statement of Mr. Rodriguez follows:]

PREPARED STATEMENT OF WALDEMAR RODRIGUEZ, SPECIAL AGENT IN CHARGE,
HOMELAND SECURITY INVESTIGATIONS, EL PASO, U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY

Introduction

Chairman Barrasso, Vice Chairman Tester, Senator Udall, Senator Heinrich, and distinguished Members of the Committee:

Thank you for the opportunity to appear before you today to discuss the efforts of U.S. Immigration and Customs Enforcement (ICE) to protect cultural and religious items, property, art and antiquities, and mitigate their illicit trafficking both into and out of the United States.

As the largest investigative agency within the U.S. Department of Homeland Security (DHS), ICE investigates a wide range of domestic and international activities

arising from the illegal movement of people, goods, and money with a nexus to the borders of the United States. Federal customs law regarding smuggling and trafficking, as well as customs border search authority provide ICE Homeland Security Investigations (HSI) with the capability and responsibility to take a leading role in investigating crimes involving the import and distribution of stolen or looted cultural property, and prosecuting those individuals and organizations responsible for these crimes.

ICE is the lead federal investigative agency with respect to export enforcement due to its jurisdiction over the investigation of crimes related to the U.S. border. However, investigations into the export of Tribal cultural items present challenges due to limitations on existing authorities and enforcement resources. To conduct its complex investigations, ICE may collaborate with Tribal, Federal, State and local law enforcement, private institutions, and foreign governments. ICE has the ability to work directly with cultural resources practitioners to support these collaborative investigations.

ICE's Cultural Property, Art and Antiquities (CPAA) Program

ICE has established the Cultural Property, Art and Antiquities (CPAA) program to oversee efforts related to the protection of cultural property. The mission of the CPAA program is three-fold: conduct training on the preservation, protection, and investigation of cultural heritage and property; coordinate and support investigations involving the illicit trafficking of cultural property from countries around the world; and facilitate the repatriation of illicit cultural items seized as a result of HSI investigations to the artifacts' lawful owners.

Education and Training

With funding provided by the Cultural Heritage Center (CHC) within the U.S. Department of State (DOS) and support from the Smithsonian Institution, ICE continues to train law enforcement officers on the handling, investigation, and seizure of items believed to be another nation's cultural property.

Since 2007, approximately 400 special agents, U.S. Customs and Border Protection (CBP) officers, prosecutors, and representatives of foreign law enforcement have been trained by experts in the fields of cultural property law, targeting, intelligence, archeology, and museum conservation. In recent years, part of the training was held at the National Museum of the American Indian, where participants received guided tours of exhibits by experts. Our goal is to train as many law enforcement officers as possible to broaden the base of expertise in cultural property investigations. Today, ICE is working more closely than ever with CBP to ensure the efforts of our agents and officers are fully integrated throughout the lifecycle of a case.

In Fiscal Year (FY) 2016, the CPAA program has also been represented in multiple conferences and workshops and the program is working with several different federal government agencies to develop more training and capacity-building workshops for FY 2017.

Education is not limited to law enforcement personnel directly involved in investigations and prosecutions. In less formal settings, ICE continues to educate potential brokers and purchasers of cultural property on the importance of provenance (history of ownership) and encourages individuals to report any encounters with individuals seeking to sell merchandise to the HSI Tip Line.

Investigations

The CPAA program plays a supporting role in cultural property investigations by identifying subject matter experts to authenticate items that may have indigenous cultural and religious significance, coordinating leads with other offices, and acting as a liaison to INTERPOL and law enforcement agencies. The program supports ICE's approximately 7,000 special agents in more than 200 domestic offices throughout the United States and 63 international attaché offices. While any ICE special agent may work a cultural property case at some time in his or her career, HSI New York has a team of special agents that works exclusively on cultural property cases. HSI Los Angeles has also recently established its own specialized team whose focus will include cultural property investigations.

Investigations into indigenous cultural property trafficking could result from a variety of leads, including: a direct request from Tribal leadership; CBP as a result of border searches, interdictions; foreign country notification of a sale at an auction house; the CPAA program; ICE Attachés; as well as lines of inquiry generated by a special agent. ICE enforces the cultural artifact import restrictions of bilateral agreements the United States (through DOS) has with 15 countries (Belize, Bolivia, Bulgaria, Cambodia, China, Colombia, Cyprus, El Salvador, Greece, Guatemala, Honduras, Italy, Mali, Nicaragua and Peru), as well as import restrictions for Iraq and Syria. These bilateral agreements help protect cultural property by imposing

U.S. import restrictions on certain categories of archeological and/or ethnological material. Even with import restrictions in place, a single cultural property investigation can result in complex cases involving multiple domestic and international ICE offices, as well as other law enforcement agencies, and can last for years. For example, one of ICE's largest, ongoing cultural property investigations, Hidden Idols, began in 2007 and has resulted in the seizure of more than \$150 million in artifacts. In FY 2015, ICE worked 239 domestic and 102 international cultural property investigations.

Investigating Cases with a Nexus to Tribal Cultural Items

ICE enforces an extremely broad set of federal laws and regulations with jurisdiction over the investigation of crimes related to the U.S. border. While ICE is the lead investigative agency for the illegal import or export of cultural property, ICE would not typically be the lead investigatory agency for the theft and illegal transport of Tribal cultural items within the United States. For example, if customs officers were to discover that Tribal cultural items were transported into or out of the United States in violation of existing import or export law, ICE would have authority and jurisdiction to conduct an investigation.

Buyers and sellers of illicitly obtained antiquities, cultural, and religious items often do not limit themselves to one type of artifact. As a result, ICE has worked cases involving smuggled antiquities from foreign sources only to find Tribal cultural items are also part of a criminal's cache of artifacts. For example, as part of an ongoing investigation of the illicit sale of pre-Columbian artifacts, ICE discovered that Tribal cultural items were also being offered for purchase by the same seller.

In another case, an individual in the Southwest collected both Tribal and Egyptian cultural items, resulting in a case requiring involvement by ICE, the Department of Justice, and the Department of the Interior. A further example of collaboration with other law enforcement agencies was an investigation involving the Bureau of Land Management, the U.S. Fish and Wildlife Service, and the U.S. Forest Service. In this case, ICE worked with the other agencies to search a residence in Arizona and seize Tribal cultural items as well as controlled substances and weapons. ICE's authorities related to the protection of Tribal cultural items also extend to intellectual property rights, such as the selling of imported goods being fraudulently marketed as Native American jewelry.

Cultural Repatriation

Cultural property investigations often result in the seizure of cultural property, which must be repatriated to its lawful owners through a legal forfeiture process. The CPAA program oversees these cultural repatriations, which can be a small exchange after the legal process is completed or it can include a grand ceremony that commemorates the items' return at the country's Embassy in Washington, D.C. or even within the country itself. Repatriation of Tribal cultural and religious items could occur on Tribal lands and within the Tribal customs and traditions as required by the Tribe itself. Whatever the venue, returning a piece of a country's history and heritage to its people is a celebration, and an event in which ICE is particularly proud to participate.

ICE has returned a wide variety of items including paintings, pottery, sculptures, fossils, and sarcophagi. In FY 2016 alone, we repatriated a first edition of Charles Darwin's book, *Origin of the Species*, to Canada; terra cotta figures, jade implements, and a 115 million year-old microraptor fossil to China; a dinosaur skull to Mongolia; imperial decrees to Russia; and several million dollars in statuary and sculptures to the Prime Minister of India during his official visit to the United States. Since 2007, we have returned more than 7,750 items to more than 30 countries.

Conclusion

Thank you again for the opportunity to testify here in Albuquerque and for your continued support of ICE and its law enforcement mission. ICE remains committed to working with this committee and Tribal governments to continue our strong relationship going forward to help prevent and combat the illicit trafficking of Tribal cultural and religious items.

I would be pleased to answer any questions.

Senator UDALL. Okay. Mr. Rodriguez, thank you so much for your testimony. I thank all of the witnesses for your excellent testimony today. We'll now have a period of questioning by myself and Senator Heinrich.

Mr. Taplin, you talked about the French—sitting down with the French. That they—this is something new, I believe, that they've agreed to. Could you tell us the significance of that, and how that's going to further the efforts that we called this hearing about.

Mr. TAPLIN. Yes, if it please you, Senator, this is something we heard within the last couple of days from our Embassy in Paris. We welcome the willingness on the part of the French government to sit down with us as we have proposed some time ago on a bilateral basis, as part of a joint working group, and so we're anticipating the first session will take place here at the end of the month.

And our composition on both sides of the table will be interagency composition with representatives from the agencies that are here, and we are looking forward to getting into that process and exchanging views and understanding better what we can potentially accomplish. But we do think it's an encouraging step forward, and gives us stronger basis to work with our French partners.

Senator UDALL. So this is really a formal first step of sitting down, and we had requested this a long time ago, but the French diplomatic folks had not agreed to it, so we should view this as something encouraging; is that correct?

Mr. TAPLIN. I think that's right. I want to be careful about setting expectations here at the beginning of this process, but I think it's certainly a positive step forward.

Senator UDALL. Well, we really appreciate your efforts and, as you know, the Acoma Shield is one of the many instances where the deeply important cultural items have been sold internationally. Can you describe the efforts, in addition to this sit-down that we've been talking about to ensure the stopping of trafficking of Native American cultural items, and how it remains a priority for the U.S. ambassador to the United Nations.

Additionally, is there a process where we can ensure the tribes have the input in the discussions. As you know, the Federal Government has the trust responsibility, and it's very important that the tribes are involved in this too.

Mr. TAPLIN. Yes. Let me make a couple of comments, Senator. The first comment would be that we are working very closely with interagency colleagues and from the agencies that are represented on this panel, where there's probably more practical experience in working with the tribes, and factoring in the input of the tribes into the process of how we undertake actions.

So we have become more active and stepped up our engagement, I think, in the interagency process. And we think the consultative aspect of our work going forward is vitally important.

In terms of other activity of the locus of our activities have, in fact, been with the French government, because of the series of auctions. And as I think I stated in my testimony, we tried to address it at various levels, the public diplomacy, if you will, the public engagement in raising public awareness aspect, I think will continue to be vitally important, and we are interested in trying to delve into in greater depth what we can accomplish through this work effort.

At the United Nations, we approach these issues in the context of some of the wider engagement and indigenous people's rights in protecting those interests.

And I should also note that another important aspect of our effort is at UNESCO. Our mission to UNESCO is also vitally interested in these issues, and I remember myself in last assignment overseas coauthoring an opinion piece with our former ambassador to UNESCO, David Killion, on the specific issue of options and commercialization of Native American tribal objects. Thank you.

Senator UDALL. Thank you very much. In this sit-down, you're going to—first formal sit-down with the French, we hope that you will find an opportunity to involve tribes, and you have some representation and consultation there.

Mr. Rodriguez, as you know, the theft and trafficking of cultural items is not a new issue, and you talked about that in your testimony. And it's something that I know your agency takes very seriously.

But one thing that seems to be new is the way in which these cultural items are being sold, and the way they're being exported through on time—online retailers such as eBay and other websites. What steps is your agency taking to keep tabs on the illegal online activity when it comes to tribal cultural items?

Mr. RODRIGUEZ. We have a variety of methods to begin investigations. Primarily we receive information from our field offices, from the public, from practitioners, in this area from concerned citizens that could involve Native Americans. And we already have a number of capabilities to investigate trafficking online. We've used it very successfully in an area that it's somewhat related to this, which is intellectual property. We've used it in many other areas of our mission.

And when—some of our investigations, and I would say that continues to increase, have initiated with information related to somebody selling artifacts online, and we utilized a number of investigative methods to pursue those investigations.

Some of those methods are best not discussed in public, but we're very successful in utilizing them to pursue these leads. A lot of work in this space has to involve the authentication of items and the provenance.

So we're in partnership with scholars, private citizens, and many of our partners that are here represented in this hearing in helping us determine that.

So I feel pretty confident that the use of online sales won't impede our ability to conduct these investigations.

Senator UDALL. Thank you very much. And as you can gather by the tenor of this hearing, we want you to be aggressive and to go after the wrongdoers at every opportunity.

So, thank you.

Mr. Toulou, the Department of Justice has a variety of existing legal authority and responsibility related to Native American cultural resources, as you are aware of from the hearing, the Antiquities Act, The Archeological Resources Protection Act, and NAGPRA, where do you see holes within existing authority that prevents you from effectively curbing the theft, illegal possession, sale, transfer, and export of tribal cultural items?

In other words, how can we help you deal with this significant problem, and do you see the need for—what you see the need for, to be done there.

Mr. TOULOU. Thank you for the question, Senator.

As I mentioned in my testimony, some of the issues we see is, you know, the vast area that needs to be patrolled, and the fact that sometimes these items can be removed without anybody knowing what happened.

So, I mean, there's some definite needs in that area.

I think, you know, from a prosecutor's perspective, there are some issues regarding the current legislation that we're currently working through with my partners at the table. And I'll be happy to talk to your staff about those, but at—you know, some of them again, I alluded to in the testimony, the level of mens rea that's necessary on some of these—and some of the act is frankly antiquated, and doesn't apply to what we see as these cases develop. And we're working through an equitable way to deal with those issues, not—to have a chilling effect on the art market, but also to make sure that these very, very important items are maintained in the custody of the individuals who should have them.

So, we're in the process of working through that with our partners. I'm happy to work with your staff, and Senator Heinrich's staff as we go forward on those issues.

Senator UDALL. Thank you very much. Ms. Maltais, I want to discuss multiagency investigations. It's my understanding that for 10 years, between 1996 and 2006, the Bureau of Indian Affairs had a single criminal investigator tasked with addressing looting on tribal lands.

This investigator was from the Acoma Pueblo, and worked with other tribes and agencies in the southwest, and was very successful in that time period that he worked on that.

It's also my understanding that since that investigator's retirement in 2006, that position has not been filled.

What are the reasons a position specifically assigned to investigate issues covered under ARPA and NAGPRA has not been filled?

Ms. ANDREWS-MALTAIS. It's my understanding that that wasn't exactly his sole responsibility. That in his professional career path, he had developed an expertise in that particular area, so it was part of the rest of his job duties. And because he had a specific expertise, that's why it wound up in there. But we would be happy to, you know, go back and look at, and speak with our Office of Tribal Justice with regard to, you know, what resources we may have.

I think it would also be imperative upon us to have consultation with the tribe in order to move that type of initiative forward.

But it is critical to be able to have those types of people with that level of expertise, and trained in that area, to be able to assist the other agencies that are working to try to combat this problem.

Senator UDALL. Thank you. And I think this person being a point person and getting known over a period of time was very important in terms of kind of coordinating and putting all of the resources behind it, so—and you didn't mention funding issues, but if there's a problem there, I'm happy to help on the appropriations side

where I serve as the ranking member at this point on the sub-committee with the Interior Department Bureau and the Indian Affairs.

So your assistant passed you a note, is there anything else you want to speak to with that?

Ms. ANDREWS-MALTAIS. We do have somebody that's in the position, but it's not the individual that had retired. But the position—there is a position that also has those responsibilities, that is currently filled. And like everything else, the resources, whether it's human or financial, are always, you know, a concern, because this is evolving at a greater pace than it had been in the past.

It's always been there, but it seems to be a much greater appetite for cultural items within these areas, and the extensiveness of the land bases that we have, tribal cultural monitors were also a recommendation from the tribes, as well as creating a point of contact, or similar to a desk, or something along those lines, so that there is consistency and a level of expertise that is gained through having individuals that have particular expertise in an area be able to do the outreach and work within the other agencies, and with the tribes specifically to better understand what those issues might mean individually for those tribes.

Senator UDALL. Thank you. And Senator Heinrich, questions.

Senator HEINRICH. Thank you, Senator Udall.

Ms. Andrew-Maltais, I want to start with you, and you had mentioned in your earlier testimony a number of recommendations that you've received from tribes to help on this front. One of them was changing the legal definition of provenance or ownership, do you have specific language in mind for that?

Ms. ANDREWS-MALTAIS. Well, we're not completed with our consultations, and we would rely very heavily on the tribes to also be able to assist us with formulating what that language or position would be. But we'd be happy to work with the Committee and with staff in order to develop that, because we've found what's happened is that it's difficult for the prosecutors or the investigators to be able to prove that these items were stolen, and from where they might have been taken.

However, if the understanding is that these items always do and always have belonged to the tribe in its entirety, and without the expressed free prior informant consent of the tribes to have those items alienated from the community, then the position should be that they were unlawfully gained or illicitly gained, and taken away from the tribal community.

Senator HEINRICH. I think that's an important distinction. I think both of us would love to work with you on that front.

Mr. Toulou, you mentioned just the challenge of enforcing looting laws over such a large area, and we all know the challenges of that in the west, but would additional funding for BIA, BLM, Forest Service, Park Service, law enforcement, be an important step in preventing looting in the first place?

Mr. TOULOU. It's always—

Senator HEINRICH. Sorry to put you on the hot seat.

Mr. TOULOU. Not at all. It's always good to have more hands, although, I would not represent that necessarily as a Departmental position.

It's also important for us to work with our tribal partners. And we try to do that as much as possible. You know, the next panel is a good representation of tribes that have really thought hard about this, and referred cases to us, and have people who are watching what's going on on the ground. Often, they're in the best position, frankly, to see those things come up, and we do—we make do with what we've got for now. Thank you.

Senator HEINRICH. I understand. Mr. Taplin, one of the things we had talked about was the fact that the STOP Act established an explicit prohibition on export of these items. From a diplomatic perspective, as opposed to a law enforcement perspective, how would an implicit prohibition on exporting protective Native American cultural objects make your job easier at the Department of State to work with other nations to secure return of those items?

Mr. TAPLIN. Yeah. I don't want to comment specifically on the legislation, although I'm familiar with it, Senator, and have taken a careful look at it. I guess it's a general observation, though, about our diplomatic practice. I do believe that a number of the things which are reflected in the legislation broadly would tend to strengthen our hand diplomatically, whether it would be trying to address the question of export controls, because that is a question that we've heard from other governments when we have raised the repatriation issues in one or another way. And some of the other steps which I think are envisioned, which demonstrate our seriousness of purpose as a nation in terms of protecting our cultural heritage.

All of those kinds of responses, including, I think, you know, a number of the provision of the legislation, you know, would tend to strengthen our hand diplomatically in these conversations.

Senator HEINRICH. Thank you. That's very helpful.

Mr. Toulou, once again, when the Department of Justice prosecutes cultural and sacred object cases, is NAGPRA your primary statute in those cases, or do you often use other Federal statutes instead?

Mr. TOULOU. It really depends on the facts of the case. I mean, we will use ARPA, we will use NAGPRA, we will use, you know, theft from Federal lands. It depends on what we can use. I mean, I think some of the recent cases that I'm not going to comment on in detail, have shown that, you know, we can be creative in how we use the statutes. It doesn't mean they're perfect, but we'll use whatever resources we have, because this is very important to us.

Senator HEINRICH. Would there be changes to NAGPRA that would result in more cases being prosecuted specifically under that statute that would maybe align better with the nature of the crime as opposed to trying to use another tool that maybe wasn't as specifically intended for these particular kinds of cases?

Mr. TOULOU. Yes, I think, you know, obviously, a statute that's designed to meet the needs or to address the crime at-hand would be better. And we're currently working with the folks here at the table, and the agencies they represent, and the tribes, to come up with, you know, better solutions in the statutes, that would help us prosecute those crimes. And we're happy, again, to work with your staff on that.

Senator HEINRICH. Thank you.

Mr. Rodriguez, in your written testimony, you mentioned that the Homeland Security investigations teams in New York and Los Angeles are leading the effort under the cultural property, arts, and antiquities programs. Are these teams receiving training to help them be able to identify cultural items that are illegal to sell under current U.S. law, but which are not explicitly illegal to export from the United States?

Mr. RODRIGUEZ. Homeland Security Investigations conducts yearly training for these teams, as well as special agents and other professionals that work on these investigations. It's done through funding provided by the Department of States Cultural Heritage Center. And also in coordination with the Smithsonian Institute.

I don't have the specifics of the content of the training, but will be happy to provide that at a later time, but I do know that it covers these areas in a way that provide awareness, not just to import/exports, but issues in general.

For example this year's training included a day that was conducted at the National Museum of the American Indian, which provided them with presentation from the staff there, as well as a visit to the exhibits. And that was a step to help raise the awareness that these issues do exist.

It does involve training from the National Park Service, which conducts a session on domestic looting, and the intersection with the international market.

And we look forward to expand that collaboration to this area more specifically. And I think steps have been taken in the right direction already.

Senator HEINRICH. I want to thank you-all for your testimony here today. That concludes my questions, Senator Udall.

Senator UDALL. Thank you Senator Heinrich, and before we move to the next panel, just one final question to all of you for the record. Can I get your commitment to provide a concerted effort to work directly with the tribes on consultation on this issue, Ms. Maltais?

Ms. ANDREWS-MALTAIS. Absolutely.

Senator UDALL. Mr. Toulou?

Mr. TOULOU. Yes.

Senator UDALL. And Mr. Taplin?

Mr. TAPLIN. Absolutely.

Senator UDALL. Mr. Rodriguez?

Mr. RODRIGUEZ. Most definitely.

Senator UDALL. Thank you. And thank you so much for that response, and as you well know, this is incredibly important to protect tribal identity for future generations. We really appreciate you being here. We're going to excuse this panel. I know some of you have schedules and planes and things, but to the extent that any of you can stay and listen to the next panel, which I think will give you a perspective on what we're dealing with here, it would be very helpful.

We'll just take a short recess. You are excused, and take a short recess, be back within five minutes so that we can have the next panel come forward and change the name plates.

Thank you very much. Short recess.

[Recess was taken from 11:16 a.m. to 11:24 a.m.]

Senator UDALL. So I'll bring us back into session here. And we will now hear from our second panel of witnesses. We have the Honorable Kurt Riley, Governor of the Pueblo of Acoma; the Honorable Paul Torres, Governor of the Pueblo of Isleta and Chairman of the All Pueblo Council of Governors; the Honorable Russell Begaye, president of the Navajo Nation; Dr. Gregory Schaaf, historian and retired professor of Native American studies at the University of California; and Ms. Honor Keeler, Director of the International Repatriation Project at the Association on American Indian affairs.

It is wonderful to have the whole panel here today. I look forward to hearing your testimony, beginning with Governor Riley. Governor Riley, please proceed.

STATEMENT OF HON. KURT RILEY, GOVERNOR, PUEBLO OF ACOMA

[Native American Language Spoken.]

Mr. RILEY. Senators Udall and Heinrich, members of the Committee, tribal leaders, and guests, thank you for allowing us this time with you to testify before you.

My name is Kurt Riley. I am the Governor for the Pueblo of Acoma. And we are deeply appreciative of the time taken by the Committee and your staff to travel to Albuquerque, and to devote your attention to this important issue.

The Pueblo of Acoma has a great deal of experience dealing with this issue. And is grateful for the opportunity to share our experience with you. I'd like to begin by trying to describe the kinds of objects we are all interested in protecting. There is a misconception about the kinds of objects tribes like Acoma are seeking to protect.

Admittedly, the cultural objects Acoma wants protected are difficult to describe. 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.

But for context, I would encourage the Committee to note the kind of objects that have been part of our public repatriation efforts, like the Acoma Shield, the priest robes in the case United States vs. Tidwell, and the items in the criminal case, United States vs. Brian Garcia and Gerald Garcia.

Their value and place within the community is similar to those described in the case *Pueblo of San Ildefonso vs. Ridlon* or the return of the Zuni War Gods.

The highly publicized repatriation effort by Zuni Pueblo near the time the Native American Graves Protection and Repatriation Act was passed.

It may be easier to describe what these items are not. These items are not created by Pueblo artists and potters. We do create works of art, pottery, paintings, and sculptures for the purpose of commerce. Sharing these works with the world is encouraged.

We fully support those Acoma artists who create works of art, to provide for themselves and their families.

Instead, the objects we are concerned with are those cultural objects that are central to our belief system and our traditional way of life.

Often these objects are cared for, stored, or used by individuals, families, or different societies within the Pueblo.

These items are cared for or stored in communal buildings or individual homes for safekeeping, until they are needed in ceremony.

Although, they may have some intrinsic artistic value, their purpose and intended use is very different.

It is important to note that the cultural objects the Pueblo seeks to protect are only those that fall within the definitions and standards of existing Federal law.

NAGPRA and ARPA have specific and detailed statutory definitions for the objects they protect.

Acoma's process when encountering potentially protected cultural objects is to determine whether the item is protected, first of all, under tribal law.

And, more importantly, whether it fits within the definitions and standards of existing Federal law.

Since the passage of NAGPRA, the Pueblo of Acoma has worked extensively to recover cultural objects illegally removed from the Pueblo.

The Pueblo has found and attempted to recover objects at locations locally, regionally, nationally, and now internationally.

We have identified an alarming number of Acoma cultural objects just within the last two years.

The Acoma Shield being held in Paris is a public example of our most recent repatriation efforts.

What we learned from our experience with the Paris auction house and with similar repatriation efforts, is that we need the help of Federal law and Federal authorities.

We are grateful for the assistance by Congress, especially with the introduction of the Safeguard Tribal Objects of Patrimony, the STOP Act, in both the House and Senate, and the Senate passage of the Protect Act.

The Pueblo of Acoma fully supports the STOP Act's passage, as it gives us an explicit tool to close the doors on the illegal exportation of our cultural objects, and creates an opportunity for pueblos, tribes and nations, and in the Native American Arts and Antiquities industry to work together.

The provisions of the STOP Act are designed to keep Native American cultural objects where they belong, as well as to facilitate the return of those that have left or been removed from tribal possession.

We understand that the STOP Act has received criticism from some members of the Native American arts and antiques industry. We believe that the criticism is unfounded. And in many instances is based on a misunderstanding of the purpose, effect, and intent of the STOP Act's provisions.

We have addressed these concerns in the written testimony we've submitted. What is clear to Acoma is that we cannot rely on the voluntary, unsolicited return of these items by collectors or dealers. That has only happened once in the last 10 years for Acoma. That approach simply doesn't work.

Finally, the Pueblo of Acoma urges this Committee to fully support and appropriate funding for the creation of a cultural items unit within the Department of Interior; specifically, the Bureau of

Indian Affairs, to investigate violations of NAGPRA, ARPA, and related statute.

In addition, further funding is needed for the United States Attorney's Office to assist in the prosecution of crimes; specifically, to the illegal sale, theft, and marketing of cultural objects.

The Pueblo of Acoma, along with tribal communities across this country cannot do—can only do so much to monitor and recover the cultural objects that we are able to find through public venues and publications.

We know we are only scratching the surface when it comes to finding cultural objects that may be out there, being bought and sold in private transactions.

We need the assistance, resource, and force of Federal law to fully shine the light on the illegal market that traffics our cultural items.

In the most recent events of the Acoma Tribal Shield, I want to thank the U.S. Attorney, Damon Martinez, for committing extraordinary resources to—at least, at this point, the Acoma Shield being held from being sold.

And with that, thank you for listening to the Pueblo's concerns. I will be happy to answer any questions that you may have. Thank you.

[The prepared statement of Mr. Riley follows:]

PREPARED STATEMENT OF HON. KURT RILEY, GOVERNOR, PUEBLO OF ACOMA

On behalf of the Pueblo of Acoma (“Pueblo” or “Acoma”), please accept this written testimony for the field hearing on the “Theft, Illegal Possession, Sale, Transfer and Exportation of Tribal Cultural Items” held by the Senate Committee on Indian Affairs on Tuesday October 18, 2016 in Albuquerque, New Mexico. Acoma is deeply appreciative of the time taken by the Committee in devoting its attention to this important issue. Acoma has a great deal of experience in both combating illegal trafficking of its protected cultural objects and in seeking repatriation of those objects. The Pueblo is grateful for the opportunity to share this experience with you.

1. Acoma's Background on the Protection of Cultural Objects

The cultural objects Acoma is attempting to protect are difficult to fully describe and publicly identify because of their sacred and confidential ceremonial use. However, the objects the Pueblo has an interest in protecting are those that are central to our cultural belief system and way of life. They are very different from the beautiful works of art created by our tribal artists and potters. While our cultural objects may have some intrinsic artistic value, their purpose is very different. Under Pueblo of Acoma traditional law, it is illegal for any member, who may have these cultural objects in their care to sell or remove the object from the Pueblo of Acoma.¹

They also qualify as protected cultural objects under federal law, especially as cultural patrimony under the Native American Graves Protection and Repatriation Act (NAGPRA), and therefore may not be alienated by any individual. Many collectors have argued that these objects were lawfully acquired and can be legally sold. This is a false statement and mischaracterization of how Acoma law and federal law

¹Different types of Acoma cultural objects may be stored, cared for, or used differently depending on what the object is. For example, some cultural objects may be cared for and stored by individuals or families in their homes. Other times, different cultural objects may be cared for and stored in communal buildings, called kivas, by specific societies or clan groups. Other times, these objects may be placed outside in the open at sacred sites. Objects are put in special places to be left there permanently, not unlike the San Ildefonso Pueblo object at issue in the case of *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936 (10th Cir. 1996), or the repatriation of the Zuni War Gods in the late 1980s (a well known example of the removal of cultural objects from area shrines).

treat these objects. Under Acoma and federal law, the Pueblo itself effectively owns the objects in question.²

A current and public example of Acoma's efforts to protect its important cultural objects can be seen in the Pueblo's effort to prevent the sale and auction of a ceremonial shield being auctioned in Paris, France, in late May. In this instance, the Pueblo believes the shield was stolen from the shield's caretaker in the 1970s, and was eventually exported overseas. Unfortunately, this incident is only one of many that the Pueblo has actively dealt with in recent years. Some of the earliest recorded incidents of the Pueblo's efforts involve federal criminal convictions handed down just after the passage of NAGPRA in 1990. In *United States of America v. Brian Garcia and Gerald Garcia*, 92-515 JC (D.N.M. 1992), two Acoma brothers pled guilty to illegal trafficking of Acoma cultural patrimony in violation of NAGPRA and other federal criminal law. The Pueblo of Acoma worked closely with the United States Attorney's Office to verify the provenance of the objects taken. This case represents the degree and extent that Acoma treats this issue by pursuing the federal conviction of our own people. Later in 1999, a set of historic Catholic priest robes cared for by Acoma, dating from the time of the Pueblo Revolt, left the Pueblo. They were recovered along with a number of Hopi objects of cultural patrimony. An Acoma Bureau of Indian Affairs ("BIA") Special Agent investigated a tribal art and antique dealer, and that investigation led to his conviction and the recovery of these objects. See *United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999). For Acoma, these two cases, some of the earliest and most important federal criminal convictions, demonstrate the Pueblo's commitment to the protection of its cultural objects.

Later, in the 2000's, as national and international auction houses began to expand and reach more collectors through the Internet, Acoma became significantly more involved in attempting to identify and recover its cultural objects. In 2006, the Pueblo of Acoma worked diligently with its legal counsel for the return of historic wooden beams and doors from the San Estevan del Rey Mission Church.³ A national auction house had possession of the wooden beams along with nearly 50 other sensitive Acoma cultural patrimony objects. All were returned. With the increased availability of auction house catalogues on the Internet, the Pueblo regularly attempts to monitor and respond to auctions involving its cultural objects. The consistent monitoring has led to discovering otherwise inaccessible or unknown art and antique gallery inventories. However, this monitoring practice may only be scratching the surface. We do not know the exact number or the kind of cultural objects that may be out there; we do know there are many, and any is too much.

In 2015, the Pueblo of Acoma uncovered a disturbing number of its cultural objects for sale in a variety of contexts. They were being sold in locations locally, nationally, and internationally. Across 10 separate incidents; 24 separate Acoma cultural objects were identified as being available for sale, or having already been sold. Of these 24 objects, the Pueblo was only successful in securing the return of only 11 of these objects. Just this year, the Pueblo of Acoma has encountered and identified 15 Acoma cultural objects for sale, or having already been sold. The Pueblo was successful in recovering only 9 of these objects. Acoma has actively worked closely with its sister tribes, such as Laguna, Jemez, and the Hopi Tribe in informing them of sacred cultural objects that Acoma has encountered, which may be culturally significant to them.

The Pueblo of Acoma wishes to highlight a very significant point. The Pueblo asks this Committee to not to think of these sacred and ceremonial objects in property right terms like title and "ownership." If these objects are merely treated like other pieces of property, their true significance is lost. Instead it is important to move beyond the Western view of property rights and consider this issue as one of human and cultural rights, unique and Indigenous to the Native people of this country.

2. Support for the STOP Act

The Pueblo of Acoma fully supports the passage of the Safeguard Tribal Objects of Patrimony (STOP) Act, S. 3127 and H.R. 5854. The STOP Act makes changes to

²The clearest analogy to describe Acoma law is the legal concept of property rights being a "bundle of sticks." For Acoma, some members may have rights of possession, but they do not have the right to sell an object of cultural patrimony. In fact, traditional law dictates what is to happen to a cultural object if a caretaker can no longer care for the object. The right to sell an object of cultural patrimony, although not contemplated in Acoma traditional law, would be exclusively reserved to Acoma itself. Certainly, the Pueblo has never exercised this right. Acoma's traditional law closely mirrors the definition of "cultural patrimony" defined under NAGPRA found at 25 U.S.C. Section 3001(3)(D).

³The San Estevan del Rey Mission Church sits atop the mesa at the Pueblo of Acoma. Founded in 1629, it is still cared for and maintained by the Acoma people.

existing federal statutes that strengthen the ability of tribes to protect their important cultural objects. Existing federal statutes include NAGPRA, 25 U.S.C. §§ 3001–3013, 18 U.S.C. § 1170; the Archaeological Resource Protection Act (ARPA), 16 U.S.C. §§ 470aa–470mm; and the Antiquities Act, 16 U.S.C. §§ 431–433 repealed and re-codified at 54 U.S.C. §§ 320301–320303, 18 U.S.C. § 1866. The STOP Act's provisions increase penalties under NAGPRA, create an explicit prohibition on exportation of protected Native American cultural objects, and provide for limited immunity for individuals voluntarily repatriating objects. These provisions are designed to both keep Native American cultural objects with tribes where they belong and to facilitate the return of those that have left tribal possession. The STOP Act also calls on the Federal government with the help of a tribal working group, to conduct studies designed to protect Native American cultural objects.

Current federal law does not adequately address and protect the hundreds of cultural objects that have been trafficked from the United States to overseas markets. A quick look at past auction catalogues of places like the Eve Auction House in Paris, France, where the Acoma shield was to be sold, quickly reveals the sheer enormity of Native American cultural objects that have left the country.⁴ Most of these objects are likely subject to their respective tribal laws and other federal laws. Put simply, countries like France have become a safe haven for this illegal market where the most sensitive of cultural objects are sold to the highest bidder, and tribes have no recourse. The STOP Act is an important tool to close the door on the illegal trafficking of our important cultural objects and send a message that this illegal practice will not be tolerated.

3. Addressing Criticisms of the STOP Act

The Pueblo of Acoma is aware that the STOP Act has come under criticism by a small segment of the representatives of the Native American Indian art and antique industry. Predominantly this has been from public statements by organizations like the Antique Tribal Arts Dealer Association, Inc. (ATADA). We would like to take this opportunity to address and dispel some of the major arguments ATADA has made.

MYTH: The STOP Act is not necessary as current federal law already prohibits the exportation of protected cultural objects.

RESPONSE: It has been argued that criminal provisions of the federal statutes cited in the STOP Act already prohibit the exportation of protected cultural objects through the use of the term “trafficking.” While it is arguable that “trafficking” may incorporate “exportation,” in reality, it is clear that this language is not being interpreted in this manner. In the Pueblo’s most recent effort to recover the Acoma shield, France cited directly to United States law and pointed to the absence of explicit exportation prohibitions on cultural objects like the shield in its reasoning for not halting the auction initially. This has resulted in the Pueblo attempting to halt auctions of its protected cultural objects abroad without success, including pursuing legal actions and filing the necessary complaints.⁵ Clear language stating that exportation of protected cultural objects is prohibited is needed to provide a necessary tool for tribes and the United States to use to prevent cultural objects from leaving the country, and negotiate the return of cultural objects illegally exported.

MYTH: The STOP Act does not provide clarity or notice regarding which objects qualify as protected.

RESPONSE: It has been alleged that the STOP Act does not provide the necessary clarity to define what objects are protected. This is inherently a criticism of

⁴The French auction of Native American sacred objects and artifacts has been widely reported since at least 2013. See Tom Mashberg, Secret Bid Guides Hopi Spirits Home, NEW YORK TIMES, (Dec. 16, 2013), <http://www.nytimes.com/2013/12/17/arts/design/secret-bids-guide-hopi-indians-spirits-home.html>; Tom Mashberg, Despite Legal Challenges, Sale of Hopi Religious Artifacts Continues in France, NEW YORK TIMES, (June 29, 2014), <http://www.nytimes.com/2014/06/30/arts/design/sale-of-hopi-religious-objects-continues-despite-us-embassys-efforts.html>; SeaAlaska Heritage Institute, Secret Bidder Saves Sacred Object from Auction for Alaska Natives, INDIAN COUNTRY TODAY, (Sept. 6, 2014), <http://indiancountrytodaymedianetwork.com/2014/09/06/annenberg-foundation-returns-sacred-object-alaska-natives-156764>; AP, Navajos Reclaim Sacred Masks at Auction, CBS NEWS, (Dec. 16, 2014), <http://www.cbsnews.com/news/navajo-indians-buy-back-sacred-masks-in-france-auction/>; Reuters, Hopi Sacred Masks Auction in Paris Despite Protests, REUTERS, (June 11, 2015), <http://www.reuters.com/article/us-france-auction-masks-idUSKBN0OR1DG20150611>.

⁵The Pueblo of Acoma previously unsuccessfully attempted to halt the sale by the Eve Auction House of the shield and other Acoma cultural objects by the Christophe Joron-Derem Auction House in 2015 in Paris, France. Fortunately at that time, the shield did not sell and became available again for sale in 2016. However, the other important Acoma cultural objects were sold and are gone forever.

the underlying laws that the STOP Act relies upon. It is important to note that the STOP Act does not create protections or penalties for any object that is not already protected under existing federal law. The STOP Act applies to “Native American cultural objects,” which include objects meeting the following definitions: “cultural objects” under NAGPRA, 25 U.S.C. § 3001(3); “archaeological resources” under ARPA, 16 U.S.C. § 470bb (1); and “objects of antiquity” under the Antiquities Act, See 18 U.S.C. § 1866(b). However, “Native American cultural objects” only include such objects when the object is “Native American” as that term is defined in NAGPRA, 25 U.S.C § 3001(9).

The definitions used by the STOP Act are legally sufficient. Courts have routinely upheld these definitions as not unconstitutionally vague, even when law enforcement officials or courts look to tribal law or tribal representatives to determine whether objects are qualify for federal protection. *See, e.g., United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999) (upholding NAGPRA); *United States v. Carrow*, 119 F.3d 796 (10th Cir. 1997) (upholding NAGPRA); *see also United States v. Austin*, 902 F.2d 743 (9th Cir. 1990) (upholding ARPA); *United States v. Smyer*, 596 F.2d 939 (10th Cir. 1979) (upholding the Antiquities Act); but see *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974) (finding Antiquities Act unconstitutionally vague).

Further, Congress has already closely considered this issue, including debate with competing testimony from tribes, museums, and private collectors. For example, at the time of the passage of NAGPRA, the Select Committee on Indian Affairs resolved to “[c]arefully consider[] the issue of defining objects within the context of who may be in the best position to have full access to information regarding whether an object is sacred to a particular tribe. . . .” *See S. Rep. No. 101-473*, at 4 (1990). For “sacred object” the Committee determined that it is much more than an object being “imbued with sacredness in the eyes of a Native American[,]” but rather the object must have been used in a traditional religious ceremony or ritual, and have a religious significance or function when possessed by a Native American. *Id.* at 5. For “cultural patrimony” those objects must have ongoing “historical, traditional, or cultural importancel,” inalienable by any individual.” *Id.* As examples, the committee listed cultural patrimony such as Wampum belts of the Iroquois and the Zuni War Gods. *Id.* The Pueblo of Acoma believes the intention of statutes like NAGPRA as interpreted by Congress and the courts, was to clearly value tribal culture and law that ultimately dictates the function, treatment, and distinction of what is considered “sacred” or “cultural patrimony.” The *mens rea*, or knowledge/intent, element of NAGPRA’s criminal provision balances this consideration with the protection of the unwitting consumer who may unintentionally violate federal law. Instead the Pueblo’s concern lies more so with those individuals who do know they are in violation of tribal and federal law, or who have enough prerequisite knowledge and information to pause and find out the legal status of a cultural object.⁶

In order to more effectively protect its important cultural objects, and provide well-intentioned dealers with guidance, a way to provide more notice and clarity regarding which objects are protected may be useful. It is important this idea be formulated by tribes and structured to function within tribal legal and traditional systems. Therefore, the Pueblo is considering various methods to provide greater clarity. These ideas include the following actions:

- Create a system where collectors can receive a letter from a tribe before purchasing or selling an object certifying that the tribe does not deem the object protected. If a prosecution were later initiated, the certification would serve as *prima facie* evidence that the object is not protected for purposes of that specific tribe.
- Create a certification system, by establishing a method for collectors to submit an inquiry by email or phone to receive a referral to the cultural representative of a tribe likely to have a cultural connection or be knowledgeable or aware of an object the collector is considering purchasing.
- Create regional networks of experts, at designated regional academic institutions or museums, to whom collectors could reach out to with questions and receive similar referrals to the appropriate tribal cultural representative for further information.

⁶*See e.g. United States v. Tidwell*, 191 F.3d 976, 980 (9th Cir. 1999) (suggesting that sufficient knowledge of Native American Art and NAGPRA should imply that individuals may “have to inquire further or consult an expert when. . . purchas[ing] the objects” and stating “one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.”).

It is paramount that if collectors or dealers are unsure if an object is from a particular tribe, they should simply contact the tribe for more information. We believe the ideas outlined above will alleviate some of the confusion collectors or dealers encounter when they do not know the cultural affiliation or legal status of the objects they are buying or selling.

To create a comprehensive list of protected cultural objects is impractical and inappropriate. There are 567 federally recognized tribes, each with its own objects meeting the criteria for existing federal protection. More important, traditional knowledge about the existence and treatment of cultural objects may be diffused through the community. For the Pueblo of Acoma, no one person or group knows comprehensively the entire scope and inventory of cultural objects within the Pueblo. Instead, the appropriate individuals or groups that interact within a particular living culture may keep this knowledge separately. Therefore, it may be impractical, and culturally inappropriate, to require tribes to divulge information in its entirety regarding protected cultural objects. In addition, this divulgence may only fuel the market for rare and desirable objects given their esoteric nature. Finally, such a list may unintentionally give a presumption of completeness that only the objects on this list are protected.

MYTH: The amnesty window will cause unwarranted return of objects lawfully owned.

RESPONSE: The STOP Act is designed to explicitly prohibit exportation of protected objects, thereby making it easier to establish that their sale overseas is illegal. The proposed Act will facilitate their return through legal channels. The amnesty window is designed to allow open dialogue between tribes and collectors or dealers regarding what specific objects may be protected under federal law. It creates a venue for dialogue and communication that groups like ATADA imply they need. The amnesty window provides an opportunity for repatriation of cultural objects without fear of having unintentionally violated the law.

Further, it is clear from Acoma's own experiences that federal and tribal enforcement of statutes through the judicial process is extremely expensive and time consuming. Tribes are not always able to invest or commit the necessary resources to seek the repatriation of culturally significant objects. They are not always able to convince federal law enforcement officials to invest their own resources to repatriate objects on a tribe's behalf. Additionally, some individuals who have protected objects in their possession and know they are protected may want to return the objects without undergoing judicial action. For these reasons, voluntary repatriation of protected objects is essential, and the amnesty window encourages the amicable resolution among all parties.

MYTH: The STOP Act will damage businesses and Native artists.

RESPONSE: In the Pueblo's experience, the vast majority of inventories held by collectors or dealers are of no concern to the Pueblo. Acoma is fairly certain that only a very small segment of an individual's collection may be protected. Provisions like the amnesty window are meant to provide an opportunity for open dialogue, amicable resolution and repatriation of the small segment of objects that are protected. This process will hopefully provide greater clarity for the market and boost consumer confidence.

Furthermore, Native American artists are generally not creating objects that are considered protected under federal law, or under the proposed STOP Act. The Pueblo of Acoma does support and encourage its community members and other tribal artisans to create art forms and other exceptional expressions of their tribal culture—whether it is by pottery, paintings, weavings, jewelry, or other mediums. These pieces of art should be celebrated and shared with the world. These are not the objects that the Pueblo feels need federal legal protection.

MYTH: The STOP Act will deprive museums of important resources in cultural education.

RESPONSE: The STOP act provides additional support and protection for the very objects that are considered core to a museum's mission—to give meaning and understanding to a living tribal culture. While it is important to protect a museum's resources, of even greater importance is the need to protect the very cultures a museum seeks to educate and inform the public about. The cultural objects that the Pueblo is interested in protecting are essential to the Pueblo's continued cultural survival and a way of life that has existed and sustained us since we first stepped into this world.

The Pueblo has placed tremendous importance on "cultural education." This inherent tribal value comes from the ability to control and care for significant and highly sacred cultural objects. This value is then passed on through ceremonial

practice and use along with lengthy explanations and admonitions. The continued unfettered passage of cultural knowledge especially to Acoma's next generation cannot be understated. We encourage dialogue with museums or institutions that may have these concerns, and applaud those institutions and museums that not only recognize this important value but, support our efforts to protect our cultural objects. We strongly suggest that museums work with tribes, to build a cultural education framework for our nation's citizens in collaboration with tribes—not by using sacred and ceremonial tribal objects in a blasphemous or deleterious manner.

4. Support for Funding

The Pueblo of Acoma seeks and fully supports an appropriation to fund a Cultural Items Unit within the Department of the Interior to investigate violations of NAGPRA, ARPA, and related statutes.⁷ Often times, cultural objects that are trafficked or put up for sale have a brief and limited time for action before they are sold and possibly disappear forever. The Pueblo has experienced, to its dismay, instances where seeking federal assistance for such an emergency has gone unanswered, only to watch as an object disappeared. The development of a Cultural Items Unit is essential to curbing the illegal trafficking of protected cultural objects. The placement of this unit within the Department of Interior is significant as officers and special agents with the Bureau of Indian Affairs are often the "first responders" to crimes in Indian Country. The Pueblo has begun to establish a regional relationship with its local Bureau of Indian Affairs Office and United States Attorney's Office to investigate crimes related to removal and trafficking of its protected cultural objects. However, we understand this relationship is not uniformly shared or established in other regions of the country. The creation of a Cultural Items Unit within the BIA would be similar to the Federal Bureau of Investigation Art Crimes Unit and the United States Fish and Wildlife Service special agents who are trained specifically for investigations within their respective areas of expertise; a similar model is needed for the specialized investigation of cultural object crimes.

As a result of increased investigation into these types of crimes, the Pueblo of Acoma calls for Congressional support for increased appropriations for the United States Attorney's offices to cover the cost of criminal and civil actions taken to protect cultural objects, especially in the southwestern part of the United States where so many Indian tribes are located. Acoma also believes it is important for funding to be made available for tribes to strengthen their tribal courts and update their law and order codes specific to their own cultural protection laws. This increase in resources will only assist the United States Attorney's Office in bringing stronger cases against those who violate current federal laws protecting cultural objects.

Since the introduction of the STOP Act there has been a surge of interest in this issue, resulting in increased contact between Acoma and various collectors and dealers. Acoma seeks to build and expand its positive relationships with this community. When they return these objects home it is a joy for us. We are extremely thankful. We do not want to have to rely on the law and the courts to secure their return, but it must be emphasized that the law must set forth the values of the United States and its Native peoples and because of that, we fully support the STOP Act. The Pueblo looks forward to working with the Committee, generating good will with those who have supported the Act, refining it as needed, and finally by securing its ultimate passage.

Senator UDALL. Thank you so much, Governor Riley. I really appreciate your testimony here. Governor Torres, Chairman Torres, also.

STATEMENT OF HON. E. PAUL TORRES, GOVERNOR, PUEBLO OF ISLETA

Mr. TORRES. [Native American Language spoken.]

Thank you, Senator Udall and Senator Heinrich. I would like to begin by publicly thanking both of you Senators, also Senator John McCain.

I would like to begin by publicly thanking the both of you Senators, Senator Udall and Senator Heinrich, and also Senator McCain from Arizona, for recently introducing a Senate Concurrent

⁷See House Report 114–632 (recommending the appropriation of \$1,000,000 for the development of a Cultural Items Unit within the Department of the Interior).

Resolution 49 in support of effort to stop the illegal—to stop the theft, illegal possession or sale, and export of tribal cultural items.

The bipartisan protection of the rights of tribes to stop the export of cultural and traditional patrimony resolution is a good expression of Congress's condemnation of the theft, illegal possession, or sale, transfer, and export of tribal cultural items.

It calls for the implementation of several measures to identify and stop the illegal trafficking of tribal cultural patrimony and secure repatriation of exported items to the rightful Native tribal owners.

Very recently, the Pueblo of Isleta was confronted with a situation that is worth discussion. In August of this year, three traditional leaders came to my office to request some assistance. We were told by one of the traditional leaders that he and his wife had recently visited a local antique shop in Albuquerque and saw what looked like a traditional ceremonial pottery bowl that was used by his traditional society before it went missing some time in the 1980s.

The home that it was in, the traditional leader's home, was vandalized and robbed, and that's when this piece was noticed to be missing.

Another traditional leader went to the shop, to this shop, and verified that it was indeed the same pottery.

Because the pottery had been missing for such a long time, and because the pottery was for sale to the public and could have been purchased by a collector, never to be seen again in—never to be seen in public again, I decided that the safest thing to do was to send my Lt. Governor to purchase this pottery, and to bring it back, to return it to the traditional society where it belonged. And this pottery was for sale for \$1,200. So I sent my Lt. Governor to purchase it.

We didn't want to raise a red flag to the owner of the store, because if we did, he would have probably gotten rid of it immediately because there was a lot of money involved. And, so, we purchased it and documented the purchase.

After the transaction occurred, we asked the salesman if he knew who owned the item, and—the item that we had just purchased, who had put it—who had brought it to his shop. And he said that the store deals with about 10 different art dealers who have their art on consignment basis. But he could not recall who the art dealers were, and who this particular art dealer was that had this pottery for sale.

He explained that that was just a salesperson, and that the owner of the business was out of the country. He informed us that the pottery was just purchased and was put on display about six months prior to us buying it.

Although we are thankful that this ceremonial pottery is back where it belongs, it is indeed an unfortunate situation when an Indian tribe is forced to purchase back a cultural item that was illegally taken from its rightful place.

If someone else wanted the ceremonial pottery that I just described, he or she could have easily made the purchase without the Pueblo or those traditional leaders even knowing about it.

Also, given the recent use of social media and Internet sites to facilitate transactions, it makes it exceedingly difficult for an Indian tribe and traditional leaders to keep track of cultural items that are up for sale to the public.

EBay, Amazon and Craigslist are just a few of the many places one can buy and sell online.

Last year, the All Pueblo Council of Governors passed a Resolution Number 2015–12 and 2015–13, calling on the United States government to consult with Native Americans to address international repatriation, and to take affirmative actions to stop the theft and illegal sale of tribal cultural items both domestically and internationally.

APCG continues to note that Pueblo Indian tribes of the southwestern United States have been disproportionately affected by the sale of tribal cultural items, both domestically and internationally, in violation of Federal and tribal laws.

More recently, in New Mexico—more recently, the New Mexico State Legislature passed a joint memorial authorizing the New Mexico Attorney General to consult with the Indian tribes of New Mexico to create stronger state laws, to stop the theft and illegal sale of tribal cultural items within the state of New Mexico.

Last month, an initial meeting was held in Santa Fe between the New Mexico Attorney General and the Indian tribes of New Mexico where many concrete recommendations were put forth for discussion.

The Pueblo of Isleta believes that both the state and the Federal Government need to strengthen their respective laws in order to prevent this kind of illegal activity from occurring.

It is a major problem for our communities, our livelihood, and our way of life.

Because Senate concurrent Resolution 49 was voted on favorably by the Senate recently, it is my hope that the difference in language between this and the companion House Resolution is quickly resolved so it can be fully implemented.

Thank you very much, and I will answer any questions that are put forth to me. Thank you so much.

Senator UDALL. Thank you so much, Governor Torres, and thank you for sharing that very disturbing situation with us in terms of the purchase back.

Please proceed, now, President Begaye.

STATEMENT OF HON. RUSSELL BEGAYE, PRESIDENT, NAVAJO NATION

Mr. BEGAYE. Yah-Ta-Hey.

Senator UDALL. Yah-Ta-Hey.

Mr. BEGAYE. [Native American Language spoken.]

My name is Russell Begaye, President of Navajo Nation. I just want to thank you, Senator Udall and Senator Heinrich, for holding this field hearing right here in my home state of New Mexico.

Last year, in 2015, we had to send a delegation to Paris to buy back basically one of the most sacred of all of our ceremonial masks, the Yei bi Chei. And earlier this year again, same thing happened, 2000 percent increase in the demand—on the demand in terms of the price of these objects.

And, so, in 2016, I sent a medicine man out to Paris to retrieve these in an honorable and respectful way.

And, also, today, the National Park Service is holding hostage the remains of Navajo people and sacred objects taken from Canyon De Chelly, the heart of the Navajo Nation, being held in the city of Tucson today.

I don't know why we have to go into litigation to retrieve these objects, so we're demanding that the U.S. government return these remains, and these sacred objects taken from the Canyon De Chelly, the heart of the Navajo Nation immediately, and we're asking members of Congress, Senator Udall, Senator Heinrich, that you communicate with the Department of Interior, that these remains and these objects be returned immediately. Take it out of court where it should not have—where it should never be.

And, so, as Navajo Nation entrusted with the protection of funerary objects, sacred objects, objects of cultural patrimony, since the beginning of time. As President of Navajo Nation, I take this responsibility very seriously.

So I'm humbled to share the responsibility with our past leaders and the medicine people who lead our ceremonies and our sacred prayers.

These objects are central to our identity and critical to our future as a people. They are as important as our language, as important as for sacred Navajo mountains, and it's important as this land that we have lived on since time immemorial.

Past leaders and traditional healers have worked tirelessly behind the scenes for decades for return of cultural patrimony. They have raised awareness of importance of these issues to the world. They have also engaged in political and academic leaders. These leaders have introduced many pieces of landmark legislation, including the Native American Graves Protection Act to provide security for not only the benefit of the Navajo Nation, but for Indian Country as a whole.

As President of the Navajo Nation, I'm in full support of these legislative actions.

Before many of the current cultural resource protections were enacted, thousands of Navajo objects of cultural patrimony were taken, stolen, and sold by people who have no right to sell them. We recognize that some folks want to admire our art and study our archeology for intellectual gain.

However, our object of cultural patrimony are often distinct from our folk art and jewelry. Our sacred objects are not to be hung on walls for decoration in mansions, are cataloged and placed in storage bins and museum—in museum warehouses around the world. They were and are constructed to maintain our sacredness and wholeness of our people.

As such, we request Congress, that Federal Government pass legislation to further protect and repatriate our cultural heritage. These laws have timelines and teeth for compliance.

In our dealing with the auction house in Paris, we ask and demanded that they take these objects off the auction block, but they refused to do so. I asked specifically that I talk directly to the owners of these objects, and I was refused also.

And, so, having gone through the White House, going through members of Congress, to the Attorney General and to the country, to government of France, to try and get these objects off of the auction block. We were unsuccessful. We turned to a legal firm in the City of Paris to help us to negotiate the return of these sacred objects, which we had to do. We had to pay, when we should not have to pay for these objects at a 1,000 percent increase because of my negotiation with the auction house, we finally were able to return these objects by having a medicine man flown out there and have him purchase these objects and return them back to the Navajo Nation land.

So, we commend the House and the Senate for passage to protect patrimony resolution. We also look forward to working with Congress and the administration to enact current measures, including the STOP Act, a bill to prohibit the exporting of sacred and Native American items, and increased penalties for stealing and illegally trafficking tribal cultural patrimony. And places off the Navajo Nation, places like Bears Ears. We know there are people that are robbing those sacred objects, that are in those places, and so we're asking that protection be not only on Indian Trust land, but on Indian Country, like the Bears Ears, and other places like that, like the Grand Canyon.

So, again, thank you for listening to my testimony, and I will be willing to take any questions. Thank you.

[The prepared statement of Mr. Begaye follows:]

PREPARED STATEMENT OF HON. RUSSELL BEGAYE, PRESIDENT, NAVAJO NATION

Good morning Chairman Udall and members of the Committee.

My name is Russell Begaye. I am president of the Navajo Nation. I want to thank the Committee, Chairman Barrasso, Senator McCain, and Senator Udall for holding this field hearing on an important matter that affects all of Indian Country.

The Navajo Nation has been entrusted with the protection of funerary objects, sacred objects and objects of cultural patrimony since the beginning of time. As president of the Navajo Nation, I take this responsibility very seriously.

This is not just my responsibility as president of the Navajo Nation. I am humbled to share the sacred responsibility with our past leaders, our cultural teachers, and the medicine people who lead our ceremonies and our sacred prayers. We believe that through their practice and use of some of our sacred objects, they restore balance, health, and spirituality and bring us together as a community. These objects are also central to the identity of the Navajo people. They are critical to our future as a people. They are as important as our language, as important as the four sacred Navajo mountains and as important as this land that we have lived on since time immemorial.

Past leaders and traditional healers have worked tirelessly behind the scenes for decades for the return of our cultural patrimony. They have raised awareness of the importance of these issues to the world. We have a responsibility to them to continue the protection of our identity.

The United States government, Native American cultural and political leaders and the academic world have introduced many pieces of landmark legislation in the past hundred years to provide protections for not only the benefit of the Navajo Nation, but for Indian Country as a whole. We are thankful for these efforts. From time to time, we must revisit these cultural protection laws based on current world events, changing technological times and add protections that were unseen at the time these laws were enacted.

We are here to improve upon the body of cultural resource protection law, domestically and internationally.

As president of the Navajo Nation, I am in full support of federal and legislative measures that address the illegal sale and trafficking of Native American cultural patrimony. We thank lawmakers and administration officials for their leadership and support on these matters. We look forward to the Government Accountability

Office's report on how the federal government currently investigates the theft and sale of tribal items and what reforms can be made to further prevent this practice in the future that will begin in early 2017.

Before cultural resource protection laws were enacted, thousands of objects of cultural patrimony were taken, stolen and sold by people who had no right to sell them to European traders, collectors, museums and academic institutions. We recognize that the Western European concept of art, archeology, anthropology and government encompasses a view of cultural patrimony as objects to be studied and admired for intellectual gain. There are professors who have spent their entire careers studying us and entire departments devoted toward teaching other students about us.

However, these objects of cultural patrimony are not like the Western European concept of icons and statuaries that are found in your churches, displayed in your museums or sold at auction or traded on the black market. These sacred objects are not to be studied, hung on walls to be admired or cataloged and placed in storage bins in annexes across the world. They were and are constructed to maintain our sacredness and the wholeness of our people. Without them, we are not a whole people. We believe this contributes to the societal problems that we have experienced and endured since they left the four sacred mountains. The levels of our current societal ills were never seen until these cultural objects have left our presence. With each return of cultural items that belong to the Navajo people, we believe they restore our balance. They restore our harmony.

In addition, museum curators, scientists and collectors do not have the inherent knowledge to care for them in a sacred way. Only medicine people know how to care for these objects in a sacred way and to use them in the way they were meant to be used, in our ceremonies to help restore balance and heal our people. In some cases, they are returned to nature within our four sacred mountains in a way known only to our medicine people.

It is unfortunate that we as a sovereign tribal nation face difficulty in utilizing current U.S. laws to protect our sacred objects and remains within the jurisdiction of international states. As such, we request Congress and the federal government to join together diplomatically and through passage of legislation to enhance protection and repatriation of our human remains, funerary objects, sacred objects and objects of cultural patrimony. These laws must have timelines, unambiguous definitions, defined roles and teeth to enforce their compliance.

The Navajo Nation has firsthand experience in repatriation of our sacred Navajo masks from an auction house in Paris France. While we were successful in the return of these living and breathing beings, it was a difficult endeavor mainly because France does not provide the legal protections and repatriation for these objects. The French people and their government also did not understand our view that these objects are sacred and were not created to hang on walls or in museums as art. France equates our interest in return of these objects as a religious issue, however they do not also take it into consideration that they are part of the identity of our people to exist. Other nations likely take a similar view. As such, we must educate all about these issues—not just the French people but also the European Union and other nations harboring our sacred objects and objects of cultural patrimony.

Our sacred artifacts and cultural items are an important part of the Navajo culture and beliefs. They provide us a sense of who we are and provide us sustenance for our physical, emotional and spiritual well being. This is why we consider these important in protecting and we will continue to work to protect these items and their rightful return to us.

We commend the House and Senate for passing the PROTECT Patrimony Resolution, H. Con. Res. 122. We look forward to the House passing the amended concurrent resolution that will ultimately send a powerful international message by our lawmakers about the importance of protecting Native American cultural patrimony.

We look forward to working with Congress and the administration to enact current measures including the Safeguard Tribal Objects of Patrimony Act, S. 3127, a bill to prohibit the exporting of sacred Native American items and increase penalties for stealing and illegally trafficking tribal cultural patrimony.

By passing these cultural protection laws, Congress will take another step in making history in its endeavor to make the Navajo Nation and all tribes across the country whole after experiencing the erosion of their cultural identities. Congress has the opportunity to contribute to our *hęzhę*, the beauty way of our life. We urge you to take advantage of this opportunity. The Navajo Nation and Indian Country are grateful for your service and long-term vision and wisdom on this matter. Thank you.

Senator UDALL. Thank you very much, President Begaye. And thank you also for sharing with us the objects, and what's happened there, especially the Yei bi Chei ceremonial mask.

Thank you very much.

Please proceed, Dr. Schaaf.

**STATEMENT OF GREGORY SCHAAF, PH.D., HISTORIAN;
PROFESSOR OF NATIVE AMERICAN STUDIES, UNIVERSITY
OF CALIFORNIA (RETIRED)**

Dr. SCHAAF. My name is Dr. Gregory Schaaf. I am a retired professor of Native American Studies from the University of California. I have Ph.D. in American Indian Histories, a separate degree in art history. I have served as a historian for over 50 different Native American nations across this country, including all 19 Pueblos.

I am retired from the National Council of the Smithsonian, National Museum of the American Indian.

My wife and I, Angie, are the authors of 17,000 Native American Artists Biogeographies.

I'm also the founder of—cofounder of Santa Fe's Indian Art Collectors Circle, which have met over 100 months in a row, the first Wednesday of each month, which invited collectors and Native American artists to come together to do show-and-tell, and each one would bring an item or two, and we would share our knowledge about each item. We didn't allow any buying, selling, or trading. But it helped many young Native American artists be introduced directly to collectors, which helped them in their careers as fine artists.

Also I served in the New Mexico Governor's Task Force for Authenticity of Native American Art. And I am a specialist in developing tribal archives, tribal libraries, tribal museums.

When Acoma Pueblo decided they wanted a museum, we dreamed up the idea and how it was going to actually be created, in my living room. So, I'm very honored to be here today with the Governor of Acoma Pueblo, and the Governor of Isleta Pueblo, and the leader of the Navajo Nation. It's truly a great honor to be here.

I'm going to begin by revealing a secret. I have never revealed this secret for 35 years, but I'm going to tell you today. For 35 years I have been involved secretly in negotiating the repatriation of hundreds and hundreds of Native American sacred objects. My work was important that it be kept secret.

I'm the one who's been involved behind the scenes negotiating the return of the Acoma Shield. I had the deal in place within two weeks. It was ready to happen. And then other forces came into play, other people, other agencies got involved, and now months have passed. I'm nervous, okay? I'm nervous. The clock is ticking. I don't want this person who consigned this Shield to withdraw his offer, okay? Because I want you-all to know today, everyone in this room, he is prepared to turn this Shield over today before the sun's down. There's only one more step that has to take place, and I don't want to embarrass anybody, so I'm not going to tell you what that step is publicly. But privately, if you want to know, I will tell you. And if you can use your power to make that happen, that Shield will come home right away.

I'm also going to reveal another secret. This man who owns this Shield, I don't know his name. I'm dealing through an intermediary. I ask questions. He sends responses back. My first question was, what does it take to make a deal?

In order to make these sacred objects come home, you have to think from the perspective of other people from other cultures. You have to think from the perspective of the collector themselves. Why do they collect this? Who are they? Are they good and honorable people? Are they dishonorable? Are they thieves? Are they smugglers? Or is there a black market going on? I mean, I read those Tony Hillerman novels. I know that must be true. I read it in a book.

But, truthfully, I have known these collectors for a long time, and most of them really are honorable people and they want these things to be returned.

Now I'm going to reveal another secret, my second secret. This man has told me that if all goes well, and this Shield is returned home to Acoma Pueblo, this man is prepared to donate his entire collection, 2,000 objects of important cultural objects. They belong to many different pueblos, to the Navajo Nation, to the Apaches, to other Native peoples in the southwest. He's in his—he's very elderly, he's collected all his life. I told him, I said, "I bet your children hated that collection, don't they?" He said, "How did you know? My kids hate this stuff. They can't wait for me to die so they can send it off to auction so that they can take it down to the pawnshop and get rid of it, because instead of getting a new bicycle or a new doll, mom and dad had to go down and get a new basket or a pot or a shield, or something, and I didn't get what I wanted, so the kids hate it."

One of our big challenges is to try to attract the younger generation of collectors. And I can tell you that if you criminalize Native American art, if you create a punitive approach to this, in certain ways, which I want to protect you from doing, and you use a punitive action, these objects—first, overnight, there will be a major black market created.

And number 2, these collectors that are honorable that don't want to have their names and lives dragged through the mud. They don't want to be charged with these huge felonies. How can you stop them from building a big fire in their fireplace and throwing the shield in, and shoveling the other things in and destroying it? How can you stop them from going on to the desert and digging up a big hole and throwing these things there and destroying them forever?

That's the punitive approach, and that's what this club symbolizes, because as I was negotiating for the return of the Shield, we talked about the carrot and the stick approach.

The carrot and the stick approach are the amendments to NAGPRA, which basically give a carrot, two years to return these objects, and you're going to be home free. And the stick, if you don't, this is what's going to happen to you. You're going to get charged with a felony, you're going to be fined hundreds of thousand of dollars, you could go to prison, okay?

These people will not allow that to happen. They're lawyering up right now, as we speak.

My approach is to advocate the diplomatic approach, which is symbolized by this wampum belt. When I first testified before the United States Senate Select Committee, I was very close to Senator Daniel Inouye. This is my testimony. I brought you copies to take home with you.

And, at that time, the chiefs of the Iroquois Confederacy made this wampum belt for me, their wives did. So it symbolizes the diplomatic approach to the return of these objects. Who was one of my great inspirations for this diplomatic approach? Because we have a choice. We have the diplomatic approach, which is the carrot and carrot approach, where everybody wins, where everybody holds their head up high in dignity.

And we have the carrot and the stick approach, where all of a sudden these people hide, or they destroy things. Who was one of my great—some of my great inspirations to do this diplomatic approach? Well, Senator, it was your mother and father. And here's a picture that proves it. Here's a picture of Senator Udall's mother and father dancing with the Indians at the creation of the Institute of American Indian Arts, demonstrating the power of a diplomatic approach. They succeeded.

That is a great inspiration to me. I would like to repatriate this to you, today. I will set it here and then we will hand it to you.

Also to prove good faith, we are repatriating three boxes of sacred objects today at this very moment. This box contains sacred objects, which are over 100 to 150 years old. And this goes back today to the Navajo Nation.

Mr. BEGAYE. Thank you.

Dr. SCHAAF. This box contains objects from the Isleta Pueblo Nation. And at this time, I'd like to return those to the Isleta Nation. This box contains sacred objects from the Acoma Nation, 100 to 150 years old. And at this time, I'd like to return these objects and give them back to the Acoma Nation, so that they might go home.

Why do I do that? I do that because we must lead by example. We must not vilify the collectors. Embrace the collectors, make friends, use kind and gentle words. Dance with them around the circle. Invite them to meet with Native people. Bring these people together, but if we do, and if we use this diplomatic approach, I believe thousands and thousands of objects will be returned, and if we don't, there's always the club.

I'm willing to help all of your committees, all of the Federal agencies. I'm willing to train at least one person within each of the Native Nations the diplomatic approach.

I will also teach each Federal agency that wish—that's involved in this, the DOJ, the State Department, the Bureau of Indian Affairs, because those people that were up, they wouldn't know a sacred object if it was sitting in front of them. They've never seen them before. Just because they toured our museum, doesn't mean they know. And there's no machine you can plug in and say, "Yup, that's a sacred object. Nope. That one's not."

Before you criminalize Native American art, please let me help you, because if we do, these things will be returned, and that's our goal.

Thank you very much.

[The prepared statement of Mr. Schaaf follows:]

PREPARED STATEMENT OF GREGORY SCHAAF, PH.D., HISTORIAN; PROFESSOR OF NATIVE AMERICAN STUDIES, UNIVERSITY OF CALIFORNIA (RETIRED)

I. Introduction

For over 35 years, I have served as a tribal diplomat, helping to repatriate many, many cultural items to Native American spiritual leaders. I have provided this service at the request of respected tribal elders. They have asked me to help negotiate privately the safe return of sacred objects to their home tribal communities. My work has been kept so secret; today is the first time I have been publicly identified. In recent months, I have sought to facilitate the return of the Acoma shield.

Tribal elders have entrusted me with these secret assignments, because they grew to trust me after years of service as a tribal historian. For decades, I have helped tribes build tribal libraries, tribal archives, and tribal museums. I also have helped traditional elders prepare statements for the United Nations and testimony for international conferences. In 1983, I testified in behalf of the Iroquois Confederacy before the United States Senate Select Committee for Indian Affairs, then chaired by my late friend, Senator Daniel Inouye. Our efforts resulted in a resolution being passed in the U.S. Senate, 100–0, passed the House overwhelmingly, and signed by the President, officially recognizing “Iroquois Influences on the U.S. Constitution.” My testimony, published in this book, has been used in Native American schools and major universities. The Spanish Edition was paid for by the government of Mexico and distributed to Mexican judges and politicians interested in amending the Constitution of Mexico. Our Native American publications have attracted diverse groups of readers around the world.

II. How can we best facilitate the safe return of these Native American Sacred Items?

Answer. There are two primary approaches to repatriation: A. “Punitive” and B. “Diplomatic.”

In my experience, there are two ways to address the return of sacred items: first, the “Punitive Approach,” which could also be called the “Carrot and the Stick Approach”; or, second, the “Diplomatic Approach,” which could also be called the “Carrot and the Carrot Approach.” In my estimation, the Diplomatic Approach is by far the better path.

A. *The Punitive Approach*

In my description of this approach, the “Carrot” is the “Sacred Object.” The “Sticks” are laws that would criminalize “possession, sale, transfer and export” of items considered “sacred” or “objects of cultural patrimony.” In my professional opinion, I advise against the “Punitive Approach” for the following reasons:

1. Out of fear some people, facing the threat of felonies, jail terms, huge fines, legal fees, and public humiliation may simply get rid of these items in whatever way possible, including possibly their destruction. This is the worst fear of tribal elders
2. “Punitive Laws” would create a black market for items not destroyed. This is a major concern expressed by tribal elders.
3. “Punitive Laws” probably would be judged “unconstitutionally vague.” The public and the courts would need to have a way to reasonably determine what is legal and what is not. No scientific tests exist to determine what is “sacred” and what is not.
4. “Punitive Laws” would require illustrated lists defining what is “sacred” and what is an “object of cultural patrimony.” Tribal elders do not want to create illustrated lists of sacred items.

Of course laws against theft should still stand as a deterrent.

B. *The Diplomatic Approach*

In my description of this approach, the “Carrot” is the “Sacred Object,” and the other “Carrots” are ways in which all parties “win.” This means everyone is respected and allowed to hold their heads up high in dignity.

I support the “Diplomatic Approach” for the following reasons:

1. The time is right to encourage this approach because, increasingly, many collectors, because of their love of these objects and their appreciation of Native cultures, want to see “sacred objects” go back to Native American Spiritual Elders.
2. Diplomacy does not create a black market, but rather it promotes transparency and open negotiations.

3. Diplomacy would not require law enforcement, related expenses, and cases that would over burden the courts. Diplomacy does not require illustrated lists. Diplomats trust the tribal elders to identify what they would like returned.

I wish to underscore the importance of collectors for Native American Nations and artists. Imagine what would happen, if collectors decided to stop collecting. I am concerned about the future of Native American artists. Instead of vilifying collectors, I believe we need to do everything we can to attract a younger generation to be patrons of Native Arts.

To help make the point that collectors are mostly kind-hearted people, I have been given to understand that the current holder of the Acoma shield wishes its safe return “home” to Acoma. I believe that such a return, using the Diplomatic Approach, will lead to thousands of additional objects, some sacred, some historic, some works of art, coming back voluntarily to Native American Nations. Let’s use the diplomatic approach to facilitate the safe return of Native American Sacred Items to their rightful, tribal caretakers.

Laws Under Consideration For Amendments

1. NAGPRA—*The Native American Graves Protection Act*
2. ARPA—*The Archaeological Resource Protection Act*
3. IACA—*The Indian Arts and Crafts Act*

Amendments to these laws, if not carefully written, could affect other laws related to Inter-state and International Commerce, as well as various treaties between the United States and foreign nations. Serious Constitutional questions also could be raised. However, I do have many good ideas for amending these laws in ways that will benefit Native Americans and the general public.

Cost Analysis of Proposed Amendments

The “Punitive Approach”—While initial costs may be minimal, the potential long-term costs could easily become many millions of dollars in annual appropriations. The actual cost of criminalizing Native American art collecting will involve authorizations for personnel in various federal agencies and special training of additional law enforcement personnel. Additional costs would require appropriations for law enforcement equipment, as well as travel, computer databases, networking, and other investigative costs required in the “Punitive Approach.”

OR, if the “Diplomatic Approach” is chosen, the costs are minimal, involving travel expenses, educational training, and some legal consulting costs. If proponents of the “Diplomatic Approach” requested assistance from the public at large, donations could easily cover all the costs of the “Diplomatic Approach.” In this best-case scenario, the cost to the U.S. government and the U.S. taxpayers would be ZERO.

Conclusion

In my professional opinion, the “Diplomatic Approach” is preferable to the “Punitive Approach.” Let us revisit our purpose:

MAIN GOAL: To help facilitate the safe return of Native American Sacred Items to their rightful, tribal caretakers.

I would encourage the Committee, as it deliberates on the most effective legislation going forward, to not only embrace the Diplomatic Approach, but to affirmatively engage the collecting community for its input on how to strike an appropriate balance in the law in order to facilitate the return of sacred objects.

SUPPLEMENTAL TESTIMONY

At the end of my verbal testimony on October 18, 2016, before the Senate Committee on Indian Affairs, I gave gifts to some of the participants. To Senator Tom Udall, I gave him an original photograph, signed by his father, Stewart Udall, depicting Tom’s mother and father dancing with Native Americans. I stated for the record that the photograph symbolized the “Diplomatic Approach” to Indian Affairs. My dear friend, the late Senator Daniel Inouye, former Chair of the Senate Committee on Indian Affairs agreed that the “Diplomatic Approach” often is the best. He called it “Quiet Diplomacy.”

The second present I gave to Senator Martin Heinrich: two of my most recent books, “American Indian Jewelry II” and “American Indian Jewelry III,” containing illustrated biographical profiles of over 5,000 Native American silversmiths and goldsmiths. I told Senator Heinrich that these books symbolize all the Native People who are served by the Committee. I believe it is important to never forget who we are working for. . .the People.

Regarding the matter of how to best help Native American Spiritual Leaders to get back "Sacred Items," my 35 years of experience confirms that "Quiet Diplomacy" is the best way. The late Mohawk Chief Jake Swamp explained it simply: "These are matters for the Peace Chiefs, not the War Chiefs."

The presents I gave the tribal leaders were beautiful, but commonly shared items made by artists from their cultures. Governor Riley stated that the Senate hearing was "not the time or place" to give the gifts. I apologized. My intentions were all the best. I sought to lead by example. I hoped to inspire others to give presents and "sacred objects" to Native American people. In this regards, I was successful, because people told me of their wishes to return items. Spiritual leaders from two other Pueblos later hugged me and asked if I would help them with the "diplomatic approach." I also was given presents, a tobacco pouch from a Native American woman and two silver pins, one for me and one for my wife, Angie, from the Director of the Pueblo Indian Cultural Center.

I believe in the natural goodness of people. Native American art collectors and Native American elders are mostly kind and honorable people. The relationships we share are precious and heart-felt. Most people who are not collectors find these relationships hard to understand. However, once you experience old-time, Pueblo hospitality at a Feast Day, you are one step closer to learning why Native American friends are among the best friends in the whole world. This is why I wrote 17,000 Native American artist biographies. . . to help my friends live honored lives as fine artists. Among my presents were textiles. These symbolize traditional art forms in danger of dying out. For over 20 years, I promoted the "Pueblo Indian Textile Revival Project." I obtained century-old native cotton seeds from the Federal Seed Bank along with traditional indigo and cochineal dyes. I bought a ton of wool. I recorded biographical profiles for every past and present Pueblo weavers. Then, I built a collection of Pueblo Textiles and offered it free of charge for museum exhibitions. The first was for six months at the Pueblo of Pojoaque Poeh Museum. The most recent was at the Pueblo Indian Cultural Center, for two years, called "Gathering the Clouds."

As part of my verbal testimony, I also held two Native American objects: The first, a replica of the "George Washington Wampum Belt," symbolizing the original promises exchanged over 200 years ago between the Iroquois Six Nations and the United States of America. This belt was made for me as a gift from the wife of the late Iroquois Chief Jake Thomas. She explained the reason why she made this belt for me was so I could "remind White people what were the original promises made to Indian people. . . Peace for as long as the Sun shines and the grass is green and the rivers flow. . ." What followed was a century of Indian wars.

This wampum belt is a symbol of the "Diplomatic Approach."

I then raised over my head a replica of the wooden war club, given to me as a present for helping the Lenni Lenape or Delaware Tribe record their oral history, to develop a library, tribal archives and tribal museum. One-by-one, the elders came forward, shook my hand and whispered in my ear, "Thank you for helping us preserve our culture."

For the purpose of the hearing, I raised an old style, Indian war club, as a symbol of the "Punitive Approach," also called the "Carrot and the Stick." This war club further symbolizes the current proposals to amend NAGPRA, ARPA, and other federal laws. While the war club made a dramatic impact on the audience, getting my point across, some saw the war club as offensive. My intent was not to offend, but to present the harsh impact such laws could have on well intentioned, Non-Indian collectors, as well as some Native American people caught up in the fervor of internal disputes.

Who is going to enforce these new laws? ERO Special Response Teams, Special Response Team Members of ICE, Immigration and Customs Enforcement, Department of Homeland Security, as well as special operation teams from the BIA, DOI, BLM, FBI and others. See their training video: <https://www.ice.gov/video/ero-special-response-team#>

After the meeting, Governor Riley and I spoke privately about his concern for my use of the replica war club. I apologized to him. I should have told him in advance and received his approval to use the war club as a symbol of the "punitive approach." Governor Riley explained that I should not have called the presents "sacred." I apologized. I only meant it in the way the Hopi say, "Everything in the whole world is sacred." The problem is that the proposed "punitive" law will make everything "sacred" illegal. Governor Riley explained that no one could tell him what is "sacred." He explained that he is a "practitioner" and I am a "student." In response, I became humble and agreed with him. However, disagreements will arise, if the present draft laws are enacted, over what is sacred [illegal] and what is not [legal].

The main problem with the proposed “punitive” law is that it is “impossible,” as Governor Torres explained, and “improper,” as Governor Riley pointed out, for anyone—except certain tribal members—to tell what is “sacred.” This dilemma can be avoided through the “Diplomatic Approach,” in which we simply honor the requests of Native American religious leaders.

In conclusion, I am very concerned about how the proposed “punitive” laws could seriously damage the Native American art world and hurt Native American artists. Re-consider the title of this hearing:

“The Theft, Illegal Possession, Sale, Transfer and Export of Tribal Cultural Items.”

The false impression is that Native American art collectors are a bunch of thieves and smugglers. In my lifetime experience, I have known many thousands of collectors. Less than a tiny fraction of 1 percent were thieves or smugglers. How can we recruit young collectors, if collectors are portrayed as the “bad guys?” Why is this so important? Good collectors are the key to keeping the Native American art world alive. I estimate over 100,000 Native American artists are trying to feed their families through the sale of the artwork. What will happen to them if the collectors simply stop collecting? Native American families will be hurt. Native American communities will become even poorer.

ENDNOTE: Can you tell what is sacred and what is not?

Under the proposed law, American citizens not only are required to know what is sacred, we also must know which objects are used presently in a “Native American religious ceremony or ritual.” The main problem is that Native American religious leaders do NOT want the public to know about their private ceremonies and sacred objects. Furthermore, Native American religious leaders do not want sacred objects to be photographed, so any thought of having a guidebook to sacred objects is absolutely forbidden. The thought of non-Indian law enforcement touching, photographing, placing sacred objects in plastic bags, holding these bags in locked evidence rooms, exposing them at press conferences. . . All of this is strictly forbidden.

All of these serious problems are avoided by adopting the “Diplomatic Approach” over the “Punitive Approach.”

Short Definition: Sacred Objects

Sacred Objects: Specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.

SOURCE: 25 USC 3001 (3)(C).

Long Definition: Sacred Objects:

(3) Sacred objects means items that are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. While many items, from ancient pottery sherds to arrowheads, might be imbued with sacredness in the eyes of an individual, these regulations are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony. The term traditional religious leader means a person who is recognized by members of an Indian tribe or Native Hawaiian organization as:

- (i) Being responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization, or
- (ii) Exercising a leadership role in an Indian tribe or Native Hawaiian organization based on the tribe or organization's cultural, ceremonial, or religious practices.

SOURCE: Title 43—Subtitle A—Part 10

PART 10—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REGULATIONS

Senator UDALL. Thank you very much, Dr. Schaaf. Really appreciate it.

And now we will proceed with Ms. Honor Keeler’s testimony.

**STATEMENT OF HONOR KEELER, DIRECTOR, INTERNATIONAL
REPATRIATION PROJECT, ASSOCIATION ON AMERICAN
INDIAN AFFAIRS**

Ms. KEELER. Thank you, Senator Udall, Senator Heinrich, and the U.S. Senate Committee on Indian Affairs for requesting testimony from the Association on American Indian Affairs.

My name is Honor Keeler. I am the founding Director of the International Repatriation Project at the Association on American Indian Affairs, and a citizen of Cherokee Nation.

The AAIA is a 94-year-old Indian advocacy organization, which has long been engaged in sacred lands protection and repatriation. And it helped to draft the National Museum of the American Indian Act in 1989, and the Native American Graves Protection and Repatriation Act of 1990.

In 2014, the AIA opened an international repatriation office and dedicated full-time staff to this global indigenous issue.

There are many important concerns that the AIA has heard across Indian country at our Indigenous International Repatriation Conferences in 2015 and 2016, regarding the looting of Native American sacred and burial places, and the sales, transfers, and exports of Native American ancestors, funerary objects, sacred objects, and cultural patrimony from tribal and traditional lands in the United States.

All are intricately linked to the global issue of repatriation as a human rights issue, and the necessity to investigate the private and international markets that may involve criminal elements and intricate illegal trafficking systems.

It is estimated that one million indigenous ancestors and cultural items are located in auction houses, private collections, and international repositories throughout the world.

American Indian tribes through intertribal resolutions on international repatriation have been passed by the National Congress of the American Indians, the United South and Eastern Tribes, the Intertribal Council of the Five Civilized Tribes, and the All Pueblo Governors Council, stating that the movement of our ancestors and cultural items from burial and sacred places and outside of the country is a human rights issue, that it is pervasive and that it violates tribal and traditional customs and laws.

While current Federal laws, such as ARPA, the NMAI Act, and the Native American Graves Protection and Repatriation Act have helped to create a Federal process to prevent looting on Federal and tribal lands, and to repatriate Native American ancestors and cultural items from the Smithsonian Institution and federally funded agencies and museums, these laws do not address repatriation from private collections and international markets.

In order to stop the looting of Native American sacred and burial places, and repatriate indigenous ancestors and cultural items back to their communities, the AAIA recommends the following.

With regards to current Federal legislation and problems, the U.S. Congress should, through meaningful consultation with tribes; one, mandate centralized training across Federal agencies for proper implementation and training of current Federal laws, such as ARPA, NAGPRA, NHPA, NEPA, and U.S. Customs to avoid undue burdens on tribes.

Two, call for a full investigation into implementation of these laws and to reveal the extent of looting of Native American sacred and burial places, as well as the full extent of the paths through which these trafficking systems operate.

Three, call for a report to provide actionable steps for Congress and agencies to take to identify funding and appropriations gaps, as well as legislative gaps to be addressed to prevent trafficking and ensure that repatriation occurs from private and international collections.

Four, mandate that every agency, including the State Department, develop a tribal consultation policy and fully understand what meaningful consultations are.

And, five, establish a Federal landing page that serves as a single source of information for Native Nations that includes all current Federal contacts, relevant laws, and each agency's current tribal consultation policies and information on proposed developments that affect American Indian tribes.

The AIA also recommends that Congress do the following: One, create funding and appropriations to establish intertribal investigative units throughout the country.

Two, Enact NAGPRA amendments to notify Native nations of missing and exchanged collections from the Smithsonian Institution and federally funded institutions.

Three, establish a 30-day hold, at least, in U.S. Customs for Native American ancestors and cultural items, so that Customs may notify tribes and have meaningful consultations over the held items to determine if it has been taken from a burial or sacred place or from the tribe.

Four, ensure that Native Nations can represent themselves at the UN, and other international forum, and are involved in any planning processes to develop mechanisms for international repatriation, including the development of databases so that proper cultural protocols are put in place.

Many tribes do not want photographs of their ancestors and cultural items displayed, as they are sacred or integral parts to the exercise of their religious and cultural belief.

Five, mandate that the State Department create an office and assign staff to assist over 567 tribes with their International Repatriation efforts.

And, six, investigate entering into bilateral and multilateral agreements with other countries concerning the repatriation of Native American ancestors and cultural items.

The AAIA supports bipartisan efforts to stop the trafficking of indigenous ancestors and cultural items, such as the protect patrimony resolution. However—and the STOP Act.

However, we also advocate for the strengthening of current Federal laws and increasing penalties in the ARPA and NAGPRA laws.

In addition, we support efforts by Congress and the GAO and other agencies to investigate the theft, illegal possession, sale, transport, and export of the tribal cultural items, and urge them to look into the issues tribes are facing in illicit trafficking, and international repatriation that we have explained here today and in our written testimony. We thank you for your time and attention

to these important matters, and look forward to the future, in returning our ancestors and cultural items home.

Thank you. I will take any questions.

PREPARED STATEMENT OF HONOR KEELER, DIRECTOR, INTERNATIONAL REPATRIATION PROJECT, ASSOCIATION ON AMERICAN INDIAN AFFAIRS

Thank you, Senator Udall, Senator Heinrich, and the U.S. Senate Committee on Indian Affairs for requesting testimony from the Association on American Indian Affairs (AAIA). My name is Honor Keeler, I am the founding Director of the International Repatriation Project at the AAIA and a citizen of Cherokee Nation. The AAIA is a 94-year-old Indian advocacy organization, which has long been engaged in sacred lands protection and repatriation. It helped to draft the National Museum of the American Indian Act¹ of 1989 (NMAI Act) and the Native American Graves Protection and Repatriation Act² of 1990 (NAGPRA). In 2014, the AAIA opened an International Repatriation Office and dedicated full time staff to this global Indigenous issue.

There are many important concerns that the AAIA has heard across Indian country and during our Indigenous International Repatriation Conferences in 2015 and 2016, regarding the looting of Native American sacred and burial places, and the sales, transfers, and exports of Native American Ancestors, funerary objects, sacred objects and cultural patrimony ("cultural items") from tribal and traditional lands and the United States. All are intricately linked to the global issue of repatriation as a human rights issue and the necessity to investigate the private and international markets that may involve criminal elements and intricate illegal trafficking systems. It is estimated that one million Indigenous Ancestors and cultural items are located in auction houses, private collections, and international repositories throughout the world.³

American Indian tribes through Intertribal Resolutions on International Repatriation have been passed by the National Congress of American Indians (NCAI), the United South and Eastern Tribes (USET), the Intertribal Council of the Five Civilized Tribes, and the All Pueblo Governors Council, stating that the movement of our Ancestors and cultural items from burial and sacred places and outside of the country is a human rights issue, that it is pervasive, and that it violates tribal and traditional customs and laws.⁴

While current federal laws, such as the Archaeological Resources Protection Act (ARPA),⁵ the National Museum of the American Indian Act (NMAI Act), and the Native American Graves Protection and Repatriation Act (NAGPRA) have helped to create a federal process to prevent looting on federal and tribal lands, and to repatriate Native American Ancestors and cultural items from the Smithsonian Institution and federally funded agencies and museums, these laws do not address repatriation from private collections and international markets. In order to stop the looting of Native American sacred and burial places, and repatriate Indigenous Ancestors and cultural items back to their communities, the (AAIA) recommends the following.

With regard to current federal legislation and problems, the U.S. Congress should, through meaningful consultations with tribes:

1. Mandate centralized training across federal agencies for proper implementation and training of current federal laws, such as ARPA, NAGPRA, NHPA, NEPA, and U.S. Customs to avoid undue burdens on tribes;
2. Call for a full investigation into implementation of these laws and to reveal the extent of looting of Native American sacred and burial places, as well as the full extent of the paths through which these trafficking systems operate;
3. Call for a report to provide actionable steps for Congress and agencies to take to identify funding and appropriations gaps, as well as legislative gaps to be ad-

¹ National Museum of the American Indian Act, Pub. L. No. 101–185, 103 Stat. 1336 (codified as amended at 20 U.S.C. §§ 80q to 80q-15 (2006).

² Native American Graves Protection and Repatriation Act, Pub. L. No. 101–601, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C. §§ 3001–3013 (2006) and 18 U.S.C. § 1170 (2006).

³ Resolution #SAC-12-008, Support for International Repatriation, National Congress of American Indians (October 21–26, 2012). Resolution No. 12-07, A Resolution on International Repatriation of the Five Civilized Tribes, The Inter-Tribal Council of the Five Civilized Tribes, October 12, 2012. Resolution #SD-15–074, Supporting the International Repatriation Project of the Association on American Indian Affairs (October, 2015). All Pueblo Governors Council Resolutions Nos. 2015-12 and 2015-13 (2015).

⁴ *Id.*

⁵ Archaeological Resources Protection Act, 16 U.S.C. § 470 cc (1979) (amended 1988).

dressed to prevent trafficking and ensure that repatriation occurs from private and international collections;

4. Mandate that every agency, including the State Department, develop a “Tribal Consultation Policy” and fully understand what “meaningful consultations” are; and
5. Establish a federal landing page that serves as a single source of information for Native Nations that includes all current federal contacts, relevant laws and each agency’s current tribal consultation policies, and information on proposed developments that affect American Indian tribes.

American Indian tribes, Alaska Natives, and Native Hawaiians involved in international repatriation are experiencing many difficulties repatriating Ancestors and cultural items, including: locating them in private and international repositories; refusals by auction houses, collectors and international repositories to accept historically documented proof, to consult, and to repatriate; an excessive burden of proof to prove ownership of Ancestors and cultural items, rather than requiring auction houses, collectors, and repositories to produce documentation that the tribes have given free, prior, and informed consent to sales; the length of time it takes to repatriate internationally; and the failure of international courts, museums, auction houses, and foreign governments to recognize tribal courts and tribal laws, even though the United States, through its trust responsibility, statutory interpretations, government-to-government relationship, and political relationship with federally recognized tribes should support tribal governments.

The AAIA also recommends that Congress do the following:

1. Create funding and appropriations to establish Intertribal Investigative Units throughout the country;
2. Enact NAGPRA amendments to notify Native Nations of “missing and exchanged” collections from the Smithsonian Institution and federally funded institutions;
3. Establish a 30-day hold in U.S. Customs for Native American Ancestors and cultural items, so that Customs may notify tribes and have meaningful consultations over the held item to determine if it has been taken from a burial or sacred place or from the tribe;
4. Ensure that Native Nations can represent themselves at the U.N. and other international fora and are involved in any planning processes to develop mechanisms for international repatriation, including the development of databases, so that proper cultural protocols are put in place. Many tribes do not want photographs of their Ancestors and cultural items displayed, as they are sacred or integral parts to the exercise of their religious and cultural beliefs;
5. Mandate that the State Department create an office and assign staff to assist over 567 tribes with their International Repatriation efforts; and
6. Investigate entering into bilateral and multilateral agreements with other countries concerning the repatriation of Native American Ancestors and cultural items.

The Association on American Indian Affairs (AAIA) supports bipartisan efforts to stop the trafficking of Indigenous Ancestors and cultural items, such as H. Con. Res. 122 PROTECT Patrimony Resolution, which was passed by the House and Senate only a few weeks ago, and has been sent back to the House. However, we also advocate for the strengthening of current federal laws and increasing penalties in the NAGPRA and ARPA.

In addition, we support efforts by Congress and the General Accounting Office to investigate the theft, illegal possession, sale, transfer, and export of tribal cultural items, and urge them to look into the issues tribes are facing in illicit trafficking and international repatriation that we have explained here today and in our written testimony further.

We thank you for your time and attention to these important matters, and look forward to positive outcomes from Congress to assist Native Nations in legislation and assistance to repatriate their Native American ancestors and cultural items back home to their communities. Thank you.

Senator UDALL. Thank you, Ms. Keeler. And I thank all the witnesses today for their testimony. Ms. Keeler, we’re now going into a questioning phase.

Ms. Keeler, I'd like to talk to you a little bit about the United Nations. You have a lot of experience there in terms of their interactions, and it's my understanding that the United Nations meets to discuss international repatriation, but oftentimes these meetings take place in New York, Geneva, or someplace else in the world without very much notice.

It's clearly impossible for tribes in New Mexico or others across the United States to be in attendance or to keep tabs on the discussion.

In your opinion, what steps might the United States take to support tribes in representing themselves in international repatriation issues?

Ms. KEELER. I think it's very important, Senators, to ensure that Native Nations have that opportunity as indigenous governments to represent themselves at the UN. Particularly, in the UN permanent forum on indigenous issues, UNMREP, UNESCO, LIPO, and other representative branches of the UN.

Yes, there has been a problem with adequate notice provided to indigenous peoples for meetings that occur on important issues, such as international repatriation.

And we encourage the United States to get behind tribes and ensure that they can represent themselves at those meetings. And also so that there is adequate notice so that they can prepare and go to these meetings.

I'd also suggest that there be some kind of fund set up to help tribes to get to the UN to represent themselves.

Senator UDALL. Thank you very much.

And, Dr. Schaaf, we really appreciate your testimony here today as an art collector and historian. You've talked about the carrot and the stick, and you did it very graphically here. And I agree with you that art dealers and collectors should be partners on this issue.

In regards to the carrot-and-stick approach, you've also indicated in your testimony there's a black market out there. So, in addition to carrot-and-stick, what would you suggest be utilized in order to tackle the black market situation that's going on?

Dr. SCHAAF. I think that the carrot and the stick approach is the last resort. I think the carrot and the stick approach is the first approach. In this approach, the person who owns or is the caretaker of a particular object, can come out of it holding their head up high in dignity. It's very important to them.

Secondly, it's a carrot—in terms of the American tribes or spiritual society, because they get their things back.

It's also important that the auction house gets a carrot, that they don't come out looking like the bad buy. It's like their villains, like they're engaged in some kind of black market. And there's a way that that can happen.

Also, each Federal agency that gets involved, they also need carrots. All of them need carrots, so if everybody can win, it's win, win, win.

Now, in regards to a black market, I've been collecting Native American art since I was 5. I'm 63. That's over half a century. I can tell you for a fact that I haven't really seen too much of the existence of a black market.

I made a reference to a black market because if you criminalize some aspects of Native American art collecting, it will create a black market instantly.

Now, when we were negotiating regarding the return of the Shield, one of things that the Acoma elders was very adamant about was they didn't want to foster a black market regarding this auction. And I told them that an auction really isn't a black market. It's the opposite. There's a public spotlight. It's online.

I have a computer system which sends me a notice every time a particular key word appears which relates to important Native American cultural items. I get an e-mail.

Other times, I get a phone call from one of the spiritual elders or members of societies, or their children from these Pueblos or Native Nations. They call me up and they say, "Dr. Schaaf, this is coming online. This is going to get sold. Is there anything you can do?"

In the case of the Shield, I thought Walter Amberg Foundation was going to come in and save the day, okay? Like they did with the Hopis. But the Walter—because they appropriated a million dollars and they only used 500,000. But this didn't happen. Now we had to do a different approach. Now, this black market (made unreportable utterance), okay, well, I can tell you that they're really—in all of the early years of collecting, there wasn't per se a black market. ARPA was created to STOP people from going into Federal lands, especially Mesa Verde and Chaco Canyon, and digging stuff up out of the ground.

When I was there in 1990, as a quasi-historian for the Senate's Committee for Indian Affairs with Senator Inouye, when ARPA—when NAGPRA was created, the Native American Grave Protection Act, the underscore was "grave." What were we trying to do? We were trying to get the Smithsonian to return the tens of thousands of skeletons that they had in their closets, and they wouldn't give them back.

And there were—when in—in my university, the University of California, the joke was that there were more dead Indians in the basement and skeletons than there were live Indians that they recruited.

And when we would ask them, "Could you return these objects, because when it says, 'rest in peace,' we consider that a human right."

And they would say—these archeologists would say "No, we own this. We own these things. You don't own it. And we're not giving them back." So, in order to get them to give it back, we approached it through NAGPRA, the Native American Grave Protection Act.

I remember the day when those guys came in and added those three words, "Objects that are sacred, ceremonial, and objects of cultural patrimony," and I said, "Oh, you guys are opening a can of worms."

And they said, "What do you mean?" I said, "Sacred. What's sacred and what's not." And, you know, "Can you prove one way or another that an object is sacred, and, therefore, illegal? And then you're going to go to prison for all of these years?"

So they really fought against me, to be honest. And finally I said, "How about—I worked for the Hopis for all these years as a histo-

rian, how about if I call them and ask them, what is sacred and what is not? You define it. Will you accept their opinion?"

They said, "Well, that's pretty good. Okay. You go for it."

I called up the Hopi elders, one of the kiva leaders that I had worked for for all of these years, and I asked him, "Tonight in the kiva, would you ask the guys what's sacred and what's not?"

The next day I got a phone call. "Man, we stayed up until late in the night talking about it, but we got the answer for you. I'm going to tell you right now. We decided that the whole world is sacred, every blade of glass, every leaf, every river, every mountain, every object in the whole world is sacred." Yet, at the same time, nothing is so sacred that the clowns can't make fun of it.

Now, we're faced with a law, in which everything is legal and yet everything is illegal. Get my point?

Now, what about ceremonial? That used to be there, and then that got pushed aside, because what about moccasins and drums? Are you going to put all the moccasin makers out of business, all the drum makers out of business?

What about shields? Shields really weren't on the radar screen until a year ago. Before that, shields weren't really addressed. And there are shields—all you have to do is go to Gathering of Nations, and there's hundreds of Native Americans dancing with shields. Are those all illegal?

And let me tell you, when those guys that were here before, that ICE guy, man, let me tell you, when you give that guy that club, okay, that's what happened two years ago when they gave the club to the Serbias Action Project, okay? Did you ever hear of Serbias Action? Well, you should know about it, because two years ago, they gave that to the Bureau of Land Management. Those guys got a SWAT team. They brought a hundred guys into these area collectors, and what's the result? Three dead on the ground. This is serious stuff.

Senator UDALL. Thank you. Thank you, Dr. Schaaf, really appreciate it.

President Begaye, it's my understanding you've floated an idea where the Department of Homeland Security should hold an object that they believe is important to cultural patrimony, and adequately consult with the tribes. Can you describe how this would benefit the Navajo Nation and the rest of Indian Country?

Mr. BEGAYE. It would greatly benefit us, because before passing these on into international market, we need to be consulted on the sacredness of these objects. We understand the difference between art and those things that can be used for deport. But sacred items are different. In this case, we're talking about what the—with art dealing with the Paris auction house, the Yei bi Chei mask. We sent a medicine man out there to authenticate. The seven, five of them were masks that were used in ceremonies. The most sacred of the Navajo ceremony, the Yei bi Chei mask.

And so, one—the owner would not reveal himself. And if they want to do it peacefully, then come out. Come out in the open and say, I am from Japan, I'm from China, I'm from France, I'm from New York, and here's an object that I want to put on the auction block. Native American, can you come and see if this is a sacred

object? And we would go there and talk to that individual and reason with him.

But, no, in our case, from 2015, when we retrieved the seven masks, from that point, to 2016 spring, it increased—the value that we were being asked for increased 2,000 percent.

And, so, some of these that are out there, are unreasonable. They are just out for profit. And how do we go after those people that knowing that we paid "X" amount of dollars in 2015, now they increase it by 2,000 percent? And, so, there are those that are like that. And I don't know if that will be labeled black market. But if the Homeland Security can make sure that these objects, sacred objects, Native American objects, before they are taken outside of the country, would be looked at, we would be consulted. Let us have a word. Let us have a say over these objects, and let us determine through our medicine people whether these are sacred or not.

But when it leaves the country, like we did with the country of France, we asked them for help, the government, we asked them to step in, because we knew that these were sacred objects that was about to go on the auction block. But they said, because your laws, United States government laws, do not address these issues, then we cannot do that. We cannot come alongside Navajo Nation and help you repatriate these items.

And, so, again we asked different lawmakers, different governments, but nobody could come alongside us, because we didn't have the laws in place.

And that's why we are supporting STOP Act, the Protect Act, we appreciate that effort, because there are people out there that will refuse to deal with us as Indian Nation in returning these sacred objects.

And, so, to me, the word I use was bribery. You guys are trying to bribe us. We know, you know, and the sellers know how much we paid in 2015, and now you're increasing it by 2,000 percent. And that is pure criminal act. It's a bribe. And we need to deal with some of these people that way.

And, so, if a person was reasonable he would say, you know, we know how much you guys paid a year ago. And we're willing to give these objects back to you at the same price or just donate back to the Navajo Nation.

They would have said that, but, no, they increased it by 2,000 percent. And, to me, that's a bribe.

And, so, again, we appreciate the efforts of the United States Congress to put laws in place that will say to people out there, "Don't take Native American objects out of the United States before you consult with the Native American people, like Navajo Nation, especially if they're ceremonial key—they're ceremonial objects."

And so we can define that. We can say, yes, this is art. Yes, it was used at Gathering of the Nations. Yes, it was used at the song and dance.

But this particular one, is used for ceremonial purposes, for healing, or to restore harmony. And those are the ones that we want to remain—that we want protected. And that's all we're asking for. Thank you.

Senator UDALL. Thank you very much, President Begaye.

And so I'm going to now—because we are running late here, I want to make sure we try to keep our schedule that we announced, we'll go to Senator Heinrich for his questions at this point.

Senator HEINRICH. Governor Riley, do members of your pueblo rely on the sale of art items for their income?

Mr. RILEY. Thank you, Senator, for the question. Yes, there are a number of individuals from the Pueblo, who, as a profession, are artists. And, so, they do earn a livelihood by the products that they produce for commerce.

Senator HEINRICH. Is there any prohibition in Federal law against selling or purchasing those items?

Mr. RILEY. None whatsoever.

Senator HEINRICH. Would you consider the Acoma Shield to be an art, Native American art item?

Mr. RILEY. I would definitely not. There are objects that are created for a specific purpose within pueblo society. In particular Acoma, the Shield had its place within our ceremonial calendar. And as such, it is not a piece of art.

There are numerous examples that other tribes have presented, including when Congressman Pearce and I talked at the Museum of the Native American.

There's a California tribe that said it very well. These items are given life, and as such we treat them as a living being. And there are differences in, I guess, perspectives.

Not to really point fingers at Professor Schaaf, but there are differences. He asks us, as Native Americans, to think like a collector. I, in turn, ask him to think as a Native American. These items that he bestowed upon us, I'm grateful for these items. He called them sacred. I don't know what's contained in these boxes. If they are, in fact, sacred, they should not be re-presented to the tribe in such a disrespectful manner. I think the Pueblo leadership would all agree with me. If they are not then, he, himself, with all of his degrees, have mislabeled them.

And that's one position that Native Americans have strongly stated at almost every hearing that I've been at. Only we can determine what is sacred. The professor is not a practitioner of Native culture. He studies Native culture. I, myself, am a practitioner. There's a huge difference between being a practitioner and being a student.

So, I guess that's a long-winded answer, but I really wanted to drive home that point. I don't know what's contained in these boxes. I cannot say for Navajo Nation, for the Pueblo of Isleta, whether or not these items are sacred. It's up to each individual tribe to determine that fact.

Senator HEINRICH. Mr. Torres.

Dr. SCHAAF. If I could just—30 seconds.

Senator HEINRICH. I'm going to continue with my line of questioning, and we'll get to you in a moment.

Governor Torres, the item of pottery that you mentioned that you purchased back for \$1,200, was that an item of art, or was that an item of cultural patrimony? Would it be the kind of item that your members would simply create and sell on the market to—for artist income?

Mr. TORRES. Thank you for the question, Senator.

This ceremonial bowl that was located and purchased, and brought back to us, has been used for centuries, and I could see that—I should have brought it. You can see the wear marks on it. And the traditional people and leaders who saw it, they recognized it right away.

And, you know, like I said earlier, if we would have—if Isleta would have went over there and demanded it or went about it in a different way, a red flag would have went up, and we would have never seen it again, because there's money involved. Everything is about money. Everything, you know. If there's money attached to something, if somebody has money invested in it, I guess, is what I'm trying to say, even though it was stolen from a house, you know, it was sold, somebody paid for it, and then now it's for sale.

So, when things—objects, sacred objects like this are found in certain places, you got to figure out a way to get them without putting up that red flag. Because if you don't, it's going to disappear, and you'll never see it again. And you had that opportunity to get it, well, you can't put a price to these sacred objects. You don't do that. We don't do that. We don't put prices to it.

I don't know what's in this box. And I'm also a traditional leader at Isleta Pueblo, but if I saw what's in this box, I probably still won't know what it is. It has to go to the right people. When I take this to my people, I will get the traditional leaders. I will have a gathering and we'll see what's in there, and see what it is.

Like governor Riley says, you don't know if it's sacred or not. I don't. I'm not going to know. If some of the other traditional leaders know, then they will tell me. But every society has their own things that they use in ceremonials.

It's kind of tough to answer a lot of questions. All pueblos are different. Ceremonials are different. Navajo Nation have different ceremonials. So, you know, there's so many, it's tough to address. A lot of things we can't disclose also.

Senator HEINRICH. I understand. Dr. Schaaf, who owns the Acoma Shield?

Dr. SCHAAF. I don't know. It appears the circumstances, there was—

Senator HEINRICH. If you don't have the circumstances, I don't—Governor Riley, who owns the Acoma Shield?

Dr. SCHAAF. Oh, the Acoma Pueblo owns the Shield. Who has possession of it at this time is a different thing.

Senator HEINRICH. And I thank you, Senator Heinrich, for that question. As I said before, I think it's time for the antique dealers and the collectors to think that way. That Shield belongs to the Pueblo of Acoma. Inherently, it belongs to us.

Senator UDALL. Having no additional questions, let me just thank each member of this panel. We really appreciate your time and your effort, and your travels here to participate in this. Senators, just so Senator Heinrich and all of our staff know, we're allowed to submit follow-up written questions for the record. We hope if you get any of those, that you will respond quickly, so we will have the information and proceed on other fronts.

The hearing record will be open for two weeks. And I want to thank the witnesses for their time and testimony.

As I said earlier, the staff members, there's an e-mail that the Committee can be contacted through, and at this point, the hearing's going to be adjourned, but I also want to have an announcement after the hearing's adjourned, so I want your attention here.

So, the hearing is now adjourned, and I will call forward Governor Yepa to give a closing prayer.

[Whereupon, at 12:30 p.m. the hearing was concluded.)

A P P E N D I X

PREPARED STATEMENT OF JOHN MOLLOY, PRESIDENT, ANTIQUE TRIBAL ART DEALERS ASSOCIATION,¹

The Safeguard Tribal Objects of Patrimony Act of 2016 is unlikely to achieve its primary goal, the return of important cultural objects to Native American tribes and Native Hawaiian organizations. If enacted, the STOP Act would instead create dangerous legal uncertainties for private owners of a wide range of American Indian art and artifacts, violate the 5th Amendment due process clause of the U.S. Constitution, generate consumer confusion that would damage legitimate art dealers and tribal artisans, and create a bureaucratic nightmare for the tribes.

Summary

It is the position of the tribes that they, and no one else, should determine which cultural objects are inalienable from their communities. This is a legitimate position, and intrinsic to tribal sovereignty. At the same time, many tribes believe strongly 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, tribes refuse to make information public that would enable an outsider or unauthorized person to know whether he or she possesses a ceremonial object considered inalienable to the tribe.

It is also the tribes' position that although non-tribal members may have some knowledge of Indian culture, that knowledge is not complete. So, while certain examples of cultural objects such as masks may be generally acknowledged as ceremonial items, others are not. Some objects deemed ceremonial to a tribe are very similar to non-ceremonial objects, and may include commonly traded objects such as ceramics. Knowledge regarding these items is also considered inappropriate to make public.

Tribal secrecy may be well-justified as necessary for the health and well-being of the tribe. However, the lack of specific, public information about what makes a cultural object inalienable—when it may have entered the stream of commerce decades or even a hundred years before—is a legal barrier to the exercise of due process and to the return of many sacred objects.

This information gap would certainly be an issue in the enforcement of the STOP Act, if it is enacted. The U.S. legal system is premised on the idea that a citizen must have fair notice of our laws. As our 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, violates the first essential of due process of law.”²

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.³ These objects are claimed regardless of the geographic and time limitations and grandfathering-in of older, non-tribal private collections under

¹The Antique Tribal Art Dealers Association, ATADA, 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*Connally v. General Constr. Co.*, 269 U. S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

³Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013, Nov. 16, 1990, § 3001(3)(c-d).

the 1979 Archeological Resources Protection Act (ARPA),⁴ and the 1990 Native American Graves Protection and Repatriation Act (NAGPRA).⁵ 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. The STOP Act therefore cannot legally achieve its primary goal of returning to the tribes the items they most seek.

While a failure to provide for due process, which is discussed in greater detail below, is a fatal flaw, the STOP Act has other serious weaknesses. The STOP Act is unnecessary because export for sale of unlawfully acquired artifacts is already illegal; ARPA specifically penalizes trafficking in unlawfully acquired objects in interstate and foreign commerce⁶ and NAGPRA has criminal penalties for unlawful transportation and sale⁷ and enables civil claims for sacred and communally owned artifacts.

The STOP Act creates no framework for administration or enforcement of tribal claims. It does not provide for management of cultural objects, or have a permitting system for objects deemed lawful to export, or provide funding. It does not provide a standard for identification of items of cultural patrimony—for example, a list or database of ceremonial items. It does not set forth standards of evidence for tribal claimants or means of appeal for the owners of disputed objects.

The STOP Act is grossly overbroad as a result of adopting multiple definitions of a “cultural object” from other laws that serve completely different purposes. As discussed below in greater detail, the STOP Act defines a “cultural object” by combining definitions from three existing U.S. statutes: ARPA, NAGPRA, and 18 USC § 1866(b). The definition of a “cultural object” under these statutes include a wide variety of non-ceremonial objects that tribes have not expressed any interest in repatriating.

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 traded without objection from tribes to be “unassociated funerary objects” under NAGPRA.⁸ Under ARPA, virtually everything made by humans over 100 years old is covered by the term “archaeological resource”,⁹ but only the age and original location of an object makes it lawful or unlawful to own. Sacred associations are irrelevant. Claims under ARPA would be especially difficult to succeed in, since the original location of the majority of cultural objects in circulation is unknown. These multiple definitions expand the STOP Act’s reach far beyond the ceremonial objects whose return is important to the tribes.

A grant of short term immunity to anyone who “repatriates” an unlawfully obtained cultural object to the “appropriate” Indian tribe or Native Hawaiian organization, is one of the most insidious elements of the STOP Act. Since the original provenance of most cultural items is unknown, the non-tribal owner is stuck between a rock and a hard place. He can “repatriate” what might be a lawful object,

⁴ Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-mm; Congressional findings and declaration of purpose, § 470aa(b), “(b) 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 archaeological resources and data which were obtained before October 31, 1979,” and 16 U.S.C. § 470ee, Prohibited acts and criminal penalties. Prospective application. “(f) 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 the date of the enactment of this Act.”

⁵ Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 and 18 U.S.C. § 1170, Nov. 16, 1990.

⁶ 16 U.S.C. § 470ee, Prohibited acts and criminal penalties. Trafficking in interstate or foreign commerce in archaeological resources the excavation, removal, sale, purchase, exchange, transportation or receipt of which was wrongful under State or local law, “(c) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.”

⁷ 18 U.S.C. § 1170.

⁸ See, for example, the 2007 NAGPRA repatriation of 10,857 cultural items in the control of the Burke Museum: Federal Register: May 24, 2007, Volume 72, Number 100, Notices, Page 29174–29177, From the Federal Register Online via GPO Access, [wais.access.gpo.gov](http://www.access.gpo.gov), DOCID:fr24my07-88.

⁹ 16 U.S.C. 470bb(1).

losing his investment and taking the chance that he has given it to the right tribe, or he can hold on to it, possibly risking a later arrest or claim from a tribe. The unavoidable uncertainty about the status of artifacts, not knowledge of unlawful origins, is what most worries collectors and the art trade.

The STOP Act not only threatens art dealers and collectors with prosecution without having had notice of wrongdoing—the legal uncertainty surrounding Native American cultural objects is likely to cause serious economic damage. It will taint both the antique and contemporary Indian art 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 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.

Background on the distribution and circulation of Native American artifacts

There are millions of Native American “cultural objects” in private ownership today; 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. In the last 25 years, awareness of tribal concerns and the harmful destruction of archaeological sites has changed everything. Today, a “good” provenance can make the difference between a valuable object and one of little worth, or that cannot be sold at all.

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.¹⁰ 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 across the United States.¹¹ 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.”¹² During the same years and throughout the early 20th century, private collectors purchased from the same sources that supplied museum collectors.

Thus, tens of thousands of cultural objects entered the stream of commerce decades before the first U.S. cultural property legislation was enacted, the American Antiquities Act of 1906 (Antiquities Act).¹³ Experts such as the Reverend Dr. Henry Baum testified regarding the enormous numbers of artifacts that had entered the market at Congressional hearings on the Antiquities Act.¹⁴ Department Archeolo-

¹⁰ Edwin Wade et al., *America’s Great Lost Expedition: The Thomas Keam Collection of Hopi Pottery from the Second Hemenway Expedition, 1890–1894*, p 9, Harvard, Cambridge (1980) (See also pages 18, 25, 26, 39) and Edwin Wade et al., *Historic Hopi Ceramics*, 84 Harvard, Cambridge (1981).

¹¹ Edwin Wade et al., *America’s Great Lost Expedition: The Thomas Keam Collection of Hopi Pottery from the Second Hemenway Expedition, 1890–1894*, p 2, Harvard, Cambridge (1980).

¹² Id. at 15.

¹³ American Antiquities Act of 1906, 16 U.S.C. §§431–433, 34 Stat. L. 225. The Antiquities Act of 1906 was held to be unconstitutionally vague and legally unenforceable in the Ninth Circuit, which includes Arizona, where Navajo, Hopi and Zuni lands are located. *U.S. v. Diaz*, 499 F.2d 113, 114 (9th Cir. 1974). The *Diaz* decision, coupled with a rise in illicit excavations on public and Indian lands in the 1970s, prompted new legislation to protect archaeological resources, ARPA. H.R. REP. 96–311, *8, 1979 U.S.C.C.A.N. 1709. **1710.

¹⁴ Hearing of the Subcommittee of the Committee on Public Lands of the United States Senate, 58th Cong., 2d Sess., 14 (1904), testimony of Reverend Dr. Henry Baum.

gist and Superintendent of Mesa Verde National Park Jesse L. Nusbaum, writing in 1929, called the 1880s and 1890s "the heyday of the commercial pothunter."¹⁵

Artifacts without provenience were dug up and sold to good faith purchasers long after enactment of the Antiquities Act in 1906. Superintendent Nusbaum reported when seeking funding for putting signs prohibiting looting on ancient ruins, a task barely begun in 1929:

"I may add, the majority of tourists are potential pothunters. The few scattered settlers of that period are replaced by the thousands of motorists and visitors today, many of whom are potential pothunters. . . Several years ago. . .warning signs were posted on and in the vicinity of some of the more important ruins. . . To the average visitor, only ruins so posted are the property of the United States and protected by the act of June 8, 1906. . ."¹⁶

Regrettably, the U.S. government is directly responsible for the loss of numerous sacred and ceremonial objects to the tribes. In 1883, Secretary of the Interior Henry Teller issued rules establishing Courts of Indian Offenses that prohibited Native American ceremonial activity under pain of imprisonment. Teller ordered Indian agents to compel medicine men to discontinue their practices and prohibited anyone less than 50 years old from being present at feasts and dances. Missionaries also encouraged the destruction of paraphernalia used in tribal religious celebrations. At various times in the early 20th C, Native Christian groups encouraged people to destroy relics. It was only in 1978 that the American Indian Religious Freedom Act gave native religions the same rights given to others in the U.S.

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 or thirty years, 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 organizations such as ATADA, the Antique Tribal Art Dealers Association, to work directly with tribal representatives to find solutions that truly serve Native American interests.

Congress Intended Private Collections to Remain a Resource for Preservation and Study of Native American Culture

Art traders and the collecting community have been accused in the media of exploiting Indian culture, especially in light of recent Paris auction sales that were deeply offensive to tribal communities. But it should be remembered that the vast majority of the trade in Indian artifacts is completely legal, and that Congress deliberately excluded pre-existing privately held collections of artifacts from ARPA's prohibition 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 archaeological resources and data which were obtained before October 31, 1979."¹⁷

"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."¹⁸

¹⁵ Annual Report of Jesse L. Nusbaum, Department Archeologist and Superintendent of Mesa Verde National Park, to the Secretary of the Interior for Fiscal Year Ended June 30, 1929 6–7.

¹⁶ Id. at V, 6–7.

¹⁷ 16 U.S.C. § 470aa(b). ARPA's legislative history reinforces this policy:

¹⁸ H.R. REP. 96–311, *12,1979 US.C.C.A.N. 1709, **1714

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.”¹⁹

Definitions of Cultural Objects Under the STOP Act Are Too Broad and Do Not Prioritize the Cultural Objects Most Desired by the Tribes

The STOP Act penalizes export of any Native American cultural object obtained in violation of NAGPRA, 18 USC 1170, ARPA, or 18 USC 1866(b).

The STOP Act defines a cultural object as fitting one of three categories:

- (1) “cultural items as described in NAGPRA, 25 USC 3001”²⁰
- (2) An “archeological resource as defined under section 3 of ARPA, 470bb(1)”²¹
- (3) And an “object of antiquity protected under section 1866(b).”²²

The combined definitions under these statutes encompass virtually every object made by human hands. Since the vast majority of Native American cultural objects have little or no ownership history, there is enormous potential for confusion about what is lawful and what is unlawful to own, trade, or export.

Some supporters of the STOP Act have said that only “serious” violations of the law would actually be prosecuted and this broader category of objects would not be affected. However, as Scalia and Garner have explained, “Ordinarily, judges apply text-specific definitions with rigor.”²³ It is not a valid defense of flawed legislation to say, as some supporters Act have, that a law will only be selectively enforced.

There is no denying the fact that the STOP Act requires repatriation to federally recognized tribes of a vast number of cultural objects that the tribes don’t appear to want back in the first place. Tribal members have stated in public fora that their

¹⁹ 16 U.S.C§ 470ee(f).

²⁰ “cultural items” means human remains and—(A) “associated funerary objects” which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects. (B) “unassociated funerary objects” which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe, (C) “sacred objects” which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and (D) “cultural patrimony” which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group. 25 USC 3001(3)(3).

²¹ “(1) The term “archeological resource” means any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.” 16 U.S.C. §§ 470aa-mm, section 470bb(1).

²² “(b) . . . any historic or prehistoric ruin or monument or any other object of antiquity that is situated on land owned or controlled by the Federal Government without the permission of the head of the Federal agency having jurisdiction over the land on which the object is situated. . . .” 18 U.S.C. 1866(b).

²³ Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* § 36 at 225–233, (Thompson/West 2012).

tribes want a much smaller and more limited number of items back.²⁴ A number of tribal representatives have also stated that only the tribes can determine whether an object is ceremonial.²⁵ If more limited repatriation of essential objects, based upon tribal criteria alone, is what the tribes want, then the only proper legislation is legislation that supports those goals—not the STOP Act.

NAGPRA Does Not Provide Adequate Guidance to Determine Status of an Artifact

The tribes' experience with NAGPRA illustrates the poor results that follow on inconsistent definitions and standards. Twenty-six years after its enactment, there are still no standard criteria under NAGPRA among museums that could provide guidance to the public about what should be repatriated. Even more importantly, museums and tribes often do not agree on which items in museum collections are subject to repatriation to tribes under NAGPRA. After 26 years, there is no publicly accessible list of items in the category of ceremonial objects under NAGPRA for each of the 567 federally recognized tribes to provide private citizens with guidance regarding which cultural objects are subject to claims for repatriation.

Only about one-third of human remains in U.S. museums, which are unquestionably subject to repatriation, have been repatriated to tribes. An even higher percentage of objects of material culture, whether for ceremonial or for ordinary usage, remains in museum collections and has not yet been cataloged for purposes of NAGPRA. Although many museums have worked diligently to set standards for repatriation—and although museums have significant institutional, academic and scientific resources, there is still not agreement even among museums regarding the types of objects subject to repatriation claims under NAGPRA.

Federal agencies have not begun to investigate the number of human remains or cultural objects that were exported from the U.S. with permits issued under the American Antiquities Act, but whose permits enabled the U.S. to request their return.²⁶ Yet if the STOP act is enacted, the Federal Government will expect U.S. citizens, who rarely have any records pertaining to cultural objects in their private collections (and which almost never contain human remains, as do museum collections), to independently determine what should be returned to tribal communities. If federal agencies have not started a process for repatriation based upon existing, written agreements with foreign institutions, why should private citizens be obligated to an even higher standard regarding cultural objects without known provenance?

Tribes May be the Best Judges, But in Many Cases, Tribes Are Not Willing to Make Public Their Criteria for Identifying Sacred or Ceremonial Objects

One response to questions about the process for the public to determine what objects would be subject to repatriation has been that it would be best to “ask the tribes,” and the “tribes intend to set up a hotline.”²⁷ On its surface, this seems a direct and reasonable proposal. However, when one remembers that there are hundreds of thousands of Native American objects in private circulation at any one time, and there are 567 federally recognized tribes, then such a solution has obvious flaws. Who is the average American going to call?

Although a few (mostly northeastern U.S.) tribes have created lists of items that they wish repatriated, most feel it is not appropriate to do so. Many southwestern U.S. tribes, including the Acoma, Laguna, Hopi, and Navajo, have stated that they will not reveal such information: the only persons who are permitted to have such knowledge are those within the tribal community with specific religious authority to possess it. It is their right and their choice to withhold information that is not proper to share with outsiders. It is improper, however, for Congress to give the tribes (or anyone else) a pass on the fair notice that due process requires. The drafters of the STOP Act should have realized that delegating authority to the tribes would require not just due process, but also transparency or “sunshine” requirements under federal law.

²⁴This point was made by Acoma Pueblo's Jonathan Sims and Navajo Cultural Specialist Timothy Begay, speaking at the panel, *Private Auction Houses & Repatriation*, at the Indigenous International Repatriation Conference: Shifting the Burden held at Isleta Pueblo, September 26–27, 2016, under the auspices of the Association on American Indian Affairs (AAIA).

²⁵*Id.*

²⁶Melanie O'Brien, Program Manager, National NAGPRA Program, U.S. National Park Service, personal communication and at the panel, *Federal Tools in International Repatriation*, at the Indigenous International Repatriation Conference, Isleta Pueblo, September 27, 2016.

²⁷Ann Rogers, Esq., made this suggestion when speaking at CLE International Visual Arts & the Law Conference, Santa Fe, NM, July 28–29, 2016.

Further, the STOP Act covers far more than ceremonial objects. Tribal decision-makers are no better able than a private citizen is to determine whether or not an item without provenance came from federal or Indian lands, or when, over the last 140 years, it was removed. The STOP Act does not address how tribes and federal agencies would split the authority to deal with objects deemed unlawful to export under ARPA's time-and-place based criteria.

A 2-Year Grant of Immunity from Prosecution Will Frighten Collectors, Harm Museums and Substantially Burden the Tribes, Without Bringing Important Objects Home

The STOP Act's 2-year "amnesty" window for the return of "unlawful" tribal cultural objects by private collectors implies that possession of all cultural objects is unlawful. Its effect is coercive and threatening. The STOP Act's immunity from prosecution provision could easily result in consumer confusion and cause unwarranted returns of thousands of lawfully owned objects to tribes which do not want them. Collectors may be pressured to give up objects simply out of an abundance of caution. Alternatively, the STOP Act's lack of clear criteria or of any process for repatriation could result in virtually no returns at all.

Regardless of the practical effect, by directing current owners to repatriate "all of the Native American cultural objects (as defined in section 1171(a)) in the possession of the person" to "the appropriate Indian tribe or Native Hawaiian organization," the STOP Act clearly makes Native tribes and organizations the arbiters of what is lawful or unlawful and which tribe is an "appropriate tribe" to return objects to. This would impermissibly subject non-tribal U.S. citizens to tribal jurisdiction and grant extra-territorial authority over U.S. citizens to the tribes.

By broadly including the definitions of cultural objects under ARPA and NAGPRA within the STOP Act, by imposing implicit obligations on the public as well as museums to return cultural objects, and by failing to establish basic evidentiary standards for claimant tribes, the STOP Act sweeps away constitutional and legislative protections for grandfathered objects under ARPA and NAGPRA, and departs from Congress' intent to preserve scientific and academic access for the public benefit through private collections of Native American cultural objects.

The STOP appears to require a *de facto* reversal of the burden of proof from the government to a private owner to show that an object is lawfully held, exported or otherwise transferred. A private owner generally does not know when and where an object was originally acquired, does not have tribally-held secret knowledge regarding the ceremonial character of an object, and cannot reasonably be expected in many cases, even to know which tribe is the "proper" tribe to return it to.

An allegation by the government that an owner failed to timely repatriate a cultural object to the proper tribe would impermissibly shift the burden of proof to a defendant's detriment and sanction a *per se* violation of his or her due process rights.

The Stop Act Would Violate the Fifth Amendment Due Process Clause of the U.S. Constitution

Under the circumstances described above, one can only conclude that S. 3127/H. 5854 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.²⁸

²⁸In *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." "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)" Deborah F. Buckman, J.D., 173 A.L.R. Fed. 765 (originally published 2001).

The U.S. Supreme Court held in *Federal Communications Comm'n v. Fox Television Stations, Inc.*,²⁹ that due process requires “fair notice” of applicable regulations. In so doing, the Court observed, “A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” The Supreme Court held in *Papachristou v. Jacksonville*, “Living under a rule of law entails various suppositions, one of which is that [all persons] are entitled to be informed as to what the State commands or forbids.”³⁰

This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.³¹ It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”³² As the Supreme Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved.³³

The void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.³⁴

This requirement for fair notice is deeply embedded in the history of the common law, a fine and early example being Blackstone’s criticism of Caligula “who (according to Dio Cassius) wrote his laws in a very small character, and hung them up on high pillars, the more effectively to ensnare the people.”³⁵ The STOP Act unquestionably falls short of the mandate for fair notice and clarity in the law.

Before cultural objects may be forfeited, whether under the STOP Act or other U.S. domestic cultural property legislation, the government must show that fair notice was given and the requirements of due process were met. This simply may not be possible, given the lack of criteria for determining the ceremonial nature of an object belonging to any one of 567 federally recognized tribes and absence of provenance for almost all Native American cultural objects in circulation.

It has been suggested that a 30-day Customs hold be placed on Native American Ancestors and cultural items prior to export.³⁶ Such a proposal raises, with respect to “cultural objects” the same issues of fair notice and due process.

Before objects may be forfeited, the government must establish that they are:

- (1) types of objects designated as inalienable ceremonial cultural objects subject to export restrictions, or
- (2) unlawfully removed federal or Indian lands after NAGPRA or ARPA went into force.

Again, the public’s inability to access information on what exactly constitutes a cultural object would cause the STOP Act to fail. Due process would be offended because an exporter could not be given fair notice of the conduct that is forbidden or required before his property could be seized and be subject to forfeiture.

Evidentiary Issues

Evidentiary issues inevitably arise when key information about what makes a ceremonial object inalienable is deliberately withheld. In order to prevail in a prosecution, the government must establish some nexus between the property to be forfeited and the forbidden activity defined by the statute.³⁷ For example, it would be expected that the government would use expert testimony to identify the original

²⁹ *Federal Communications Comm'n v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2012 U.S. LEXIS 4661 (June 21, 2012). In that case, the Supreme Court held that because the FCC failed to give Fox Television Stations or ABC, Inc. fair notice that fleeting expletives and momentary nudity could be found to be actionably indecent, the FCC’s standards as applied to these broadcasts were vague.

³⁰ *Papachristou v. Jacksonville*, 405 U. S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 453 S. Ct. 618, 83 L. Ed. 888 (1939)).

³¹ See *United States v. Williams*, 553 U. S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).

³² *Ibid.*

³³ See *id.*, at 306, 128 S. Ct. 1830, 170 L. Ed. 2d 650.

³⁴ See *Grayned v. City of Rockford*, 408 U. S. 104, 108–109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

³⁵ Quoted in *United States v. Burgess*, 1987 U.S. Dist. LEXIS 11227 (N.D. Ill. Dec. 1, 1987)

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.

³⁷ *United States v. \$506,231 in United States Currency*, 125 F.3d 442, 451–52 (7th Cir. 1997).

site of an unprovenanced object on federal or Indian land, or the approximate date in which it was removed.³⁸

Similarly, in a prosecution for failure to timely repatriate a sacred or ceremonial object, the government would be required to provide expert testimony to establish that an object was sacred or ceremonial in nature—but many tribes insist that this knowledge remain secret. In any trial resulting from the STOP Act, the fact that certain tribes decline to share information on ceremonial and inalienable objects would result in the government's inability to provide fact witnesses who could clearly explain the rationale for the detention and seizure of private property, which would be fatal to the government's case.

Tribes have stated that only they have the true knowledge regarding ceremonial objects. Nonetheless, the Federal Rule of Evidence 702 governs the issue of the standards for admission of expert testimony for every federal trial.³⁹ The proponent must establish the admissibility of testimony by a preponderance of the evidence standard. The Judge, acting as gatekeeper, must keep in mind two overarching but competing goals.⁴⁰ “First, Rule 702 was intended to liberalize the introduction of relevant expert testimony and thus encourages courts to rely on vigorous cross-examination and contrary evidence to counterbalance expert opinions of uncertain veracity. . . Simultaneously, however, a trial court must mind the high potential for expert opinions to mislead, rather than enlighten, the jury.” “Qualified” experts “must have ‘knowledge, skill experience, training or education’ in the subject area. . .”⁴¹ Even where an expert is qualified, however, his underlying methodology must also satisfy Rule 702, i.e. that methodology must satisfy a two prong test for (1) reliability and (2) relevance.⁴² Certainly, tribes could provide knowledgeable experts, but expert testimony would be subject to challenge and crossexamination that might reveal information tribes are unwilling to make public.

French law

Finally, there is a serious weakness in the STOP Act supporters' arguments that a U.S. law prohibiting export would not only be recognized in France, but would require French authorities to halt auctions and return items to the U.S. and to the tribes. France is a signatory of the 1970 UNESCO Convention,⁴³ but France's ratification of UNESCO 1970 has not prevented it from being a major market center in Europe for ancient, antique, ethnographic and tribal art.

To provide a single example, the most important ethnographic and tribal art fair in the world, the Parcours des Mondes,⁴⁴ is held every year in September, in St. Germain des Pres, Paris. This year, eighty art dealers came to the fair from around the world, and artworks from Africa, Oceania, Asia, and South and “Indigenous America” were displayed. The catalog of exhibitors showed, among many other objects from countries with laws prohibiting export, pre-Columbian works from Mexico, an Amazonian shrunken head, and a wide variety of African and Southeast Asian sculptures. No art dealers were stopped at the border, and no one's art was detained or forfeited.

The existence or lack of an “export law” is not the issue; it is a filing of an actual claim of theft. The key event which resulted in the withdrawal of the disputed Acoma shield from auction in Paris took place in New Mexico. An affidavit was filed in federal district court by a family member who identified the shield as having been stolen from the family home many years before. This specific claim of ownership made all the difference in France, and is likely to result in the object's return.

It is hoped that tribes will take steps to strengthen their hand in future claims. Tribes are presently considering enacting internal tribal legislation that establishes title to cultural objects under codified tribal law, and delegating authority to tribal authorities to make claims as they feel it is appropriate. Some form of internal docu-

³⁸ See *United States v. 328 “Quintales” of Green Coffee Beans*, 21 F. Supp. 3d 122, 129 (D.P.R. 2013) (government's and claimant's experts contest origin of coffee beans); *United States v. One Tyrannosaurs Bataar Skeleton*, 2012 U.S. Dist. LEXIS 165153*4 (S.D.N.Y. November 14, 2012) (government uses expert testimony to establish that Bataar skeleton almost certainly came from the Nemegt Formation in Mongolia and was most likely excavated between 1995 and 2005); Three Burmese Statues, 2008 U.S. Dist. LEXIS 48474*7 (government's experts identify statues as Burmese); *United States v. Eighteenth Century Peruvian Oil on Canvass*, 597 F. Supp. 2d 618, 623 (E.D. Va. 2009) (CPIA case; government experts state painting originated in Peru).

³⁹ *Foster v. Legal Sea Foods, Inc.*, 2008 U.S. Dist. LEXIS 57117*25–28, at 25 (D. Md. 2008) (Blake, J.).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ France ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property on January 7, 1997.

⁴⁴ <http://www.parcours-des-mondes.com/index.php?lang=en>

mentation that tribes consider suitable for themselves would likely be more effective than any “export law,” since France and several other European countries have not yet implemented international treaties such as UNESCO into practice, even after several decades.

Recommendations for future action

1. The U.S. government should clean its own house prior to placing unreasonable burdens on private citizens. The U.S. government should locate and seek repatriation of cultural objects under permitting agreements with foreign museums executed after the 1906 Antiquities Act.⁴⁵

2. A thorough and accurate study of the Indian art market should be undertaken in order to define the scope and scale of problems any proposed law is to address. Despite public statements by some supporters of the STOP Act that important tribal cultural objects are currently at risk of looting and that significant traffic in stolen objects continues, this is emphatically not the experience of contemporary traders in Native American art. On the contrary, most art dealers and collectors are better educated about and far more sensitive to tribal concerns than ever before.

3. Due process should be assured—not obscured—by clearly setting forth the regulatory process and administrative structure for implementation of any proposed law. Any law must have provisions for fair notice that adequately inform the American public of what constitutes a violation of law, and what steps must be taken to stay within the law.

4. The costs to the American taxpayer, to local governments, and to tribes should be clearly identified, with respect to loss of tax and tourism revenue and the costs of regulatory systems and activities before considering passage of the STOP Act.

5. There must be good faith, effective consultation with all federally recognized tribes, since all are covered by the proposed legislation, to ensure that legislation accurately reflects the goals of the tribes and honors tribal sovereignty.

6. There must be adequate funding to establish and sustain the administrative structure envisioned by any proposed legislation.

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. The STOP Act is an ill-conceived law that will achieve neither goal.

ATADA is working diligently to meet with tribal officials and to work directly together 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.

PREPARED STATEMENT OF HON. MYRON ARMIJO, GOVERNOR, PUEBLO OF SANTA ANA

Thank you for coming to New Mexico to discuss this important issue that affects all tribes in our state, including the Pueblo of Santa Ana. In the early 1980s, the Pueblo of Santa Ana suffered a massive tragedy of the theft of many sacred and cultural items from the family homes of our people, including the home of my own family. Our family homes are located in the old village, a location that was established in the 1500s and which is closed off to the public for most of the year. Thieves broke into these homes at the old village, where our Pueblo was originally located, and stole sacred items and items of cultural patrimony from many, many families.

The thieves crossed the river near our Pueblo and hid our sacred items underneath a large juniper and would later return to their hiding place to retrieve the items to sell to willing buyers. These thefts were happening sporadically for years and through several Administrations. Many nights, tribal sheriffs including the Governor would keep the Pueblo under surveillance in hopes of apprehending the thieves. One day the individuals perpetrating these acts were finally apprehended. My understanding is that they served some jail time and were released with what my people consider to be a slap on the wrist.

⁴⁵ Some permitting agreements under the 1906 Antiquities Act with foreign museums and institutions vested permanent ownership in cultural objects in the U.S., and returns of cultural objects could be demanded, but has not yet been sought, according to a presentation by Melanie O’Brien, Program Manager, National NAGPRA Program, U.S. National Park Service, at the panel, Federal Tools in International Repatriation, Indigenous International Repatriation Conference, Isleta Pueblo, September 26–27, 2016.

Meanwhile, we recovered the items that were left in the thieves' stash. These sacred items are, in fact, not merely "items" to us. They are full of life, they are central to our ceremonies, and they are close to our hearts.

Some "items," however, have still not made it home. But they are not forgotten. Nearly two generations later, our people still discuss these sacred items around the dinner table, wondering what happened to them and where they are, the way one would wonder about the fate of a missing relative. Among the items that have never returned is a shield that was stolen from our home and belonged to my grandfather. Grandfather has long since passed, but our family still remembers the loss of this shield, and although I remember it clearly, I still try to recall its finer details in my memory.

The Pueblo of Santa Ana strongly supports the Safeguard Tribal Objects of Patrimony (STOP) Act and related federal legislation because we still yearn for the return of our sacred items and because we do not ever want another generation or another tribe to suffer the loss that we have suffered. Theft and the illicit trade of tribal cultural items steals from our people, our families, and our communities our history, our culture, and the legacy we leave for our future generations. Truly, it threatens our very identity and cultural survival—our ways of being as a people and as a tribe.

The STOP Act strengthens existing federal laws, increasing penalties for violations of the Native American Graves Protection and Repatriation Act (NAGPRA). It also prohibits exporting items that were obtained in violation of NAGPRA, the Archaeological Resources Protection Act (ARPA), and the Antiquities Act. These increased penalties and explicit export restrictions are necessary to deter the theft and trafficking of our sacred and cultural items and to aid in theft recovery both domestically and internationally.

Also, the STOP Act will protect tribes as well as good faith sellers and purchasers. Illegal trafficking of tribal cultural items corrupts the Native American art market, introducing uncertainty into transactions. Santa Ana vehemently opposes those who work to illegally market items of cultural patrimony, yet we do believe that we can protect tribal cultures and support artists, dealers, purchasers, and others engaged in the legitimate sale of Native American art. It is only a small subset of the items for sale that qualify as federally protected Native American cultural objects, and we fully support the sale and enjoyment of legitimate Native American art. The STOP Act will reduce illegal trafficking in tribal cultural items, allowing buyers and sellers to be confident that they are participating in legitimate transactions that honor Native American arts and culture.

In addition to supporting the STOP Act, we request support for the creation of a Cultural Items Unit within the Bureau of Indian Affairs. Such a unit, and sufficient funding for such a unit, could aid tremendously in Santa Ana's efforts to locate and bring home our still missing sacred and cultural items. We also welcome opportunities to work with collectors to quietly repatriate sacred items.

My most sincere thanks to you the Committee for allowing the Pueblo to provide testimony on this issue but most importantly, for bringing this Field Hearing to New Mexico. We hope that you will take action to remedy the great loss our community has suffered and continues to suffer and that you will work to protect future generations and other tribes from such tragedy. We welcome the opportunity to work with the Committee and others as new ideas come in to address the grave problem of the theft, illegal possession, sale, transfer, and exportation of tribal cultural items. We continue to have faith and hope that one day we all will be able to see and hold those items which were wrongfully taken from us so many years ago.

PREPARED STATEMENT OF HON. J. MICHAEL CHAVARRIA, GOVERNOR, SANTA CLARA
PUEBLO

Introduction

On behalf of Santa Clara Pueblo, thank you for this opportunity to submit written testimony on the issue of the theft, illegal possession, sale, transfer, and export of tribal cultural items. Trafficking in our sacred cultural items has gravely affected our Pueblo, threatening our way of life and our cultural survival. Santa Clara Pueblo fully supports S. 3127, the Safeguard Tribal Objects of Patrimony (STOP) Act. Urgent, immediate action is required to combat trafficking in our cultural items, as we have seen a marked increase in such trafficking over the last year. Higher penalties are needed to deter the theft and sale of our cultural items, along with increased funding for and attention to enforcement efforts. Additionally, in order to stop trafficking in tribal cultural items, federal laws need to address items dug up

from private lands and items taken before the enactment of NAGPRA. But even as we ask for stricter measures, we would welcome the opportunity to build positive relationships with collectors of good will in order to facilitate the voluntary return of sensitive items as collectors come to understand how central these items are to our identity. Thank you for your attention to these important issues.

Trafficking in Tribal Cultural Items Poses a Grave Threat to Our People

Santa Clara has been plagued by the theft and sale of our cultural items since the time of first contact, and we continue to struggle against this scourge. For us, our sacred and cultural items are not merely objects or items of artistic or historical value. These items are integral to our cultures. Our Pueblo, like many other tribes, has been greatly impacted by having items stolen. The theft of our sacred and cultural items must be stopped, and these items must be returned home to our people, where they belong.

Support for the STOP Act and Related Efforts

Santa Clara Pueblo fully supports the STOP Act and related efforts to end the theft and sale of our cultural items and ensure their repatriation. We were very much encouraged by the Senate's September 29, 2016 passage of the Protection of the Right of Tribes to Stop the Export of Cultural and Traditional (PROTECT) Patrimony Resolution, H.Con.Res. 122, as amended. The PROTECT Patrimony Resolution acknowledged the seriousness of illegal trafficking in tribal cultural items both at home and abroad and called for additional steps to address this problem. We encourage the Committee to build on this support for ending illegal trafficking in tribal cultural items by supporting passage of the STOP Act.

Urgent Action is Required

Santa Clara welcomes recent congressional efforts to end trafficking in tribal cultural items and to ensure these items return home. However, we strongly urge the Committee to take swift action to address these issues. In 2016, we have seen a significant uptick in the rates at which our items are being sold at auction. In fact, we believe that some of this increase in trafficking is because thieves and vendors are attempting to offload stolen goods before legislation can be passed that would crack down on the illegal trade in tribal cultural items. We need your help now to stop these illegal sales and assist us in recovering our sacred items.

Higher Penalties are Needed to Deter Trafficking

Currently, it is difficult to combat the trafficking of our cultural items because penalties are not taken seriously. This is due to both the relatively low jail time associated with such crimes as well as the low risk of apprehension and prosecution. In order to effectively combat trafficking in our cultural items, we need perpetrators to take the risk of prosecution and criminal penalties seriously. We strongly support the STOP Act's increase in criminal penalties under the Native American Graves Protection and Repatriation Act (NAGPRA). This increase in possible jail time will help deter those that would pillage our cultures for profit in violation of federal law. Additionally, we support the extension of criminal penalties to the export of protected cultural items that have been taken from us illegally. It is our hope that explicit export restrictions will keep our sacred and cultural items from ending up abroad, where they are much harder to locate and recover.

We have heard that there have been some criticisms of the STOP Act, and we believe these are mostly founded upon a misunderstanding of the Act. Importantly, the Act does not criminalize activities that were not already violating federal law. It merely increases NAGPRA penalties and prevents someone from knowingly exporting items taken in violation of NAGPRA, the Archaeological Resources Protection Act (ARPA), and the Antiquities Act. The feedback we have received over the years from art and antiquities dealers is that our cultural items are being bought and sold in backroom or basement deals, and the parties involved in these deals are aware that they are breaking the law and violating our culture. Neither current law nor the STOP Act seek to penalize good faith sellers or purchasers.

Increased Attention to and Funding for Enforcement are Needed

In addition to higher criminal penalties, increased attention to and funding for law enforcement efforts are needed to deter those that would traffic in stolen cultural items. The Bureau of Indian Affairs (BIA) needs additional resources to investigate these crimes and enforce federal law. Santa Clara requests an appropriation to fund a Cultural Items Unit within the BIA to investigate violations of NAGPRA, ARPA and related federal laws. We understand that the House has recommended \$1,000,000 for the development of a Cultural Items Unit, see House Report 114-632, and we request Senate support for such appropriations.

Federal Laws Need to Address Private Lands and Repatriation of Items Taken Before NAGPRA

In addition to increased criminal penalties for and enforcement of current federal law, we urge Congress to address the narrow scope of current laws. For instance, NAGPRA's provisions regarding private ownership and control only apply to cultural items excavated or discovered on federal or tribal lands after November 16, 1990. 25 U.S.C. § 3002. We are left without recourse when dealing with items stolen from our Pueblo prior to November 16, 1990, including ancient items belonging to the Ancestral Puebloans. We also have no protection regarding cultural items that have been dug up from private lands. The narrow scope of current protections impedes the repatriation of many cultural items that are deeply important to our Pueblo. We ask that Congress address these very serious gaps in federal law.

Building Relationships with Collectors and Dealers

Federal laws regarding tribal cultural items shape the values of our country. But within their frame, there is an opportunity for people of good will to voluntarily bring these sacred items home. In our experience, there is much work to be done to educate private entities about shared Puebloan ancestry, ancient items, and the importance of these to current Pueblos. We believe that fostering relationships with collectors and dealers can help us to educate them about the history of our peoples and facilitate the return of cultural items without demanding forms of proof that would either be impossible to provide or would entail sensitive information. The Santa Clara Pueblo will always be open to discussing with the current holders of our cultural items how their appropriate return can be achieved in a way that brings dignity to all.

Conclusion

Thank you for visiting New Mexico to hold this important field hearing. The theft, illegal sale, possession, and export of our Pueblo's cultural items is threatening our very way of life. We welcome your attention to this important issue, and we fully support the STOP Act and related congressional efforts. In particular, we ask that you help us deter the theft and sale of our cultural items by supporting increased criminal penalties and greater attention to and funding for enforcement of federal laws related to trafficking in tribal cultural items. We also urge you to address the large gaps in federal protections that impede the repatriation of items taken from us pre-NAGPRA or from private lands. We respectfully request that you act swiftly to address these issues, as the problem of trafficking in tribal cultural items continues to grow. Each day that passes makes it more difficult for us to recover the cultural items that have been taken from us, and we urgently request your assistance in ending these vile practices and restoring our sacred items to their rightful homes. Thank you.

PREPARED STATEMENT OF ROBERT V. GALLEGOS, ALBUQUERQUE, NM

Sharing the Burden

On the surface, STOP or the PROTECT legislation seems like the noble thing to do. However, understanding how we have arrived at this juncture is important. We cannot lose sight of the fact that cultural objects left Indian possession in many different ways over the years, and that in fact, US government agencies were responsible for most of the inalienable cultural objects having left the native communities.

For more than 150 years, our government has passed laws and issued regulations restricting Indian ceremonies, used termination acts to alter indigenous governing structures, and forcibly relocated entire communities. It has repeatedly forced assimilation upon indigenous peoples by attempting to destroy their religions and language.

Our government's goal was to access Indian lands and terminate its obligations to the tribes under treaties and federal law. In the 20th century, termination policies provided a means to appropriate Indian's cultural property for the benefit of non-tribal interest groups, including the academic and scientific communities, without compensation or permission from the native communities from which the cultural property originated. According to the article *History and Culture: Termination Policy-1953-1968*, "pursuant to this policy, 109 tribes were terminated between 1953 and 1964, 2,500,000 acres were removed from trust status and 12,000 natives lost tribal affiliation." This policy continued until President Nixon reversed this trend through executive actions in 1970.

It is no surprise that so many inalienable objects left the reservations. Not knowing about the native cultural prospective, we art dealers and collectors collected le-

gally under the laws set forth by our government. Now the market (dealers, collectors and museums) is being blamed for the problems that are occurring in Paris and elsewhere. We have forgotten or ignored the government actions that brought cultural objects into the stream of commerce in the first place.

We, the market, recognize our role in these transactions and we are be willing to extend our hands in helping the Native Americans in owing and controlling their sacred objects and objects of cultural patrimony as defined by NAGPRA. As NAGPRA does not cover items in the private sector acquired prior to 1990, the market should encourage voluntary repatriation.

The most effective way of reaching out to other art dealers, collectors, and museums is through education. Repatriation can best be accomplished by educating dealers, collectors and museums about the native world view and how the possession or loss of such items affect the health of native communities. Solicitation of large foundations such as Annenberg, Sackler, and others, and encouraging dealers and collectors to donate monies for repatriation purchases could be pursued. The availability of subsidized donations and the ability to take advantage of tax deductions for donating to a federally recognized tribe is essential for many collectors who are not, in fact, wealthy individuals.

The U.S. Government needs to recognize that it created this problem in the first place and accept its part of the burden. It needs to allocate substantial amounts of monies for repatriation purposes to ensure this process will work. NAGPRA encourages compromise solutions between groups that do not normally interact. We need to come together as a community and treat each other with respect as human beings. To litigate is not the answer as it further polarizes peoples and the millions spent on litigation can be better spent elsewhere. The Market fears overreach by the native communities. However, it is time to trust the decisions of the religious elders based on their customary laws. If this process breaks down, we can always resort to old ways but we must try!

PREPARED STATEMENT OF HON. DAVID R. YEPÀ, GOVERNOR, PUEBLO OF JEMEZ

Senator Udall, Senator Heinrich and distinguished members of the Senate Committee on Indian Affairs, thank you for holding this field hearing in New Mexico to prevent the Theft, Illegal Possession, Sale, Transfer and Export of Tribal Cultural Items.

On behalf of the Pueblo of Jemez, I request the assistance of the United States Government to stop the theft, illegal possession, sale, transfer, and export of Native American sacred objects and objects of cultural patrimony.

The Pueblo of Jemez has been against the illegal sale, possession, trade, theft and export of sacred objects of cultural patrimony ever since we became aware of such incidents. We have had thousands of our ancestral homelands desecrated in the form of archeological excavations and looting on archeological sites associated to our ancestral forefathers. Looters have stolen human remains as well as funerary objects placed with our ancestors at the time of their interment.

Since the passing of Native American Graves Protection Repatriation Act or NAGPRA, we have had to prove to the Federal Government that the human remains and their associated funerary objects were in fact our ancestral forefathers. Jemez Pueblo has repatriated tens of thousands of human remains and their associated funerary objects and objects of cultural Patrimony from Museums across the nation as well as one international repatriation from New Zealand. In a few instances private collectors have voluntarily returned many artifacts in their private possession to Jemez Pueblo. It is hard to fathom the intensity of mixed feelings these acts have brought to our people. It is just not right.

Today, in the 21st century we are still in the same predicament. The difference today is that we have seats at the table to have our voices heard. Our forefathers witnessed the lootings and the formal archeological excavations occurring at our ancestral sites but who were they going to tell? What were they supposed to do? It must have been really heart wrenching to see their sacred sites and the human remains of their ancestors dug up and put into boxes to be shipped away. In the eyes of the Government they were not hurting anybody, just performing a science on archeological sites on public lands with no consideration of the Jemez people who were associated to these sites. Today, we can join forces with our Native American brothers and sisters and make one voice be heard by the United States Government that the act of theft, illegal possession, sale and transport of Native American sacred objects and objects of cultural patrimony has to stop now.

Jemez Pueblo has had hundreds of sacred objects and objects of cultural patrimony sold in the antiquities market at national and international websites like

Sotheby's, Butterfield's Auction House, Eve Auction House and the Galerie Flak in Paris, to name but a few (see below for others), not to mention private collectors selling to other collectors in "legal transactions" in the stores in Santa Fe and Albuquerque. These activities must stop. Jemez Tribal Law states that it is illegal for any tribal member to sell or desecrate any object of cultural patrimony at any time or to anyone because they do not rightfully own it; they may be responsible for it while it is under their care but they do not own it. It is inexcusable and the result could be alienation from tribal members and tribal activities. The Pueblo of Jemez is in favor of stiffer penalties for the parties involved in the illegal theft, sale, illegal possession, transfer and export of sacred objects and for ensuring that such objects are returned to the Native American owners.

The Pueblo of Jemez fully supports the Safeguard Tribal Objects of Patrimony (STOP) Act, S. 3127 and H.R. 5854. This Act strengthens our ability to protect our important cultural objects from ending up in the hands of those that have no right to possess them. Stiffer penalties and an explicit prohibition on exportation are crucial to prevent the theft and trafficking of our cultural objects. The provisions in the STOP Act are important to allow us to recover those objects that have left our territory and to bring them back to where they belong.

A law is only good and will serve its purpose if it is enforced. Enforcement of the STOP Act is absolutely necessary in order to achieve the intent and objective behind this law. The Pueblo of Jemez strongly suggests establishing a Cultural Crimes Unit within the Bureau of Indian Affairs or within an appropriate federal agency to investigate violations of the STOP Act. More importantly, the Pueblo of Jemez requests for Congressional support for federal funding to support establishment of a Cultural Crimes Unit and increased appropriations for the United States Attorneys' Offices who will be responsible for prosecuting violators of the STOP Act.

In conclusion, the Pueblo of Jemez in one voice with our Native American brothers and sisters from 23 sovereign nations in the State of New Mexico join in urging the United States Government to work with us to stop the theft, sale, illegal possession, transfer and export of Native American sacred objects and objects of cultural patrimony.

Jemez Antiquities have been sold on these websites

- Christies.com
- Artvalue.com
- New.liveauctioneers.com
- Adobegallery.com
- Navajorugsindianbaskets.com
- Artfinding.com
- Sotheby's
- Eve Auction House
- Butterfield's Auction House
- Galerie Flak

PREPARED STATEMENT OF JIM OWENS, CORRALES, NM

Dear Senator Barrasso,

I am writing concerning the above referenced bill which has recently been assigned to your committee on Indian Affairs. This legislation is a bad idea not only because it asks for unconstitutional action, but it is based on trying to correct a perceived illegal activity which does not exist. An auction house in Paris, France has been selling American Indian items. The main cultural items which have gained publicity are Hopi Masks and an Acoma War Shield. The Hopi's contend the masks are cultural property under NAGPRA, and based on that law they cannot be sold. This may or may not be true depending on the facts of each item.

NAGPRA has an alienation clause which says that certain cultural items cannot be sold. However, neither of the other two cultural property laws, ARPA and the Antiquities Act, have such language. Further, NAGPRA is very specific in holding that it only applies after its enactment in 1990. In talking to the older dealers and collectors, many many of the masks, including those in the Paris auction, were in the market place long before 1990. Therefore, these masks could be sold in the US and still are being legally sold. What they tell me (I do not collect this type of item) is in the 70's, 80's and 90's tribal members would come into their shops and simply sell a mask or alter pieces or similar types of property. It was absolutely legal for the person to sell and the buyer to buy. You will note NAGPRA even mentions the 5th Amendment property rights provision of our Constitution.

NAGPRA, after 1990, in some instances changes this because of the alienation clause. But to say all cultural property items cannot be sold or disposed of at auction or shipped is simply a 5th Amendment "taking" violation. And that is why S.3127 is a bad amendment. Who is going to say the item is a cultural item, who is going to say when it was placed in the market for sale and who was the individual who sold it. No where in Senator Heinrich's bill nor in NAGPRA are these issues addressed. The author of the bill just wants to make good honest people criminals and send them prison for 10 years on the whim of some one alleging an item is cultural property or is cultural patrimony, the definition of which NO one understands. I would ask that you read the definition section of NAGPRA and then define which cultural items are covered.

I don't think anyone should criticize and not have an idea. If we really want to STOP the sale of cultural items sold in violation of NAGPRA then we should go to the source-tribal members who sell these items to the unsuspecting public. I enclose legislation to do that.

At the very least hearings should be held in Albuquerque, Santa Fe, or Phoenix where dealers and collectors can express their views. To date only tribal members have been heard.

Thanks you for your consideration.

Additional amendment

SEC. 2. ENHANCED PROTECTIONS FOR NATIVE AMERICAN CULTURAL OBJECTS.

(b) Enhanced penalties for original seller.—Section 1170 of title 18, United States Code, is further amended to include

“(1) If the original seller is an enrolled member of the tribe claiming the item is an item of cultural patrimony and if the sale of the item is held to violate this act:

- “(a) shall carry a maximum penalty of two years;
- “(b) shall carry a maximum penalty of eleven years.”

RENUMBER (b) to (c)

Reasoning:

(1) Such a seller is in a much better position to know what items his or her tribe claims to be an item of cultural patrimony:

(2) It is always better to stop an illegal activity at its source (Drugs are a great example.):

(3) Such an amendment tells the U.S. Attorney's office that BOTH the seller and buyer should be subject to the requirements or penalties of NAGPRA.

S.3127

Reference points for Hearing

The basic problem with S. 3127 is that it tries to use digging Acts to deal with commerce issues. It is like trying to put a square peg in a round hole! I want to discuss the 3 main issues that collectors have with the proposed legislation.

First, the 3 acts discussed are the Antiquities Act, ARPA, and the Trafficking portion of NAGPRA. These Acts were enacted to prevent digging on Federal and Indian Land.

The trafficking portion of NAGPRA requires that there be a violation of NAGPRA for that law to apply. Putting S.3127 into the trafficking portion simply does not fit. As Judge Roberts ruled in the Federal District Court case of Geronimo v. Obama, "plaintiffs cite a law (NAGPRA) that only applies to Native American cultural items excavated or discovered after 1990." That is the most succinct statement of NAGPRA's intent and purpose that I have found.

The underpinnings of S.3127 were alleged violations of NAGPRA concerning the auctioning of Hopi masks and an Acoma War Shield in France. It is clear under NAGPRA that these types of "cultural items" are not subject to NAGPRA and therefore not in violation of that act. As to the shield the date it "went missing" was in the 1970's long before NAGPRA and for that matter before ARPA was enacted. The Hopi masks were in the market place well before 1990 being sold by tribal members in the 1960's 1970's and 1980's. Even if those dates are challenged those types of Indian artifacts were not excavated or discovered at any time. They are what we call perishable items which could not survive in the ground. The Sarracino affidavit makes that clear "My grandfather, as the shield's caretaker, kept the shield in the home of my grandmother...which is on the mesa top at Acoma...I remember the room in which the shield was kept...I believe it to have gone missing in the 1970's when our home was broken into". So what S.3127 tries to do by using alleged NAGPRA violation to prevent alleged cultural items from being exported does not fit into the trafficking section. The trafficking portion of NAGPRA does not apply to these types of items and does not apply to almost all cultural items. ARPA also cannot be used for these types of cultural items for the following reasons:

- A) The cultural item has to be 100 years old or more for ARPA to apply;
- B) ARPA was not enacted until October 31, 1979;
- C) It has no alienation clause; and
- D) ARPA has a grandfather clause which grandfathered in cultural items in private hands (market place) prior to its enactment

The Antiquities Act does not apply to these types of cultural items:

- A) It has been held Unconstitutional by the 9th Circuit in U.S. v. Diaz that case specifically involving Masks (Apache);

- B) These Hopi Masks and the Acoma Shield are too modern to be antiquities; i) antiquities are defined as "relics of ancient times" ii) belonging to a period before the middle ages (500-1500ad) and
- C) As defined in the case of U.S. v. Smyer, 598F2d 939, 10th Cir 1979 "times long since passed" which involved digging a Mimbres ruin 800-900 years old.

Remember, these Acts were enacted to prevent digging on Federal and Indian Land.

Secondly, when a collector or dealer purchases Indian art or artifacts those items become his personal property. At least until proven that I do not have a valid title to the item I purchased, I can dispose of my personal property as I chose. The 5th Amendment protects the personal property rights of Americans and those 5th Amendment rights are even noted in sec.2 para. 13 of NAGPRA.

Perhaps the best statement of these personal property rights was set forth by Sherry Hutt when testifying before your Indian Affairs Committee in April of 1999. She was the head of NAGPRA for many years and designated by the National Park Service as "a nationally recognized expert on NAGPRA and cultural property law". Here, in part, is what she said to your committee about the 5th Amendment and property rights: "The law (NAGPRA) expressly avoids creating a "taking" of private property to effectuate a public purpose in violation of the Fifth Amendment. Sacred objects may be individually owned and be subject to alienation pursuant to the tribal laws of the tribe. Items that are now considered to be cultural patrimony may not have been imbued with such distinction at the time they separated from the group and are not subject to the requirements of NAGPRA....To summarize the law, it may be said that NAGPRA is wholly consistent with the American ideas of property rights. In its present form the law is internally consistent and unambiguous in its adherence to the prevailing concepts of property law." In short, I can sell my personal property anywhere any time whether it's by private sale or at an auction in the United States or elsewhere. To restrict my doing so would be a taking of my rights to that property and a clear violation of the 5th Amendment.

The third aspect of S.3127 that is wrong and unsustainable is the penalty provision which seeks to increase the penalty provisions of a 3 Acts to 10 years for exporting and the trafficking provision to 10 years for all violations.

Senator Heinrich says in his press releases and press conferences that the penalty provision is proposed to have cultural property laws comport to other Federal theft statutes. First, collectors do not steal items of Indian art and artifacts we BUY them. We buy them by private sale, from auctions, or on the internet. We do not go out to an Army base and steal a jeep. He cites the National Stolen Property Act and a simple reading of that act shows his flawed reasoning. NSPA has a \$5,000. threshold as to a violation being a felony vs a misdemeanor. Neither NAGPRA nor the Antiquities Act has any threshold and ARPA has a \$501. threshold. S.3127 has none. So, in actuality, S.3127 has a more severe penalty provision than the theft statutes he cites!! And this more severe penalty is for a collector who buys an item that someone with a vested interest later says is a "cultural item".

If, for no other reason than the penalty provision, would ask for a no vote from you when S.3127 comes up for committee vote.

There is a remedy and it the remedy every American has if you claim someone has property that you claim is yours. You file a replevin action in Federal or State District Court for return of that property and you go to Civil Court and present your case.

