GLOBAL HERITAGE ALLIANCE

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Hearing Testimony of Peter K. Tompa, Executive Director, Global Heritage Alliance, Regarding the Revised Safeguard Tribal Objects of Patrimony Act of 2017 (S.1400, H.R.3211) ("STOP Act"), November 8, 2017

Mr. Chairman, my name is Peter Tompa. I am testifying on behalf of the Global Heritage Alliance ("GHA").[1] The GHA's mission is to foster appreciation of ancient and indigenous cultures and the preservation of archaeological and ethnographic artifacts for the education of the American public.

The GHA wishes to express a number of concerns with this well-meaning legislation, whose goals and objectives we share. As currently written, STOP will fail to achieve these goals. At the same time, it will have significant negative consequences for the legitimate trade in Native American artifacts, undercutting both its avowed purpose and threatening an individual's right to due process. Nevertheless, the GHA stands willing to work with the bill's sponsors to ensure the bill accounts for our concerns.

If History is any Guide, the STOP Act Will Encourage Customs to Shift the Burden of Proof Administratively on to the Exporter to Demonstrate that the Property was Lawfully Removed from Federal or Indian Lands.

STOP builds on the Archaeological Resources Protection Act ("ARPA"), 16 U.S.C. 470aa-470mm; Public Law 96-95 and The Native American Graves Protection and Repatriation Act ("NAGPRA"), Pub. L. 101-601, 25 U.S.C. 3001 *et seq.* ARPA and NAGPRA place the burden of proof on the federal government to prove that an individual was aware of the illegal nature of the underlying crime. ARPA and NAGPRA also require the government to prove the defendant was aware of the facts and circumstances that constitute the crime. In some circuits, it means that the government must prove the defendant knew the item was an archeological resource that was illegally excavated. This presents a significant challenge to the government, since it must prove that the current possessor knew of the illegal conduct.[2]

The same considerations apply to civil forfeitures made pursuant to these statutes.

[1] For more about GHA, see its website, http://global-heritage.org/

[2] The Theft, Illegal Possession, Sale, Transfer and Export of Tribal Cultural Items: Field Hearing Before the S. Comm. on Indian Affairs, 114th Cong. 12 (Oct. 18, 2016) (Statement of Tracy Toulou, Director of Tribal Justice, U.S. Department of Justice).

Requiring the government to prove the elements of its case under the preponderance of the evidence standard applicable to civil forfeitures provides property owners with protection from government seizure of property whose origin is unknown.[3] Given the hundreds of thousands of items that are not in violation of ARPA or NAGPRA but lack documentation, this is a significant protection to collectors and small businesses that deal in Native American artifacts.

However, current enforcement of another "cultural property" statute, the Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601 *et seq.* ("CPIA"), should raise red flags about how the STOP Act may be enforced in practice. The CPIA authorizes the imposition of import restrictions on "designated" archaeological and ethnographic objects illegally removed from their country of "first discovery" after the effective date of the restrictions. 19 U.S.C. § 2606. The CPIA explicitly places the burden of proof on the government to make out each of these elements. 19 U.S.C. § 2610. Unfortunately, despite the CPIA's plain meaning, implementing regulations place the burden of proof on the importer, not the government, to prove the negative, i.e., that the object was exported from its country of first discovery before the date import restrictions were imposed. Given the modest value of most imported cultural goods and the high cost of legal services, in practice this usually means that the importer defaults and the government is able to forfeit the property without a fight. The implementing regulations thus make it easy for the government to prevail over collectors and small businesses, wrongfully denying them the protections Congress intended.

If STOP becomes law, regulatory authorities will have a similar incentive to ensure whatever the legislative intent, the burden of proof is placed on the individual, not the government. The problem is that prosecutors will have a difficult time proving that items are stolen, "and from where they might have been taken."[4] With trade of Native American objects active since the nineteenth Century, the absence of provenance information for the vast majority of objects, and the STOP Bill's all-inclusive definition of "cultural objects," it would be almost impossible for U.S. Customs and Border Protection ("CBP") to expeditiously decide whether an object can be exported or not. As a result, CBP may require exporters to make certain evidentiary showings to demonstrate that their object is not stolen. In other words, with no procedures in place, there is nothing stopping the CBP from employing a similar burden-shifting mechanism to enforcement of the STOP Act. And like the challenges facing importers under the CPIA, it is almost impossible to prove

[3] Civil forfeitures under ARPA and NAGPRA should be governed by the provisions of the Civil Asset Forfeiture Reform Act of 2000, which also places the burden of proof on the government. 18 U.S.C. §983(c).

[4] The Theft, Illegal Possession, Sale, Transfer and Export of Tribal Cultural Items: Field Hearing Before the S. Comm. on Indian Affairs, 114th Cong. 24 (Oct. 18, 2016) (Statement of Cheryl Andrews-Maltais, Senior Advisor to the Assistant Secretary—Indian Affairs, U.S. Department of the Interior).

(or disprove) that a Native American-affiliated object was found on private lands, federal lands or tribal lands.

Even worse than the CPIA, which incorporates only time and location considerations, the STOP Act adds the challenge of evaluating whether the object is "sacred," a fatal flaw to providing fair notice to the individual that their property may be subject to export restrictions. As part of an individual's opportunity to be heard, this could place an even greater burden on the individual to demonstrate to CBP that an object does not fit within STOP Act's definitions of "Native American cultural heritage," an even more burdensome requirement than that placed on importers under the CPIA.

The STOP Act's Vague Definitions and Procedures will Lead to Selective Enforcement of the Export Prohibitions.

As a result of the lack of fair notice to both the CBP and individuals, the CBP will likely be tasked with enforcing legislation where they have no means of carrying out informed and uniform enforcement. Where inherently vague statutory language permits selective law enforcement, there is denial of due process.[5] In striking down a flag desecration statute in *Smith v. Goguen,* the Supreme Court noted that flag desecration statutes are often void for lack of notice because these statutes fail to acknowledge that "what is contemptuous to one man may be a work of art to another."[6] Similarly, the STOP Act fails to distinguish that "what is ceremonial to one tribe may be a work of art to another."

Even if Native American tribes do become involved in defining what is "sacred" and therefore unexportable, interpretations will likely be incongruent and lead to disparate results depending on which tribe is contacted or the level of the tribal liaison's expertise. For example, the Antique Tribal Art Dealers Association ("ATADA") has a policy that attempts to return certain objects to Native American tribes. In implementing that policy, ATADA has conferred with designated tribal cultural heritage experts. In this process, it has happened that only an expert within a tribe could identify one of several similar objects as being important to the tribe, while the non-tribal layperson, although very experienced, could not have made the determination.

The bottom line is that the legislation as currently drafted, although seeking worthy objectives, erodes individual due process rights by encouraging Customs to reverse the burden of proof, something that will inevitably result in an uncompensated taking. Such abuses may well be unavoidable under the STOP Act given the unique challenges that the STOP Act will place upon law enforcement. Governor Kurt Riley of the Acoma Pueblo aptly summed up the problem before this Committee last year when he stated: *The cultural*

[5] *Smith v. Goguen*, 415 U.S. 566, 576 (1974) (finding that a Massachusetts flag desecration statute prohibiting "contemptuous" treatment of the U.S. flag was unconstitutionally vague and overly broad because it failed to draw reasonably clear lines between the kinds of nonceremonial treatment of the flag that are criminal and those that are not.)

[6] Goguen, 415 U.S. at 574.

objects the Acoma is attempting to protect are difficult to fully describe and publicly identify because of the sacred and confidential ceremonial use.

Given the task of protecting a few secret and undefined items in the midst of a vastly greater number of legal items with no provenance, there can be little doubt that the enforcement result will mirror CPIA import restrictions that reverse the burden of proof. Such a state of affairs will violate Due Process and threaten the legality and value of significant numbers of legal items without providing significant, effective protection to sacred items.

Conclusion

In summary, the GHA asks the Committee to address these real and valid concerns as part of the legislative process. As proposed, the legislation threatens uncompensated takings without offering a clear path to achieve the legislation's stated objectives. Allowing law enforcement to shift the burden of proof is unfair to owners of legal objects. Moreover, there is a real danger that the law will become unenforceable. By treating so many objects as potentially tainted, federal authorities will be unable to provide comprehensive or consistent enforcement and are likely to miss the most important illegal objects. In addition, a presumption of guilt combined with the difficulty of proving an object is legal will drive legitimate participants out of the market, reduce transparency, and harm all legitimate trade, and the cultural understanding it brings.