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**The *STOP ACT* Must Yield the Right-of-Way to  
Grandma's Antique Dream Catcher: A Call to Congress**  
***(Summum ius summa iniuria)***

By: Chief Justice Gregory D. Smith  
St. Regis Mohawk Court of Appeals<sup>1</sup>

**Introduction**

Great ideas can lead to unfortunate, unforeseen, and unintended consequences.<sup>2</sup> The Safeguard Tribal Objects of Patrimony Act,<sup>3</sup> commonly known as the *STOP ACT*,<sup>4</sup> is one such statute – laudable in intent, but unintentionally intrusive to the religious rights of Native Americans in another. Native Americans are justified in their frustration that religion, sacred objects of historic and cultural significance, and heritage are being disrespected and sold as museum trinkets.<sup>5</sup> In 1987, the United States General Accounting Office (GAO) found that “nearly 44,000 of the 136,000 archaeological sites on the Four Corners states of Arizona, Colorado, New Mexico, and Utah have experienced looting of Indian artifacts and cultural property.”<sup>6</sup> Looting Native American graves for profit, which has impacted virtually every indigenous tribe in the United States,<sup>7</sup> can be judicially traced to at least one hundred years prior to the 1987 GAO report<sup>8</sup> and

<sup>1</sup> Gregory D. Smith, J.D. (1988), Cumberland School of Law at Samford University. Chief Justice Smith is a jurist on six Native American tribal supreme courts (in AZ, CA, NY, OK, NE, and WI) and he is the Chief Judge of the United States Department of the Interior's Court of Indian Appeals (Miami Agency) based in Oklahoma. Chief Justice Smith teaches Federal Indian Law at the Lincoln Memorial University School of Law in Knoxville, TN and he teaches Ethics, Rural Courts, and Evidence for the National Judicial College, which is based at the University of Nevada-Reno. Chief Justice Smith is the tribal courts representative to the United States Sentencing Commission's Tribal Issues Advisory Group (TIAG), which reviews and comments on proposed amendments to the United States Sentencing Guidelines. **Any statement made or presented in this essay reflects the sole opinions of the author and does not reflect the official positions of any court, TIAG, or any other organization with which the author has membership or association.**

<sup>2</sup> See, e.g., *Coleman v. Block*, 663 F. Supp. 1315, 1329 (D. N.D. 1987); Lisa Vertinsky, *Pharmaceutical (Re) Capture*, 20 YALE J. HEALTH POL'Y L. & ETHICS 146, 199 n.245 (2021).

<sup>3</sup> 25 U.S.C. §§ 3071-79. See also Public Law 117-258 (2022).

<sup>4</sup> See, e.g., B. Stephen Jones, Note, *Strengthening NAGPRA*, 41 CARDOZO ARTS & ENT. L.J. 883, 884 (2023). This *Stop Act* is not to be confused with another recent statute of the same name that addresses synthetic drug overdose issues. See generally U.S. Customs and Border Protection, Department of Homeland Security (DHS), *Mandatory Advance Electronic Informational Mail Shipments*, 86 Fed. Reg. 14245, 14259 (Mar. 15, 2021).

<sup>5</sup> See DAVID H. GETCHES ET AL, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 758 (W. Acad. Publ'g 6th ed. 2011). See also James D. Leach, *A Shooting Range at Bear Butte: Reconciliation or Racism?*, 50 S.D. L. REV. 244, 246-48 (2005).

<sup>6</sup> See Shannon Price, *Living Heritage, Stolen Meaning: Protecting Intangible Native American Cultural Resources Through the Right of Publicity*, 20 UIC REV. INTELL. PROP. L. 31 (2020). See also Rebecca Tsosie, *NAGPRA and the Problem of "Culturally Unidentifiable" Remains: The Argument for a Human Rights Framework*, ARIZ. ST. L.J. 809, 815-16 (2012) (discussing how looters would try to pass themselves off as “amateur archaeologists”).

<sup>7</sup> Craig W. Jerome, *Balancing Authority and Responsibility: The Forbes Cave Collection, NAGPRA, and Hawai'i*, 29 HAWAII L. REV. 163, 166 n.28 (2006).

<sup>8</sup> See, e.g., *The Louisa Simpson*, 15 F. Cas. 953, 957 (D. Ore. 1871).



arguably to the first contact Europeans had in North America.<sup>9</sup> Sadly, indigenous people's grave desecration offers a high dollar return on the Black Market.<sup>10</sup> The **STOP ACT** increases the criminal penalty for violations of the Native American Graves Protection and Repatriation Act (NAGPRA)<sup>11</sup> to a potential time of incarceration for up to ten years for individuals attempting to sell Native American artifacts to non-Native Americans for profit.<sup>12</sup> The bogus argument that Native American artifacts are abandoned by the original owners, and found by later individuals, allowing for resale without repercussion is not a novel concept.<sup>13</sup> Cases involving the pilfering of Native American cultural relics have made their way to the United States Supreme Court multiple times over the last one hundred years.<sup>14</sup>

This essay addresses the unsavory plight twenty-five tribal nations<sup>15</sup> that span or sit on America's national borders<sup>16</sup> face where ancient family artifacts, carried across national borders to

<sup>9</sup> See generally, Jack F. Troupe & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 38-43 (1992); Christopher A. Amato, *Digging Sacred Ground: Burial Site Disturbances and the Loss of New York's Native American Heritage*, 27 COLUM. J. ENV'T. L. 1, 2 n.5 (2002).

<sup>10</sup> Alston V. Thorns, *Beyond Texas' Legacy: Searching for Cooperation Without Submission*, 4 TEX. F. OF C.L. & C.R. 41, 42 (1998); Ethan Plaut, *Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?*, 36 ECOLOGY L.Q. 137, 160 n.152 (2009).

<sup>11</sup> 25 U.S.C. §§ 3001-3013. The NAGPRA was originally enacted to "prevent the continued looting of Native American graves and the sale of these objects by unscrupulous collectors." *Thorpe v. Borough of Jim Thorpe*, 770 F.3d 255, 259-61, 266 (3<sup>rd</sup> Cir. 2014).

<sup>12</sup> 25 U.S.C. § 3071(2); 18 U.S.C. § 1170.

<sup>13</sup> See, e.g., *Oregon Iron Co. v. Hughes*, 81 P. 572, 574 (Ore. 1905) (rejecting the abandonment or "finders/keepers" argument regarding Native American artifacts).

<sup>14</sup> See, e.g., *Pittsburgh, C., C., & S. L. R. Co. v. Fink*, 250 U.S. 577, 580 (1919); *Andrus v. Allard*, 444 U.S. 51, 54-55 (1970); See also, Stephen J. Massey, *Justice Rehnquist's Theory of Property*, 93 YALE L. J. 541, 556 n.88 (1984).

<sup>15</sup> There are seven tribal nations that cross the United States/Mexico border: Yaqui/Yoeme, the Tohono O'odham, the Cocopah/Cucapá, the Kumeyaay/Kumiai, the Pai, the Apaches, and the Kickapoo/Kikapú. Christina Leza, *Handbook on Indigenous Peoples' Border Crossing Rights Between the United States and Mexico*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R.,

<https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Call/IndigenousAllianceWithoutBorders.pdf>, (last visited on Feb. 21, 2024). For a list of the tribal nations that overlap the United States/Canada border, see FRED CARON, GOVERNMENT OF CANADA, REPORT ON FIRST NATION BORDER CROSSING ISSUES, Annex B (2017), <https://rcaanc-cirnac.gc.ca/eng/1506622719017/1609249944512> (last visited on Feb. 21, 2024). For a discussion on the documentation requirements for Native Americans crossing into the United States from Canada, see generally, The North American Indian Center of Boston, *Rights of First Nation Members in the United States*, [http://www.naicob.org/uploads/4/6/9/1/46918873/jay\\_treaty\\_guide\\_\\_1\\_.pdf](http://www.naicob.org/uploads/4/6/9/1/46918873/jay_treaty_guide__1_.pdf), (last visited on Feb. 21, 2024).

<sup>16</sup> Rachael Marshbanks, *The Borderline: Indigenous Communities on the International Frontier*, 26 TRIBAL COLL. J. OF AM. INDIAN HIGHER EDUC. 276 (2015). Examples of cross-border Native Nations include the Kootenai Tribe in Idaho/Canada; the Gwitchin people of Alaska/Canada; and the arguably the Ysleta Del Sur Pueblo on the Texas/Mexico border. See *McCoy v. Lyons*, 820 P.2d 360, 361 (Idaho 1991); Angelique Eaglewoman, *Tribal Hunting and Fishing Lifeways & Tribal-State Relations in Idaho*, 46 IDAHO L. REV. 81, 82-3 (2009); Northern Lights, Inc., 39 F.E.R.C. P61352, 62102 n. 4 (June 25, 1987); Gregory Scruggs & Thomas Reuters Foundation, *How Restrictions Along U.S.-Canada Border Divide an Indigenous Arctic People*, ARCTIC BUS. J. (May 2, 2019), <https://www.arctictoday.com/how-restrictions-along-u-s-canada-border-divide-an-indigenous-arctic-people/>; Reuters, *American Indians Fear US-Mexico Border Wall Will Destroy Ancient Culture*, VOICE OF AM. (June 25, 2018) <https://www.voanews.com/a/american-indians-fear-us-mexico-border-wall-will-destroy-ancient-culture/4454218.html>.

facilitate participation in tribal cultural and religious events, could violate the **STOP ACT**.<sup>17</sup> The prospect of a Native American tribal member being prosecuted for taking personal ancient family heirlooms to participate in cultural or religious gatherings is repugnant to both the First Amendment to the United States Constitution's Freedom of Religion and Assembly Clauses and/or the Indian Civil Rights Act's Freedom of Religion and Assembly Clauses.<sup>18</sup> One should be aware that community assembly of tribal members is actually part of their religious experience.<sup>19</sup> "Thus, for Indian people, it is important that they be allowed to maintain the special character of their social relationships through traditional spiritual activities in concert with Mother Earth and the sacred plants she offers."<sup>20</sup> No person should be forced to choose between their faith and criminal sanctions.<sup>21</sup> Here, the **STOP ACT** must yield to sincere religious rights.<sup>22</sup>

The current United States Sentencing Guidelines do not exempt potential prosecution for tribal members from taking their own family heirlooms across either the United States/Canada or United States/Mexico borders for the purposes of exercising sincerely held religious or cultural rituals.<sup>23</sup> This is unfortunate because, "[i]n many cases, a cultural object is required for the continuation or revitalization of an important ceremony" of Native American worship.<sup>24</sup> The author of this essay presides over the appellate court of one of the tribal nations that overlap the United States/Canada border whose members are impacted with the statutory glitch created by the **STOP ACT**.<sup>25</sup> Reputations can be quickly ruined by unfounded criminal charges.<sup>26</sup> One court, long ago, warned that, "a person not of strong character, overawed and subdued by a criminal charge, involving the ruin of himself and all dependent upon him, may, under *influence*, confess himself guilty, when in fact he is innocent."<sup>27</sup> Standing, respect, and reputation is especially important in Native American communities.<sup>28</sup> Likewise, honoring the land and spirits is a central

<sup>17</sup> Kayla Molina, "The Desert Is Our Home," 45 AM. INDIAN L. REV. 125, 129-30 (2021).

<sup>18</sup> U.S. CONST. amend. I; 25 U.S.C. § 1302(a)(1).

<sup>19</sup> See Luralene D. Tapahe, *After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshipers*, 24 N.M. L. REV. 331, 360 (1994).

<sup>20</sup> *Id.* at 360-61.

<sup>21</sup> *Hodges v. Thomas*, No. 22-00132, 2023 U.S. Dist. LEXIS 58200, at \*11 (D. Ariz. Mar. 3, 2023).

<sup>22</sup> See generally, *Bacher v. North Ridgeville*, 352 N.E.2d 627, 630-31 (Ohio App. 1975).

<sup>23</sup> See *Sentencing Guidelines for the United States Courts*, 88 Fed. Reg. 89142(5) (proposed Dec. 26, 2023).

<sup>24</sup> FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1268 (Nell Jessup Newton et al. eds., 2012 ed. 2012). Accord Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 Ariz. St. L. J. 299, 300 (2002).

<sup>25</sup> St. Regis Mohawk Court of Appeals. The St. Regis Mohawk Tribe's reservation is located in Akwesasne, NY and southeastern Ontario, Canada. See <https://nyheritage.org/organizations/saint-regis-mohawk-tribe> (last visited on Feb. 16, 2024).

<sup>26</sup> See, e.g., *Medina v. Toledo*, 718 F. Supp. 2d 194, 209 (D. P.R. 2010); *Kendall v. Russell*, 572 F.3d 126, 146 (3rd Cir. 2009); *People v. Cunningham*, 195 Misc. 2d 295, 297 (N.Y. Sup. Ct. Nassau Co. 2002).

<sup>27</sup> *Deathridge v. State*, 33 Tenn. 75, 79 (1853) (emphasis in original text).

<sup>28</sup> See generally, Justin Seigler, *Injustice in Indian Country: The Need for a Serious Response to Native American Elder Abuse*, 19 ELDER L.J. 415, 416-17 (2012). But see, Suzannah Linton, *Reflections on a Decade of International Law: International Legal Theory: Snapshots from a Decade of International Legal Life: Rediscovering the War Crimes Trials in Hong Kong, 1946-48*, 13 MELBOURNE J. OF INT'L L. 284, 301 (2012), for proof that Native Americans are not exclusive when placing high regard on not disgracing oneself or family (discussing Japanese prisoners of war).



tenant to Native American culture.<sup>29</sup> This essay suggests that tribal members exercising sincerely held religious or cultural beliefs should be directly and fully exempt from prosecution under the **STOP ACT** and 25 U.S.C. § 3071 *et seq.* should be amended to clearly declare this exemption.

### Background

Native American tribal nations are sovereign bodies that pre-existed the United States Constitution.<sup>30</sup> The sale of stolen or improperly obtained Native American “Indian”<sup>31</sup> artifacts<sup>32</sup> is a problem that spans both the United States<sup>33</sup> and the world.<sup>34</sup> “International law defines ‘cultural property’ to include any property of great importance to the cultural heritage of a people.”<sup>35</sup> As a matter of fact, the United Nations Declaration on the Rights of Indigenous People declares that “Indigenous peoples have the right to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions...”<sup>36</sup>

Several Native American tribes define cultural artifacts as follows:

- (a) An “artifact” is defined as
- (1) A usually simple object (as a tool or ornament) showing human workmanship or modification;

<sup>29</sup> See, e.g., Mary Christina Wood & Zachary Welcker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 HARV. ENVTL. L. REV. 373, 380-81 (2008).

<sup>30</sup> *Denezpi v. United States*, 596 U.S. 591, 598-99 (2022); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2015); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Evers*, 46 F.4th 552, 556-57 (7th Cir. 2022); *Grondal v. United States*, 37 F.4th 610, 616-17 (9th Cir. 2022); *Spurr v. Pope*, 936 F.3d 478, 483 (6th Cir. 2019) (court praising a tribal supreme court that included the author of this essay as Chief Justice); *But see Miccosukee Tribe of Indians v. United States*, 698 F.3d 1326, 1331 (11th Cir. 2012); *MacArthur v. San Juan County*, 497 F.3d 1057, 1067-68 (10th Cir. 2007) (for the reminder that Congress’ plenary power makes Native American tribal sovereignty subject to the will and whims of Congress).

<sup>31</sup> The term “Indian,” referring to Native Americans, is a term of art used in the United States Code and is not being used here as a derogatory term. See, e.g., 25 U.S.C. §§ 1301(4) and 3703(10).

<sup>32</sup> While there are various definitions of “artifact” in state and federal statutory codes and regulations, a common thread for the definition includes an item that is usually over 100 years old that is “nonportable evidence of past human behavior or activity” that is “found on or in the ground, including structural remains.” Ind. Code Ann. § 14-21-1-2 (2024). *Accord* MINN. STAT. § 307.08(13)(c). See also, 16 U.S.C. §§ 431-433 (repealed 2014).

<sup>33</sup> See, e.g., *State v. Syed*, 204 A.3d 139, 150 (Md. 2019); *Estate of Redd v. Love*, 848 F.3d 899, 902 (10th Cir. 2017); *State v. Taylor*, 269 P.3d 740, 748 (Hawaii 2011); *State v. McDonald*, 2002-Ohio-3326, ¶ 2 (Ohio App. 2002); *United States v. Taylor*, 176 F.3d 331, 336 (6th Cir. 1999); *United States v. Gerber*, 999 F.2d 1112, 1115 (7th Cir. 1993); *Grooms v. Solem*, 923 F.2d 88, 89 (8th Cir. 1991); *State v. Grooms*, 399 N.W.2d 358, 361 (S.D. 1987); *Church of Scientology v. U.S. Dep’t. of Justice*, 612 F.2d 417, 427 (9th Cir. 1979).

<sup>34</sup> See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-537, NATIVE AMERICAN CULTURAL PROPERTY: ADDITIONAL AGENCY ACTIONS NEEDED TO ASSIST TRIBES WITH REPATRIATING ITEMS FROM OVERSEAS AUCTIONS (2018); Alix Rogers, *Owning Geronimo but Not Elmer McCurdy: The Unique Property Status of Native American Remains*, 60 B.C. L. REV. 2347, 2357-59 (2019).

<sup>35</sup> COHEN, *supra* note 24, § 20.01[1], at 1267.

<sup>36</sup> G.A. Res. 61/295, Art. 31(1) (Sept. 13, 2007). See also, COHEN’s, *supra* note 24, § 20.01[1], at 1267; Gregory A. Smith & Ann Berkley Rogers, *Who Stole the Acoma Shield*, 43 HUM. RTS. 17, 19-20 (2017).

- (2) A product of civilization;
- (3) A product of artistic endeavor.<sup>37</sup>

Other tribal nations use interchangeable terms to the above definition of artifact such as “antiquities” to include “...any relic, artifact, fossil, or any object which represents the past culture of the Standing Rock Sioux Tribe or any hardened remains of a plant or animal of a previous geological age preserved in the earth’s crust.”<sup>38</sup> There is a congressionally enacted public policy to protect Native American’s right “to believe, express, and exercise” their traditional cultural religious views.<sup>39</sup> The point to be made is that the treasures and traditions of a tribal nation should remain with the tribe, not at an auction house,<sup>40</sup> museum,<sup>41</sup> or in a non-Native American’s personal history collection.<sup>42</sup>

Probably the best known of the twenty-five Native American tribal nations that cross the United States’ national borders of Canada and Mexico<sup>43</sup> are the St. Regis Mohawk Tribe in New York and Canada,<sup>44</sup> the Tohono O’odham Nation in Arizona and Mexico,<sup>45</sup> and the Blackfeet

<sup>37</sup> MILLE LACS BAND OF OJIBWE CODE tit. 10, § 1001(a) (2023) (parentheticals in original); see, e.g., WHITE EARTH TRIBAL HISTORICAL PRESERVATION ACT: PROTECTION OF BURIAL GROUNDS CODE § 3.03 (1997).

<sup>38</sup> STANDING ROCK TRIBAL LAW § 9-201(4) (2024).

<sup>39</sup> American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996.

<sup>40</sup> *State v. Baker*, 867 P.2d 1392, 1393-1394 (Or. Ct. App. 1994).

<sup>41</sup> See, e.g., 20 U.S.C. § 80q-9 (2023); Marilyn Phelan, *A History and Analysis of Laws Protecting Native American Cultures*, 45 TULSA L. REV. 45, 46-47, 53 (2009); Miss Op. At’y Gen. 94-0499 (1994).

<sup>42</sup> See, e.g., *U.S. Fish & Wildlife Serv. v. Bush*, 1979 NOAA Lexis 3 (U.S. Dept. of the Interior Hearings & Appeals 1979); N.C. GEN. STAT. § 70-2 (2023).

<sup>43</sup> See Marshbanks, *supra* note 16; See also, *United States v. Conigliaro*, 384 F. Supp.3d 145, 156 (D. Mass. 2019); See also, G.D. Crawford, *Looking Again at Tribal Jurisdiction: “Unwarranted Intrusions on Their Personal Liberty,”* 76 MARQ. L. REV. 401, 425 n.165 (1993); Cf., Laura Spitz, *The Gift of Enron: An Opportunity to Talk About Capitalism, Equality, Globalization, and the Promise of a North-American Charter of Fundamental Rights*, 66 OHIO ST. L. J. 315, 358 n.182 (2005) (discussing how Native American tribes that have lands overlapping national borders are economically impacted by geography).

<sup>44</sup> See *People v. Chaney*, 2019 N.Y. Misc. LEXIS 4635, at \*2-4 (Franklin Cnty. Ct. Aug. 28, 2019); See also *United States v. Wilson*, 699 F.3d 235, 238 (2nd Cir. 2012). The author of this essay is the Chief Justice of the St. Regis Mohawk Court of Appeals. The St. Regis Mohawk Tribe (SRMT) Reservation has been accused of being a haven for drug trafficking because tribal members can cross the United States/Canada boundary without traveling through an international border checkpoint. See Sarah Kershaw, *Drug Traffickers Find Haven in Shadows of Indian Country* N.Y. TIMES (Feb. 19, 2006), <https://www.nytimes.com/2006/02/19/us/drug-traffickers-find-haven-in-shadows-of-indian-country.html>.

<sup>45</sup> Kaitlyn Schaeffer, *The Need for Federal Legislation to Address Native Voter Suppression*, 43 N.Y.U. REV. L. & SOC. CHANGE 707, 737 n.229 (2019); Gregory D. Smith & Bailee L. Plemmons, *The Court of Indian Appeals: America’s Forgotten Federal Appellate Court*, 44 AM. INDIAN L. REV. 211, 212 n.1 (2020). The author of this essay is the Alternate Appellate Judge for the Gila River Indian Community, which is historically a part of the Tohono O’odham Tribe. See OFF. WEB SITE OF THE TOHONO O’ODHAM NATION, <http://www.tonation-nsn.gov/history-culture/>, (last visited on Feb. 16, 2024). The Tohono O’odham Nation is best known for being the tribe that was split in two by “Trump’s Wall,” that was placed at the United States/Mexico border. See Angela R. Riley & Kristen A. Carpenter, *Decolonizing Indigenous Migration*, 109 CALIF. L. REV., 115 (2021).



Nation which overlaps the Montana/Canada Border.<sup>46</sup> Many tribal nations that have land and members on separate sides of a national border, such as the Tohono O'odham Nation, frequently interact for cultural, educational, and religious reasons.<sup>47</sup> The exercise and practice of Native American religious and cultural rights sometimes conflict with non-Native American values and "progress."<sup>48</sup> An example of a religious gathering that brings Native Americans together in a single location is a pow-wow.<sup>49</sup> The application of the **STOP ACT** is one of the areas of American law where a strict reading produces a stumbling block for Native Americans exercising their religious beliefs.<sup>50</sup>

### **Freedom of Religion and Freedom of Assembly**

The terms of the United States Constitution do not automatically apply to Native Americans because tribal nations pre-exist the creation of the United States.<sup>51</sup> In 1924, all Native Americans born on United States soil were declared citizens of the United States of America.<sup>52</sup> Irrespective of the logic that the United States Constitution's Bill of Rights applied to Native Americans after 1924, the Indian Civil Rights Act of 1968 (ICRA) incorporated most of the Bill of Rights to Native Americans.<sup>53</sup> Both the First Amendment of the United States Constitution's Freedom of Religion and Assembly Clauses and the ICRA's similar clauses provide protection for Native Americans'

<sup>46</sup> America's federally recognized Blackfeet Tribe of Montana has a sister tribe just over the international border in Canada. See *In re L.S.* 179 Cal. Rptr. 3d 316, 327 (Cal. Ct. App. 2014); see Ashleigh Breske, *Politics of Repatriation: Formalizing Indigenous Repatriation Policy*, 25 INT. J. OF CULTURAL PROP. 347, 359 n.81 (2018).

<sup>47</sup> See Molina, *supra* note 17; *State v. Hanapi*, 970 P.2d 485, 486 (Haw. 1998). See also, *State v. Pratt*, 243 P.3d 289, 322 (Haw. 2010) (Nakamura dissenting).

<sup>48</sup> See, e.g., *Nw. Indian Cemetery Prot. Ass'n. v. Peterson*, 552 F. Supp. 951, 957 (N.D. Calif. 1982); *United States v. Bresette*, 761 F. Supp. 658, 659, 664-65 (D. Minn. 1991).

<sup>49</sup> See, e.g., *Orso v. Shumate*, No. 3:10-cv-1069, 2011 US Dist. Lexis 10706, \*5-7 (W.D. La. Feb. 3, 2011); Daniel Donovan & John Rhodes, *To Be or Not to Be: Who is an "Indian Person"?*, 73 MONT. L. REV. 61, 80 (2012). Accord, *Vialpando v. State*, 640 P.2d 77, 81 (Wyo. 1982) and *Michelle Vann and Mass. Comm. Against Discrimination v. Walcare, Inc., d/b/a Diamante Sports Restaurant, Inc.*, 2006 Mass. Comm. Discrim. Lexis 26, \*3 (Mass. Discrim. Comm. Apr. 28, 2006).

<sup>50</sup> See generally, *E. Tex. Baptist Univ. v. Burwell*, 807 F.3d 630, 634 n.6 (5th Cir. 2015).

<sup>51</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Long v. Snoqualmie Gaming Comm'n*, 435 P.3d 339, 343 (Wash. Ct. App. 2019); Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 84 (2006). The author had the honor of serving as a tribal court appellate justice with Professor Fletcher, of the University of Michigan School of Law, on the Nottawaseppi Huron Band of the Potawatomi Supreme Court for six years. In this author's opinion, Matthew L.M. Fletcher is the world's top living scholar in the field of Federal Indian Law. While this author was the Chief Justice of that court, my friend "Matthew L.M." was the face of that court.

<sup>52</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 236 n.1 (2023), (Thomas concurring); *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1019-20 (9th Cir. 2020), *rev'd on appeal on other grounds in Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2329 (2021); *Granite Valley Hotel Ltd. P'shp. v. Jackpot Junction Bingo & Casino*, 559 N.W. 2d 135, 160 (Minn. Ct. App. 1997).

<sup>53</sup> 25 U.S.C. §§ 1301; Accord, *Fort Peck v. Charette*, 1988 Mont. Fort Peck LEXIS 9, \*4 (Ft. Peck App. Feb. 21, 1989). For a discussion of the selective incorporation of the Bill of Rights into the ICRA, and the reason for an incomplete adoption of the Bill of Rights, see *Pueblo*, *supra* note 51, at 63 n.14; See also Carla D. Pratt, *Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti*, 11 WASH. & LEE RACE & ETHNIC ANC. L. J. 61, 115 (2005).

right to worship and facilitation of cultural events such as pow-wows.<sup>54</sup> The First Amendment states the following:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.<sup>55</sup>

25 U.S.C. § 1302(a)(1), the ICRA's version of the First Amendment, states the following:

No Indian tribe in exercising powers of self-government shall make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;<sup>56</sup>

The American Indian Law Deskbook (AILD), published by the Conference of Western Attorneys General, describes the importance of Native American spiritual beliefs being tied to geographic locations and religion as being "inextricably bound to the use of land."<sup>57</sup> Specifically, the AILD says:

An important feature of Indian cultural identity is the unique relationship Indians have with the natural world. Spiritual beliefs of most Indians are site-specific and "inextricably bound to the land." There is a "sacred and indissoluble bond" between Indians and areas within their aboriginal lands.<sup>58</sup>

An example of a Native American religious belief that is sincerely held as a central and fundamental tenet for many tribal religions is the sweat lodge.<sup>59</sup> Longer hair on men is also frequently associated with Native American religious traditions and expressions of culture.<sup>60</sup> A common example of articles used in traditional Native American religious festivals are prayer

<sup>54</sup> Milo Colton, *Texas Indian Holocaust and Survival: McAllen Grace Brethren Church v. Salazar*, 21 SCHOLAR 51, 96 n.242 (2019).

<sup>55</sup> U.S. CONST. amend. I.

<sup>56</sup> 25 U.S.C. § 1302(a)(1); *Accord, Acres v. Marston*, 2022 Cal. Super. LEXIS 69649, \*12-\*13 (Sacramento Super. Ct. Oct. 21, 2022).

<sup>57</sup> CONF. W. ATTY. GEN., AM. INDIAN LAW DESKBOOK, § 3:18, at 215 (2016 ed., Thomas Reuters 2016) (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 460-1 (1988)).

<sup>58</sup> CONF. W. ATTY. GEN., *supra* note 57.

<sup>59</sup> See, e.g., *Pevia v. Hogan*, 443 F. Supp. 3d 612, 638 (D. Md. 2020). A sweat lodge is a sacred religious structure that Native American tribal members use to facilitate meditation for a spiritual cleansing that works like a sauna. *Wilson v. Moore*, 270 F. Supp. 2d 1328, 1353 (N.D. Fla. 2003). See generally, *Spurr v. Tribal Council*, 12-005APP, 2012 Nottawaseppi Huron Band Supreme LEXIS 3, at \*8-9 (NBBP Sup. Ct. Feb. 21, 2012) (for a discussion on various types of sweat lodges).

<sup>60</sup> See, e.g., *New Rider v. Bd. of Educ.*, 414 U.S. 1097, 1097-98 (1973) (*Douglas dissenting from the denial of cert.*); *Emp. Div., Dept. of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990); and *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 254 (5th Cir. 2010).



sticks and feathers.<sup>61</sup> Prayer sticks are also called dream catchers.<sup>62</sup> This final example leads to potential conflicts with the **STOP ACT**.<sup>63</sup>

### The **STOP ACT**

The **STOP ACT**<sup>64</sup> is congressional legislation introduced in 2017 to address the sale of Native American<sup>65</sup> cultural and religious artifacts by French auction houses that ignored pleas by Native American tribes to return the cultural items because no international law existed to protect indigenous peoples.<sup>66</sup> The United States Department of the Interior (DOI) explains the **STOP ACT** as “The **STOP ACT** of 2021 (P.L. 117-258) aims to prevent the international export of cultural items prohibited from trafficking under the Native American Graves Protection and Repatriation Act (NAGPRA)<sup>67</sup> and the Archeological Resources Protection Act (ARPA).”<sup>68</sup> The USSC invited comments on pending proposed amendments to the United States Sentencing Guidelines, to include the **STOP ACT** from tribal nations.<sup>69</sup> Multiple tribes publicly declared their support for

<sup>61</sup> See, e.g., *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1099 (9th Cir. 2008)(*en banc*)(*Fletcher dissenting*); *United States v. Tawahongva*, 456 F. Supp. 2d 1120, 1126 n.6 (D. Ariz. 2006); *United States v. Kramer*, 168 F.3d 1196, 1198 (10th Cir. 1999); *United States v. Corrow*, 119 F.3d 796, 799 (10th Cir. 1997); *Hamilton v. Schriro*, 863 F. Supp. 1019, 1021 (W.D. Mo. 1994); *Zuni Tribe v. United States*, 12 Cl. Ct. 607, 631 & 633 (1987); *Healing v. Jones*, 210 F. Supp. 125, 160 n.45 (D. Ariz. 1962).

<sup>62</sup> See Photograph of a dream catcher listed for sale in *Native American Prayer Stick 7" Dream Catcher (nas1)*, MISSION DEL REY SW., <https://www.missiondelrey.com/native-american-prayer-stick-7-dream-catcher-nas1/> (last visited Feb. 18, 2023).

<sup>63</sup> Current legislation grants governmental entities, such as the United States Department of Justice or a tribal nation, standing to sue over stolen Native American cultural items, but does not grant the same standing for individuals wronged by stolen culture. See CONF. W. ATT'YS GEN., *supra* note 57, at § 3-18, at 216; See Kristen A. Carpenter, *A Human Rights Approach to Cultural Property: Repatriating the Yaqui Masso Kova*, 41 CARDOZO ARTS & ENT. L.J. 159, 161 n.10 (2022); Cf., COHEN, *supra* note 24, at § 20.01[2].

<sup>64</sup> 25 U.S.C. §§ 3071; Compare, *United States v. Tidwell*, 191 F. 3d 976, 980 (9th Cir. 1999) with *United States v. Aubrey*, 800 F.3d 1115, 1125-26 (9th Cir. 2015), for a discussion on what constitutes “Indian property.”

<sup>65</sup> The **STOP ACT** equally applies to items related to Native Hawaiian and Native Alaskan heritage. See Robert Alan Hershey, *Repatriation of Sacred Native American Cultural Belongings from Historic Racism*, 56 ARIZ. ATT'Y 40, 46 n.3 (July/Aug. 2020); *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1470-71, 1476 (9th Cir. 1989); Rebecca Kitchens, *Insiders and Outsiders: The Case for Alaska Reclaiming Its Culture*, 29 ALASKA L. REV. 113, 136-39 (2012).

<sup>66</sup> See Aaron Haines, *Will the STOP ACT Stop Anything? The Safeguard Tribal Objects of Patrimony Act and Recovering Native American Artifacts from Abroad*, 39 CARDOZO L. REV. 1091, 1092-94 (2018). See also, In the Senate, *Tribes: Senators Float Bill to Stop Trafficking of Cultural Objects*, ENV'T & ENERGY DAILY (July 7, 2016), <https://subscriber.politicopro.com/article/eenews/1060039881>.

<sup>67</sup> 25 U.S.C. §§ 3001-3013.

<sup>68</sup> 16 U.S.C. § 470aa; See also, *Safeguard Tribal Objects of Patrimony (STOP) Act draft regulations*, U.S. DEPT. INTERIOR INDIAN AFFAIRS, [https://www.bia.gov/service/tribal-consultations/safeguard-tribal-objects-patrimony-stop-act-draft-regulations#:~:text=The%20STOP%20Act%20of%202021,Resources%20Protection%20Act%20\(ARPA\)](https://www.bia.gov/service/tribal-consultations/safeguard-tribal-objects-patrimony-stop-act-draft-regulations#:~:text=The%20STOP%20Act%20of%202021,Resources%20Protection%20Act%20(ARPA)) (last visited on Feb. 18, 2024).

<sup>69</sup> U.S. SENT'G COMM'N, NOTICE: SENTENCING GUIDELINES FOR UNITED STATES COURTS, 2023-28317, (Dec. 26, 2023) at 89156; See also, U.S. DEPT. INTERIOR, *supra* note 68; *Accord*, 25 U.S.C. § 3078.

the original **STOP ACT**.<sup>70</sup> The **STOP ACT** is the first explicit export control on Native American cultural heritage that protects and prevents trafficking of Indian objects being taken beyond the borders of the United States for sale to non-Native American buyers via glorified French (or other non-indigenous) auction house looting.<sup>71</sup> The DOI is authorized and funded by Congress to implement the **STOP ACT** and to enact regulations that support the intent of this landmark legislation.<sup>72</sup>

The **STOP ACT** breaks down into seven statutes, (absent the funding and reg provisions discussed above), which sets out the following paraphrased laws:

**25 U.S.C. § 3071** (Purpose): 1) carry out the federal government's trust relationship with Native Americans; 2) increase criminal penalties for taking Native American cultural objects outside of the United States as a deterrence for stealing or fencing tribal objects; 3) stop the export of tribal cultural and historic objects outside the United States and facilitate their return from foreign countries; 4) encourage the voluntary return of Indian objects to tribes through an amnesty program; and 5) create a structure for implementing the act.

**25 U.S.C. § 3072** (Definitions): Definitions in the statute include "cultural items" (e.g., funeral objects, sacred objects, and culturally historic objects),<sup>73</sup> "items protected from exportation" (e.g., cultural items and archaeological resources), and tangible cultural heritage (e.g., human remains and historically significant objects).<sup>74</sup>

**25 U.S.C. § 3073** (Export Regulations): Sets regulations and a potential ten-year incarceration penalty for violations of illegally selling Native American tribal objects. This statute allows voluntary return of illegally exported items and authorizes country-to-country agreements to discourage commerce in stolen or improperly exported Native American historically significant items.

**25 U.S.C. § 3074** (Voluntary Return of Items): Encourages the return of Native American items obtained in violation of the **STOP ACT** via a *de facto* amnesty process and offers a potential tax benefit for collectors and dealers of historic items for returning culturally significant Native American historical items improperly or illegally obtained.

<sup>70</sup> Haines, *supra* note 66, at 1094 n.14; Casey J. Snyder, *Law, Cultural Heritage, and Climate Change in the United States*, 36 PACE ENV'T L. REV. 95, 132 (2018).

<sup>71</sup> Snyder, *supra* note 70, at 132.

<sup>72</sup> 25 U.S.C. §§ 3078, 3079.

<sup>73</sup> 25 U.S.C. § 3072 (cross-referencing 25 U.S.C. § 3001, the Native American Graves Protection and Repatriation Act (NAGPRA) for definitions).

<sup>74</sup> 25 U.S.C. § 3072; *Accord*, Pueblo of San Ildefonso v. Ridlon, 103 F.3d 936, 938 (10th Cir. 1996).



**25 U.S.C. § 3075** (Interagency Cooperation): This statute sets up a working group between the United States Departments of Interior, Justice, State, and Homeland Security to facilitate the intent of the **STOP ACT**.

**25 U.S.C. § 3076** (Native Working Group): This statute creates a working group of twelve Native American tribes that will work with the agency group created in 25 U.S.C. § 3075.

**25 U.S.C. § 3077** (Exemption from F.O.I.A.): This statute exempts proceedings related to the **STOP ACT** from general inquiry under the Freedom of Information Act.

The application of the new enhanced ten-year sentence for **STOP ACT** violations<sup>75</sup> demanded consideration of how the new statute impacts the United States Sentencing Guidelines (USSG),<sup>76</sup> which brings the discussion of the Tribal Issues Advisory Group (TIAG) to the United States Sentencing Commission (USSC).

### TIAG

The United States Sentencing Commission invited comments to the proposed amendments to the United States Sentencing Guidelines.<sup>77</sup> Among the proposed amendments, USSG § 2B1.5 asked for comments regarding how federal courts should address violations of the **STOP ACT**.<sup>78</sup> Among the groups that provided comments on the **STOP ACT** to the USSC was the Tribal Issues Advisory Group (TIAG).<sup>79</sup> There are nine members of TIAG that represent the federal judiciary, federal prosecutors, federal defenders, tribal interests, tribal authorities, and tribal courts.<sup>80</sup> Neither

<sup>75</sup> 25 U.S.C. § 3073(a)(2); 18 U.S.C. § 1170.

<sup>76</sup> See, e.g., 28 U.S.C. § 944(g), and Report: *United States Sentencing Commission Crimes Policy Team*, U.S. SENT'G COMM'N (Dec. 1, 1999) <https://www.uscc.gov/research/research-and-publications/united-states-sentencing-commission-economic-crimes-policy-team>.

<sup>77</sup> See *Proposed 2024 Amendments to the Federal Sentencing Guidelines*, U.S. SENT'G COMM'N <https://www.uscc.gov/guidelines/amendments/proposed-2024-amendments-federal-sentencing-guidelines#:~:text=A%20two%2Dpart%20proposed%20amendment,an%20amendment%20to%20C2%A75H1> (last visited on Feb. 18, 2024).

<sup>78</sup> *Id.*

<sup>79</sup> TIAG is one of four named standing advisory groups to the United States Sentencing Commission. *Advisory Group*, U.S. SENT'G COMM'N, <https://www.uscc.gov/about/who-we-are/advisory-groups>, (last visited on Feb. 18, 2024). TIAG is authorized under 28 U.S.C. § 995 and U.S.S.C. Rules of Prac. & Pro. 5.4. *Tribal Issues Advisory Group*, U.S. SENT'G COMM'N, <https://www.uscc.gov/new/tribal-issues-advisory-group>, (visited on Feb 18, 2024).

<sup>80</sup> See *Tribal Issues Advisory Group Members*, U.S. SENT'G COMM'N, <https://www.uscc.gov/about/who-we-are/advisory-groups/tribal-issues-advisory-group-members> (listing the current TIAG members) (last updated on Jan. 2024). The members of TIAG, as of February 19, 2024, are as follows: Hon. Ralph R. Erickson (Circuit Judge, U.S. Court of Appeals for the Eighth Circuit); Hon. Jesse Laslovich, (U.S. Attorney for the District of Montana); Hon. Tricia Tingle (Associate Director, Tribal Justice Support, U.S. Dept. of the Interior); Hon. Manny Atwal, *esq.*, (Asst. U.S. Federal Defender for the District of Minnesota); Hon. Carla R. Stinnett, *esq.* (At-Large Member); Hon. Tim Purdon, *esq.* (At-Large Member); Hon. Neil Fulton, *esq.*, Dean of the University of South Dakota Knutson School of Law (At-Large

the USSC (nor TIAG) have the authority to negate legislative acts of Congress,<sup>81</sup> but the USSC can set reduced sentencing guidelines for violations of congressional statutes, like the **STOP ACT**, that are deemed criminal acts.<sup>82</sup> For this reason, TIAG recommended to the USSC that the United States Sentencing Guidelines for Native Americans facing prosecution under the **STOP ACT** for taking cultural or religious icons across national borders for personal or tribal use receive a starting Guideline of “2/Zone A,” which is at the low end of the sentencing chart, presuming a sentence of six months or less and probation.<sup>83</sup> While the intent of the **STOP ACT** is clear, the application of a **STOP ACT** investigative stop, which often involves a remote location at the Mexican or Canadian borders of the United States, between the United States Border Patrol, Homeland Security Officer, or local law enforcement and Native Americans, creates a conundrum of policing policies that interweave with civil, social, and religious rights.<sup>84</sup>

### The Conundrum Within the **STOP ACT**

Border tribal lands are frequent points of entry/export for illegal activity such as drug smuggling, and contraband alcohol and/or cigarette tax evasion actions.<sup>85</sup> An example of the daunting task that tribal land border patrols face is trying to thwart schemes “to smuggle significant amounts of alcohol and tobacco from the United States into Canada through the [St. Regis] Reservation, which straddles the border between the two nations.”<sup>86</sup> One Border Patrol agent, Brian Hotz, testified that his duties at the St. Regis Mohawk international border “involves detection and arrests for alleged cross-border smuggling, cigarettes and illegal aliens, the St. Regis

Member); Hon. Jami Johnson, *esq.*, (Asst. U.S. Federal Public Defender for the District of Arizona); Hon. Gregory D. Smith, *esq.*, Chief Justice, St. Regis Mohawk Tribal Court of Appeals (Tribal Court Member).

<sup>81</sup> See generally, *Mass v. United States Fidelity & Guaranty Co.*, 610 A.2d 1185, 1194 (Conn. 1992); *Black v. United States*, 25 Cl. Ct. 268, 273 (1992); *Jones v. Commissioner of I.R.S.*, 743 F.2d 1429, 1432 (9th Cir. 1984); *Hachiya v. Bd. of Education*, 750 P.2d 383, 387 (Kan. 1988).

<sup>82</sup> *United States v. Schetz*, 698 F. Supp. 153, 155 (N.D. Ill. 1988); Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2447 (1995).

<sup>83</sup> See U.S. SENTENCING COMM’N, *United States Sentencing Guideline Chart for 2023*, <https://www.ussc.gov/guidelines/2023-guidelines-manual-annotated-2023-chapter-5>, (Last visited on Feb. 19, 2024); See also Letter from the Hon. Ralph Erickson, Chair of TIAG, to the Hon. Carlton W. Reeves, Chair of the United States Sentencing Commission Feb. 20, 2024 (on file at the author’s office for inspection) [Hereinafter “**TIAG Letter**”], (stating TIAG’s official position on **STOP Act**). Judge Erickson also testified before the USSC on TIAG’s position regarding the 2024 proposed amendments to the USSG, following closely the format declared in the **TIAG Letter**.

<sup>84</sup> See e.g., *United States v. McCowan*, 2018 U.S. Dist. Lexis 28576, \*2 (D. Ariz. Feb. 1, 2018); *United States v. March*, 2014 U.S. Dist. Lexis 78869, \*3 (D. Ariz. Mar. 12, 2014); *Bates v. United States*, 60 Fed. Cl. 319, 326-7 (2004); *United States v. Renondo-Lemos*, 754 F. Supp. 1401, 1405 (D. Ariz. 1990), *rev’d on appeal on other grounds in 955 F.2d 1296 (9th Cir. 1992)*.

<sup>85</sup> See e.g., *McCowan*, 2018 U.S. Dist. Lexis 28575 (*drugs – Mexican border*); *Renondo-Lemos*, 754 F. Supp. 1401 (*drugs – Mexican border*); *New York v. UPS*, 942 F.3d 554, 566 (2nd Cir. 2019) (*cigarettes – Canadian border*); *United States v. Miller*, 7 Fed. Appx. 59, 61 (2nd Cir. 2001) (*cigarettes and alcohol – Canadian border*); *United States v. Pierce*, 224 F.3d 158, 161 (2nd Cir. 2000) (*alcohol – Canadian border*).

<sup>86</sup> *United States v. White*, 237 F.3d 170, 171 (2nd Cir. 2001). (Parenthetical added for clarity and context).



Mohawk Reservation, known as Akwesasne Mohawk Reservation, known as Akwesasne.”<sup>87</sup> The Jock court, where Agent Hotz was testifying, explained the reasoning behind roving border patrol stops as follows:

When a Border Patrol agent refers a motorist to secondary inspection in the context of a border search, the intrusion on personal liberty has been held to be minimal. However, once the questioning at the checkpoint, whether at the primary or secondary station, satisfies the agent that the vehicle occupants are not illegal aliens and do not appear to have crossed the border illegally, and do not appear to be carrying contraband based on facts apparent to the agent at that moment in time, the basis for detaining the motorist ends. Absent reasonable suspicion of criminal activity, the agent has no permissible basis on which to detain the motorist or passenger further.<sup>88</sup>

There sadly exists a distrust between law enforcement, such as border patrol agents, minorities, and non-citizens.<sup>89</sup> This is the beginning of the **STOP ACT** conundrum.

The **TIAG Letter**, while acknowledging the **STOP ACT** being a positive step for Native Americans, noted, “For hundreds of years, tribal communities have seen their cultural heritage stolen and exported for sale overseas, thereby depriving communities of their history and disrupting their sacred cultural traditions. The **STOP ACT** aims to curb their illicit trafficking in Indigenous cultural heritage, and TIAG agrees that U.S.S.G. § 2B1.5 is the appropriate Guideline for **STOP ACT** violations.”<sup>90</sup> TIAG went further to declare to the USSC the following:

Members of tribal communities who live along a border have sometimes come into conflict with federal law enforcement patrolling the border. These federal officials, generally tasked with preventing illegal movement of people and goods across the border, have at times acted without sufficient sensitivity to the treaty and other rights of tribal members to move freely around their historic lands. While patrolling the border, law enforcement agents have on occasion seized cultural and ceremonial objects. Once seized, these objects have not always been handled in culturally sensitive ways.

TIAG hopes that the Department of Justice will not use the **STOP Act** to prosecute individual Native Americans crossing the border with objects of cultural patrimony for ceremonial or cultural use, but the express language of the **STOP Act** does not appear to foreclose such prosecutions.<sup>91</sup>

<sup>87</sup> *People v. Jock*, 40 Misc. 3d 457, 458 (St. Lawrence Co. Ct. 2013).

<sup>88</sup> *Id.* at 462, (internal citations omitted).

<sup>89</sup> See e.g., Elizabeth M. Rieser-Murphy and Kathryn D. DeMarco, *The Unintended Consequences of Alabama's Immigration Law on Domestic Violence Victims*, 66 U. of Miami L. Rev. 1059, 1082 and 1082 n.159 (2012); Theresa Nolan Breslin, *Fleeing Below the Poverty Line – Is it a Crime? C.E.L. v. State and Its Impact on Indigent Defense and Police-Citizen Relations*, 66 U. Miami L. Rev. 783, 785 (2012).

<sup>90</sup> **TIAG Letter**, *supra* note 83, at 9-10.

<sup>91</sup> **TIAG Letter**, *supra* note 83, at 10.

Native Americans should be treated differently from non-Natives when applying the **STOP ACT** to the unique situation that Native Americans face regarding worship and assembly.<sup>92</sup>

Examples of how the **STOP ACT** could undermine tribal sovereignty and culture come from the Seneca Nation of New York,<sup>93</sup> that owns land within walking distance of Niagara Falls.<sup>94</sup> The Senecas are part of the Haudenosaunee Confederacy<sup>95</sup> which has an international high level lacrosse team that considers lacrosse a spiritual religious experience.<sup>96</sup> If a Seneca elder, such as Leon Sam Briggs, took his 200 year old lacrosse stick to a match on the Canadian side of Niagara Falls,<sup>97</sup> that lacrosse stick would qualify as a **STOP ACT** cultural item because the stick is “an object of ongoing historical, traditional, or cultural importance central to the Native American group or culture itself.”<sup>98</sup> While a conviction of Mr. Briggs is unlikely under the **STOP ACT**, because Mr. Briggs did not intend to sell his antique lacrosse stick, a criminal charge is possible.<sup>99</sup> Likewise, the Seneca-Iroquois Nation Museum has a tomahawk/peace pipe on display that President George Washington gave to Seneca Chief Cornplanter in 1792.<sup>100</sup> Sadly, putting that gift from Washington on display in Canada at the request of the Seneca Nation of Brantford, Ontario, Canada, (which also considers Chief Cornplanter as one of their most important leaders), could likewise violate the **STOP ACT** if a fee is charged to see the icon in Canada.<sup>101</sup>

<sup>92</sup> *TIAG Letter*, *supra* note 83, at 11.

<sup>93</sup> *Cf.*, *SNI Ct. of Appeals Legal Advisor*, *SNI*, <https://sni.org/app/uploads/2022/03/FINAL-Legal-Advisor-Description-COA.pdf> (last visited Feb. 19, 2024) (The author was the legal/technical adviser to the Seneca Nation of Indians Court of Appeals for a couple years).

<sup>94</sup> *See e.g.*, *Superior Concrete and Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y. 3d 538, 542 (N.Y. 2014).

<sup>95</sup> *See Perkins v. Comm’r of Internal Revenue*, 970 F.3d 148, 151 (2d Cir. 2020); *Oneida Indian Nation of Wis. v. New York*, 731 F.2d 261, 263 (2d Cir. 1984) (The Haudenosaunee Confederacy is also known as the Iroquois Confederacy) (The Iroquois Confederacy was a six-tribe treaty association consisting of the Haudenosaunee, Mohawk, Oneida, Onondaga, Seneca, and Tuscarora nations).

<sup>96</sup> *See Haudenosaunee Nat’l Lacrosse Team*, HAUDENOSAUNEE NAT’L, <https://haudenosaunenationals.com/pages/our-history> (last visited on Feb. 19, 2024)

<sup>97</sup> *See Wilmington College, Tonawanda Seneca Shares the Role of Lacrosse in Native American Life*, <https://www.wilmington.edu/news/tonawanda-seneca-shares-the-role-of-lacrosse-in-native-american-life> (last visited on Feb. 24, 2024).

<sup>98</sup> *See* 25 U.S.C. § 3001(3)(D) (2022).

<sup>99</sup> *Mens rea* intent must be proven by the prosecution to sustain a **STOP Act** conviction according to 25 U.S.C. § 3072(5)(A)(2022), but if Mr. Briggs is paid to show his lacrosse stick, it could be a violation of the **STOP Act** as a “use for profit.”

**100** AP News Article, *Pipe tomahawk given by Washington in 1792 returned to Seneca Nation*, [https://www.lockportjournal.com/news/local\\_news/pipe-tomahawk-given-by-washington-in-1792-returned-to-seneca-nation/article\\_5cb5227d-4b15-5bd7-b444-e8b424ebd0f2.html](https://www.lockportjournal.com/news/local_news/pipe-tomahawk-given-by-washington-in-1792-returned-to-seneca-nation/article_5cb5227d-4b15-5bd7-b444-e8b424ebd0f2.html) (Mar. 15, 2019), (last visited on Feb. 19, 2024).

<sup>101</sup> *See The Canadian Encyclopedia, Seneca*, <https://www.thecanadianencyclopedia.ca/en/article/seneca>, (last visited Feb. 19, 2024).



"It is easy to find fault in any guidelines."<sup>102</sup> "It is easy to find fault and poke holes in innovative ideas."<sup>103</sup> "But it is easy to find fault. It is more difficult to find the good."<sup>104</sup> Now, having addressed the problem, it is time to propose a solution.<sup>105</sup>

### Fixing the **STOP ACT**

The "fix" for the **STOP ACT** is a two-step process. **Part 1** is simply to modify the definition of a "Cultural item" in 25 U.S.C. § 3072(3) to specifically exclude personal items a Native American owns and/or possesses for religious or cultural use when crossing an international border. **Part 2**, the application of this exception is a bit trickier, but not overwhelming. Presume that the Kickapoo Traditional Tribe of Texas (KTTT), which straddles the Rio Grande at the United States/Mexico border,<sup>106</sup> plan to have a pow wow for all tribal members on the Mexican side of the tribe's land in Sonora, Mexico.<sup>107</sup> Often, when a tribal nation spans an international border such as the KTTT experience, the less affluent nation (Mexico) becomes a cultural or ceremonial place of retreat.<sup>108</sup> How would the United States Border Patrol be able to tell if an elderly female "Texas side" KTTT member was taking "Grandma's antique dream catcher" to the pow wow for prayer or to an auction house sale? First, one must acknowledge that even safeguards cannot guarantee that Grandma isn't planning to sell her religious icon, but that likelihood is low. One could follow the pattern below to meet the statutory mandate, and real intent, of the **STOP ACT**, while allowing Grandma to take her dream catcher to the Kickapoo event in Mexico:

- A/ Create an Enhanced Tribal I.D. Card<sup>109</sup> like that used by the Pascua Yaqui Tribe (PYT) on the United States/Mexico border<sup>110</sup> or the Kootenai Tribe of

<sup>102</sup> Phillip Areeda, *Justice's Merger Guidelines: The General Theory*, 71 Calif. L. Rev. 303, 307 (1983).

<sup>103</sup> Bob Willey and Melanie Knapp, *How to Increase Citations to Legal Scholarship*, 18 Ohio St. Tech. L.J. 157, 235 (2021).

<sup>104</sup> Condance L. Pressley, *A Diversity of Voices in a "Yasi Wasteland"*, 55 Fed. Comm. L.J. 565, 567 (2003).

<sup>105</sup> The author was honored in 2023 by a request to propose solutions on how the country of Ukraine could restructure its small claims courts after completing its war against Russia. See Gregory D. Smith, *The Verkhovna Rada Should Establish Courts of Limited Jurisdiction With Both Civil and Criminal Jurisdiction as Part of Ukrainian Judicial Reform*, 10 Lincoln Mem'l. U. L. Rev. 128 (2023). To criticize without offering a proposal for the solution wastes time and effort. *Accord*, *Nowell v. Medtronic, Inc.*, 372 F. Supp. 3d 1166, 1202 (D. N.M. 2019).

<sup>106</sup> See Kickapoo Traditional Tribe of Texas Homepage, <https://kickapootexas.org/>, (last visited on Feb. 20, 2024).

<sup>107</sup> See Explore-Sonora, <https://explore-sonora.com/indigenous-peoples-of-sonora/kikapu/>, (last visited on Feb. 20, 2024). (In two interesting notes, the Mexican spelling for this branch of the Kickapoo is "Kikapu." Also, in 1983, the United States Congress declared that the Mexican Kikapu would be considered a sub-group of *Oklahoma's* Kickapoo Tribe, not the KTTT); *Id.*

<sup>108</sup> Elizabeth A. Mager Hois, *The Kickapoo of Coahuila/Texas Cultural Implications of Being a Cross-border Nation*, <http://www.revistascisan.unam.mx/Voces/pdfs/9008.pdf>, at 39 (Conclusions) (Dec. 1, 2009), (last visited on Feb. 20, 2024).

<sup>109</sup> See e.g., Round Valley Tribal Law & Order Code § 11.04 (Identification) (2023); Olga Bryana Gonzalez, *Cultural Appropriation: The Native American Artists Struggle for Intellectual Property Protection in Canada, Mexico, and the United States*, 42 T. Jefferson L. Rev. 1, 15 (2019).

<sup>110</sup> See Nell Jessup Newton, et al., *Cohen's Handbook of Federal Indian Law* §22.06[2][a] (Lexis/Nexis 2019 Supp.); Riley & Carpenter, *supra* note 45, at 134.

Idaho on the United States/Canada border.<sup>111</sup> The PYT Enhanced Tribal I.D. Card includes a photo and description of the tribal member, a unique tribal enrollment number, and fingerprint of the tribal member.<sup>112</sup>

- B** Have the tribe notify both the Bureau of Indian Affairs (BIA)<sup>113</sup> and Homeland Security<sup>114</sup> of the time, date, and location of an anticipated tribal gathering outside of the boundaries of the United States and that the purpose of said gathering may include tribal members transporting cultural or religious icons. The BIA and Homeland Security would then notify local law enforcement officials and border patrols near the primary ingress/egress checkpoints of the upcoming event, as is commonplace for announcing government public meeting notices.<sup>115</sup>
- C** Have the tribal member provide proof of ownership or verification of authority to possess the item in question.<sup>116</sup>

Canada is wrestling with this same issue with their version of Native Americans, called "First Nations," and similar recommendations to the one proposed here are being considered by the Canadian government.<sup>117</sup> Upon showing that the tribal member has a valid purpose to possess the item and travel, the inquiry should cease, and the traveler should be allowed to proceed in a manner like the vehicle checkpoint stop at a border crossing discussed above.<sup>118</sup> The details of this procedure could be set out in the Code of Federal Regulations (CFR) if Congress does not wish to address the minutia of how to implement the modified legislation itself.<sup>119</sup>

<sup>111</sup> Caitlin C.M. Smith, *Kootenai Advanced Tribal Cards*, 1 Am. Indian L.J. 161, 166 n.29 (2017).

<sup>112</sup> See, Marshbanks, *supra* note 16; Press Release for DHS, *Dept of Homeland Sec., The Pascua Yaqui Tribe Announce a Historic Enhanced Tribal Card*, <https://www.dhs.gov/news/2010/07/30/departement-homeland-security-and-pascua-yaqui-tribe-announce-historic-enhanced> (July 30, 2010), (last visited on Feb. 20, 2024).

<sup>113</sup> See *Sault Ste. Marie, v. Andrus*, 532 F. Supp. 157, 164 (D.D.C. 1980) (The Bureau of Indian Affairs (BIA) is a sub-part of the United States Department of the Interior). See, Bureau of Indian Affairs (BIA), *History of BIA*, <https://www.bia.gov/bia>, (For a history of the BIA)(last visited on Feb. 20, 2024).

<sup>114</sup> See, 6 U.S.C. § 111; Bennie G. Thompson, *A Legislative Prescription for Confronting 21<sup>st</sup>-Century Risks to the Homeland*, 47 Harv. J. on Legis. 277, 282-3 (2010) (For a discussion of the purpose, mission, goals, and history of the United States Department of Homeland Security); Homeland Security, *Creation of the Department of Homeland Security*, <https://www.dhs.gov/creation-department-homeland-security>, (last visited on Feb. 20, 2024).

<sup>115</sup> See e.g., C. Christine Fillmore, *Riding the Wave: Social Media in Local Government*, 52 N.H.B.J. 16, 17 & 17 n.8 (2012).

<sup>116</sup> There are many ways to prove ownership or an authorized trust bailment. See generally, Neb. Admin Code, tit. 46, ch. 12, §§ 008.02 & 008.03 (2024); Andrew Jack Van Singel, *Disaster Relief: The Calm After the Storm: 45 Years of ABA Young Lawyers Division's Disaster Relief Legal Services Program*, 35 Touro L. Rev. 1019, 1069 (2019). (This could be done as simply as providing a notarized letter (and perhaps a photograph of the item) from the tribe on tribal letterhead stating that a person owns an item).

<sup>117</sup> See generally, Caron, *supra* note 15.

<sup>118</sup> See generally, Elhady v. Kable, 993 F.3d 208, 224 (4th Cir. 2021).

<sup>119</sup> See e.g., Mack v. Yost, 968 F.3d 311; 323 (3rd Cir. 2020) (discussing day to day administrative and operational prison procedures being left to the Bureau of Prisons under 28 C.F.R. § 545.23); Mulack v. Hickory Hills Police



### Conclusion

The **STOP ACT**, 25 U.S.C. §§ 3071-3079, is a statute designed to protect Native American culture, traditions, and religion.<sup>120</sup> Similar past efforts to protect Native American heritage have proven successful<sup>121</sup> at returning tribal objects of cultural, spiritual and historic significance to the rightful owners of those objects – the tribes!<sup>122</sup> The **STOP ACT** needs to be slightly adjusted to ensure that Native Americans do not face prosecution for exercising legitimate acts of closely held religious and/or cultural assembly expressions of faith and heritage.<sup>123</sup> Instead of simply reducing potential criminal penalties for **STOP ACT** violations by Native Americans, the statute should expressly exempt Native Americans that are practicing their beliefs, instead of trying to sell their heritage, from prosecution.

Pension Bd., 625 N.E. 2d 259, 264 (Ill. App. 1993) (discussing how/when/if a Social Security disability claimant can refuse offered medical treatment under 20 CFR § 416.930(c)).

<sup>120</sup> See generally Angela R. Riley, *The Ascension of Indigenous Cultural Property Law*, 121 Mich. L. Rev. 75, 142-3 (2022).

<sup>121</sup> See e.g., Cecily Harms, *NAGPRA in Colorado: A Success Story*, 83 U. Colo. L. Rev. 593, 617 (2012). (Sometimes, states have exceeded federal efforts in returning Native Americans' stolen cultural icons).

<sup>122</sup> See e.g., *Notice of Intent to Repatriate Cultural Items in the Possession of the Arizona State Museum, The University of Arizona, Tucson, AZ*, 64 Fed. Reg. 10161, 10162 (Mar. 2, 1999) (return of cultural items to Pasca Yaqui Tribe o/b/o Mexican Sonoran Yaqui Community and National Museum of the American Indian, 135 Cong. Rec. S. 15517, at § 17 (Nov. 14, 1989), where Senator Daniel Inouye, President Pro Tempore of the United States Senate, praises Walter Echo-Hawk (the lead attorney for the Native American Rights Fund and a professor at the Tulsa University School of Law) and others for brokering the deal where the Smithsonian Institute returned thousands of funeral, spiritual, or cultural items to tribal nations. Estimates of the number of cultural items and human remains returned to tribes is 19,000). See Getches, *supra* note 5, at 760. (The author was appointed to the Pawnee Nation Supreme Court in 2015 to fill a seat being vacated by Justice Walter R. Echo-Hawk, a highly respected attorney and law professor. Later, as the author served as Chief Justice for the Pawnee Nation Supreme Court, retired Justice Echo-Hawk served as the President of the Pawnee Nation of Oklahoma. From working closely with President Echo-Hawk, this author can attest that President/Justice/Professor Walter Echo-Hawk is a true gentleman).

<sup>123</sup> *TIAG Letter*, *supra* note 83, at 9-11.