Testimony of the Society for American Archaeology
Before the Senate Indian Affairs Committee
Regarding S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017

November 8, 2017

Dear Chairman Hoeven and Vice Chairman Udall,

The Society for American Archaeology (SAA) appreciates this opportunity to provide testimony on S. 1400, the Safeguard Tribal Objects of Patrimony Act of 2017. This bill would enhance the United States' ability to prevent the export of tribal objects of cultural patrimony acquired in violation of the Archaeological Resources Protection Act (ARPA) or the Native American Graves Protection and Repatriation Act (NAGPRA), and to help prevent the sale of such items that have already been removed from US territory. While we do have concerns with certain provisions, we are hopeful that these issues can be resolved in the weeks ahead.

SAA is an international organization that, since its founding in 1934, has been dedicated to the research about and interpretation and protection of the archaeological heritage of the Americas. With more than 7,500 members, SAA represents professional archaeologists in colleges and universities, museums, government agencies, and the private sector. SAA has members in all 50 states and many nations around the world.

The need for the legislation in halting overseas auctions

The looting of Native American archaeological materials and objects of cultural patrimony from federal and tribal land is a longstanding and multi-faceted problem and was a primary reason for the enactment of such statutes as the Antiquities Act, ARPA, and NAGPRA. SAA has consistently worked to end such looting and trafficking both at home and abroad. We have long stood against the buying and selling of objects out of archaeological context. As noted in our Principles of Archaeological Ethics, commercialization "…*is contributing to the destruction of the archaeological record on the American continents and around the world. The commercialization of archaeological objects - their use as commodities to be exploited for personal enjoyment or profit - results in the destruction of archaeological sites and of contextual information that is essential to understanding the archaeological record*."

In recent years, numerous objects of great spiritual and cultural importance to Native American tribes have been put up for sale in European auction houses. SAA and other organizations, including the US government, have repeatedly asked foreign auction houses and governments to prevent these sales from going forward. For example, in Europe, there were highly publicized sales of objects affiliated with the Hopi and other Southwestern tribes in both 2012 and 2013. The sales went ahead, in spite of objections from tribal and preservation groups and the US State Department. Foreign government officials asserted that the auctions could not be stopped because the US did not have a law specifically prohibiting the export of illegally procured Native American objects.

Section 2 of S. 1400 would close this gap by explicitly barring and setting penalties for the knowing export of Native American cultural items that were obtained in violation of ARPA, NAGPRA, or the Antiquities Act. It would also increase the maximum term of imprisonment for repeated violations of NAGPRA from five years to ten. These are simple and straightforward remedies that will not only help deter the export of illicitly acquired materials, but also give our government the crucial legal footing it needs to halt future overseas auctions of such pieces.

Voluntary return of items

Many objects important to Native American tribes were taken illegally, both prior to and after the enactment of the federal laws, and in some cases against tribal law. These objects may still be located in the US, or they may be overseas. In the US, NAGPRA provides a valuable and effective method of repatriating certain types of articles held by federally linked institutions to lineal descendants and culturally affiliated tribes. No such mechanism exists, however, for objects and materials still in the United States but not covered by NAGPRA.

Sections 3 and 4 of S. 1400 attempt to address this matter by defining and establishing a mechanism of voluntary return of items of "tangible cultural heritage." Under this language, it would become the official policy of the federal government for "collectors, dealers, and other individuals and non-Federal organizations" that hold such articles to return them—without threat of prosecution—to Indian tribes and Native Hawaiian organizations.

We find that enactment of these provisions, as currently worded, would be highly problematic for the following reasons:

Sec. 3(5)(B)'s current definition of Tangible Cultural Heritage will be interpreted to mean virtually anything of Native American origin, regardless of age or means of acquisition. This would pose dramatic practical problems in both interpretation and implementation. Every potsherd and arrowhead in archaeological collections can be considered "significant," and thus subject to the federal government's voluntary return policy.

Coupled with the broad definition of "tangible cultural heritage" in Section 3, Section 4 says that all non-federal museums and research institutions should return all of their Native American collections, regardless of the provenance of the items, the means of acquisition, or of the ongoing relationships that such facilities have with tribes. Thousands of cultural, natural history, and art museums that hold substantial collections of Native American items and that use them both for research and educational exhibits would be subject to this voluntary return policy of the United States, even though the objects in their collections were acquired legally, and even though many of these museums have excellent relationships with tribes and hold items in trust for them. Under such circumstances, research into our shared past would come to a halt.

It should also be stated that the Voluntary Return section of the bill is vague, convoluted and, in many ways, simply impractical. For example, the bill is not clear on how the referrals process would be effectuated from what consultation means under the bill, including how notice would be given to other tribes and Native Hawaiian organizations to the operation (selection, election, terms) of a new advisory working group. Moreover, the proposed bill provides no funding for a position at DOI to do the referrals, maintain the referral list, or make determinations of "likely" affiliation. It offers no funds for tribes to repatriate items or hire staff to handle the referrals, both of which can present a significant financial hardship. Additionally, it should also be stated that the "return" outcome envisioned in the bill would not be as straightforward as it might appear. For example, to which Apache or Cherokee or Yavapai tribe should an item known only as Apache, or Cherokee, or Yavapai go? Also, what about objects whose affiliation might be shared between tribes, or items that don't have an associated modern tribe but are nonetheless Native American?

Furthermore, NAGPRA provides an established process for the repatriation of cultural items (human remains, sacred objects, funerary objects, and cultural patrimony) that are under the control of museums and universities that receive federal funds. We believe that cultural items, as defined by NAGPRA (including human remains), will cover the items at issue. As written, S.1400 provides a parallel process

for the return of these same items from these same institutions, adding a legal conflict and leading to confusion without providing any additional protection or benefit with respect to these remains and items.

However, we appreciate the intent of Sections 3 and 4, and see the need for some kind of voluntary method for restoring to the tribes looted objects that are not covered by NAGPRA, and that are still in the US. We believe the language could be rewritten 1) to apply to "cultural items" as defined by NAGPRA (and embodied in Section 2 of the proposed law—eliminating the term "tangible cultural property); and 2) to specify that the voluntary return policy does not apply to museums, universities, and other institutions that are subject to NAGPRA, only to dealers, collectors, and other organizations.

An alternative would be to eliminate Section 4 altogether and to convene a gathering of all stakeholders on this issue to create a new approach in separate legislation. In either case, it would be useful to add a provision authorizing more funding and staffing for law enforcement in the area of cultural resources and looting or illegal trafficking.

SAA strongly supports the export-related provisions of S. 1400, and stands ready to work with Senator Heinrich and the committee to remedy what we see as some serious problems and to help move this legislation forward.