

Calendar No. 608

116TH CONGRESS }
2d Session }

SENATE

{ REPORT
{ 116-308

TO ENHANCE PROTECTIONS OF NATIVE AMERICAN TANGIBLE CULTURAL
HERITAGE, AND FOR OTHER PURPOSES

DECEMBER 9, 2020.—Ordered to be printed

Mr. HOEVEN, from the Committee on Indian Affairs,
submitted the following

R E P O R T

[To accompany S. 2165]

[Including cost estimate of the Congressional Budget Office]

The Committee on Indian Affairs, to which was referred the bill (S. 2165) to enhance protections of Native American tangible cultural heritage, and for other purposes, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill, as amended, do pass.

PURPOSE

The purpose of S. 2165 is to provide a framework for Indian Tribes to repatriate items of Native American cultural heritage from individuals and organizations in possession thereof. S. 2165 increases the maximum penalty for trafficking items of Native American cultural heritage, in violation of current federal law. S. 2165 will establish an interagency working group and a Native working group of Indian Tribes and Native Hawaiian organizations, to ensure both a smooth implementation of the law, and consistent communication between all relevant stakeholders.

NEED FOR LEGISLATION

For generations, Native American cultural items, including human remains, funerary objects, sacred objects, and objects of cultural patrimony have been looted and sold to collectors in the United States and abroad. These pieces are of great importance to the cultural heritage and traditions of Native peoples who do not consider them pieces of art to be traded without their consent. Over the last 30 years, a growing awareness in public and government policy regarding the problem has developed, resulting in action to ensure the repatriation objects of cultural patrimony.

The federal government has a unique and sacred duty to Indian Tribes to assist in the protection of their cultural heritage that is essential to preserving spiritual traditions in Tribal communities. S. 2165, is necessary to provide explicit export restrictions that would help curb illegal trafficking in Native American cultural heritage. Without an explicit export restriction, a sophisticated and lucrative international black market trade in Tribal cultural heritage will continue to thrive.

In most cases, theft of Native American cultural heritage is a violation of either the *Native American Graves Protection and Repatriation Act (NAGPRA)*, the *Archaeological Resources Protection Act (ARPA)*, or both.¹ S. 2165 is necessary to build upon *NAGPRA* and *ARPA*, and provides greater export controls to stop the export of cultural heritage items already protected under federal law. These are the same export protections afforded to foreign countries whose illegally trafficked cultural heritage is imported to the United States. S. 2165 is also necessary to facilitate greater cooperation among federal agencies, and international partners, in the repatriation of items of cultural heritage once they are identified.

BACKGROUND

Congress addressed this issue and imposed civil and criminal penalties for these practices when it passed the *ARPA* in 1979. The *ARPA* governed the permitting of excavations of archaeological resources on public and Indian lands.² This Act required, among other things, that before the federal land manager issues a permit for excavation, which may result in the harm to, or destruction of, any cultural or religious site, notice be provided to any potentially affected Indian Tribe. Permits are not required for Indian Tribes to excavate and remove resources on Tribal lands.³ Individual Tribal members must require permits to excavate in the absence of Tribal law governing excavate and removal policies.⁴

Congress again addressed this issue with the passage of *NAGPRA* in 1990.⁵ *NAGPRA* was intended to address the rights of lineal descendants, Indian Tribes, and Native Hawaiians organizations to Native cultural items, including human remains, funerary objects, sacred objects, and objects of cultural patrimony.

The enactment of both *ARPA* and *NAGPRA* were milestones in the federal effort to address the domestic theft, illegal sale, and distribution of Tribal cultural items. Nevertheless, concerns from Indian Tribes and Tribal advocacy groups remain about the level of federal enforcement of *NAGPRA*. In addition, the lack of an explicit export ban on illegally obtained items has significantly hindered the efforts by Indian Tribes themselves to curb the theft, illegal possession, sale, transfer, and export of these items.

Moving forward, one particular incident involving an ancient artifact, the “Acoma Shield,” illustrates the protections that the *STOP* Act will provide to Tribes and their respective objects of cultural patrimony. Acoma Pueblo Tribal leaders assert that the sa-

¹ *The Native American Graves Protection and Repatriation Act*, Pub. L. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. 3001 et seq.); *Archaeological Resources Protection Act of 1979*, Pub. L. 96-95, 93 Stat. 721 (1979) (codified as amended at 16 U.S.C. 470aa et seq.).

² *The ARPA*, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ *The NAGPRA*, *supra* note 1.

cred “Acoma Shield” was stolen in a 1970s home robbery on Acoma Pueblo lands, making it subject to federal forfeiture laws. In 2016, the shield surfaced at the EVE Auction House in Paris when it was scheduled for sale in May 2016. It became the subject of diplomatic pleas from Indian Tribes, executive branch officials, and members of Congress, until the Auction House acquiesced and stopped the sale.

There is no question that cultural patrimony is vital to the continued existence and maintenance of Tribal culture and ways of life. The illegal sale of items of cultural patrimony has occurred domestically for decades but, as evidenced by the Acoma Shield controversy, the export and sale of these items has spread internationally. The bill, S. 2165, contains measures that will make those who traffic in Tribal cultural patrimony contemplate whether the risk is worth the reward—monetary or otherwise.

LEGISLATIVE HISTORY

In the 114th Congress, Senators Heinrich, Flake, and Udall introduced the “*Safeguard Tribal Objects of Patrimony Act of 2016*” (i.e. S. 3127). The Committee held an Oversight hearing on “*The Theft, Illegal Possession, Sale, Transfer and Export of Tribal Cultural Items*,” on October 18, 2016. No further hearings were held, and the Committee did not consider the bill prior to adjournment of the 114th Congress. Representatives Ben Ray Luján and Michelle Lujan Grisham introduced H.R. 5854, the House companion to S. 3127. The bill was referred to the House Judiciary Subcommittee on Crime, Terrorism, Homeland Security, and Investigations. No further action on the bill took place prior to adjournment.

In the 115th Congress, Senators Heinrich, Flake, McCain, Schatz, Daines, Tester, Murkowski, and Udall introduced S. 1400, the “*Safeguard Tribal Objects of Patrimony Act of 2017*”. On November, 8, 2017, the Committee held a legislative hearing to receive testimony on the bill. On May 16, 2018, the Committee ordered the bill reported favorably without amendment. No further action on the bill took place prior to adjournment.

In the 116th Congress, Senators Heinrich, Murkowski, Baldwin, Daines, Schatz, McSally, Lankford, and Udall introduced the bill, S. 2165. On June 24, 2020, the Committee held a legislative hearing to receive testimony on the bill. On July 29, 2020, the Committee ordered the bill reported favorably, with an amendment in the nature of a substitute, offered by Senator Udall, on behalf of Senator Heinrich.

Amendment. Senator Udall’s amendment incorporated the concerns the Committee received in hearing testimony, as well as extensive feedback and technical assistance from the U.S. Departments of the Interior, State, Homeland Security, and Justice. Among other things, the substitute amendment added language noting that, in the event an item is found not to have a certification upon export, it will be detained and referred to the Secretary of the Interior to determine whether the item qualifies as an “Item Prohibited from Export.” Should an item be deemed prohibited from trafficking under federal law (i.e. *NAGPRA* or *ARPA*), that law alone will trigger the repatriation process that will apply until the item is returned to the appropriate Indian Tribe. The amend-

ment created an exemption in the definition of “Item Requiring Export Certification” that allows Indian Tribes with a cultural affiliation to an item to issue certificates authorizing exportation, thereby allowing the exporter to avoid the federal certification process entirely. Lastly, the amendment authorized \$3,000,000 in funding for each of the fiscal years 2021 through 2026 to carry out the provisions in the bill.

SECTION-BY-SECTION ANALYSIS OF S. 2165 AS ORDERED REPORTED

Section 1. Short title

This section sets forth the title of the bill as the *Safeguard Tribal Objects of Patrimony Act of 2019*.

Section 2. Purpose

This section sets forth the purpose of the bill, most notably the following:

- To increase the maximum penalty for actions taken in violation of federal law;
- To stop the export, and facilitate the international repatriation, of cultural items prohibited from being trafficked by federal law;
- To establish a Federal framework in order to support the voluntary return by individuals and organizations of items of tangible cultural heritage;
- To establish an interagency working group to ensure communication between Federal agencies to successfully implement the bill; and
- To establish a Native working group of Indian Tribes and Native Hawaiian organizations to assist in the implementation of this Act.

Section 3. Definitions

This section sets forth the definitions to be used in the bill.

Section 4. Enhanced NAGPRA Penalties

This section increases penalties for illegal trafficking in cultural items, in violation of the *Native American Graves Protection and Repatriation Act (NAGPRA)*, with the goal of aiding in deterrence and encouraging prosecution of cultural theft.

Section 5. Export prohibitions; export certification system; international agreements

This section contains an explicit prohibition export of Tribal cultural heritage items already prohibited from being trafficked under existing federal law. Section 5 also creates an accompanying export certification system, and confirms the authority of the President to retrieve items from other countries under an existing 1970 international treaty. This will help prevent the export of federally-protected Tribal cultural heritage items, and it will also facilitate their repatriation from abroad. Other countries are often unwilling to provide aid without an explicit export prohibition and accompanying export certification system.

Subsection (a) prohibits the export of cultural items trafficked in violation of *NAGPRA*, and Native American archaeological re-

sources, the trafficking in which is prohibited by the *Archaeological Resources Protection Act (ARPA)*. Section (a) creates a criminal penalty for such export or attempted export when a person knew, or reasonably should have known, the item was illegal. It also authorizes detention, forfeiture, and repatriation to the appropriate Indian Tribe or Native Hawaiian organization.

Subsection (b) prohibits export of a cultural item (defined under *NAGPRA*), or a Native American archaeological resource (defined under *ARPA*), without an export certification obtained from the Department of the Interior. This subsection also states that cultural items, and Native American archaeological resources, may receive an export certification when (1) they are not under ongoing federal investigation, (2) are not covered by *NAGPRA* or *ARPA*'s trafficking prohibitions, and (3) their export would not otherwise be unlawful.

Subsection (b) also requires exporters to submit applications to the Department of the Interior, and, in most cases, self-attestation that an item is not prohibited from trafficking under *NAGPRA* or *ARPA* is sufficient evidence to support the application. It authorizes civil penalties for export or attempted export without an export certification, as well as detention, and, when found to be covered by *NAGPRA* or *ARPA*'s trafficking prohibitions, authorizes forfeiture and repatriation.

Subsection (c) reaffirms the authority of the President to enter into agreements with other countries regarding Tribal cultural heritage items. The U.S. is a signatory to a 1970 international treaty under which countries may enter into agreements for the return of cultural property *if* the requesting country has an explicit export prohibition and certification system. The U.S. has enacted a federal statute under which it returns cultural property to other countries, but has not utilized the treaty to retrieve cultural property originating within its own borders. The bill would allow the U.S. to utilize the mechanisms under the 1970 international treaty to retrieve Tribal cultural heritage items from abroad.

Section 6. Voluntary return of tangible cultural heritage

This section creates a voluntary return framework through which individuals and organizations seeking to voluntarily return tangible cultural heritage may receive federal assistance in locating the Indian Tribes or Native Hawaiian organizations with a cultural affiliation. Tangible cultural heritage includes Native American human remains and culturally, historically, or archaeologically significant objects, resources, patrimony, or other items that are affiliated with a Native American culture. Tangible cultural heritage also extends beyond items protected under existing federal law.

Subsections (a) through (c) call on the Departments of the Interior, and State, to create the infrastructure to facilitate the voluntary return of tangible cultural heritage to Indian Tribes and Native Hawaiian organizations by individuals and organizations.

Subsection (d) clarifies that there will be no additional penalties or legal liabilities imposed beyond what is specified in the bill, and Subsection (e) directs the Department of the Interior to provide the individual, or organization returning the item, with tax documentation for a deductible gift.

Subsection (f) mandates that the voluntary return framework is not applicable to items subject to *NAGPRA*'s repatriation process for federal agencies and museums.

Section 7. Interagency working group

Creates an interagency working group consisting of representatives from the Departments of the Interior, Justice, State, and Homeland Security, the function of which are required to protect Tribal cultural heritage items. Federal agencies currently collaborate without statutory mandate, but a framework for their ongoing collaboration and mechanisms by which Indian Tribes and Native Hawaiian organizations can more easily interact with them are necessary.

Section 8. Native working group

This section creates a Native working group through which representatives of Indian Tribes and Native Hawaiian organizations. This working group will advise the federal government regarding the sensitive issue of protection of Tribal cultural heritage items and make requests for aid.

Section 9. Treatment Under Freedom of Information Act

This section creates an exemption from disclosure under the Freedom of Information Act for sensitive information provided under the bill.

Subsections (a) and (b) exempt from disclosure information submitted by Indian Tribes or Native Hawaiian organizations pursuant to the bill, and designated as sensitive or private. Also exempt is information submitted by any person pursuant to the bill that relates to a Tribal cultural heritage item for which an export certification is denied. In exempting this information, Indian Tribes and Native Hawaiian organizations are more likely to provide necessary sensitive information to the federal government, and information provided that may otherwise be used to authenticate an item will not increase that item's value on the black market.

Subsection (c) allows an Indian Tribe or Native Hawaiian organization to request from a federal agency its own information it provided under the bill.

Section 10. Regulations

This section directs the Department of the Interior to promulgate regulations implementing the bill, in consultation with the Departments of State, Homeland Security, and Justice, and after consultation with Indian Tribes and Native Hawaiian organizations.

Section 11. Authorization of appropriations

This section authorizes \$3,000,000 in funding for each of the fiscal years 2021 through 2026 to carry out the bill.

COST AND BUDGETARY CONSIDERATIONS

As of the date of publishing this report, the Committee has received the following informal communication from the Congressional Budget Office regarding the cost and budgetary considerations for S. 2165:

CBO estimates this legislation would increase both direct spending and revenues by an insignificant amount over the 2021–2030 period. They would offset each other, resulting in an insignificant decrease in the deficit over that period.

CBO estimates the legislation would increase spending, subject to appropriation, by \$7 million over the 2021–2025 period.

Sincerely,

JON SPERL,
Principal Analyst,
Congressional Budget Office.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 2165 will have minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding S. 2165.

CHANGES IN EXISTING LAW

On February 6, 2019, the Committee unanimously approved a motion to waive subsection 12 of rule XXVI of the Standing Rules of the Senate. In the opinion of the Committee, it is necessary to dispense with subsection 12 of rule XXVI of the Standing Rules of the Senate to expedite the business of the Senate.