

Indigenous Rights to Cultural Heritage

U.S. Law and Native Americans

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Native American Tribes and the United States Government

- Article 1, Section 8 of the U.S. Constitution gives Congress the authority to engage in relations with the tribes.
- In the 1830s the U.S. Supreme Court held that tribes are “domestic dependent nations.”
- The relationship between the tribes and the United States is one of government to government.
- Federally recognized tribes possess certain inherent powers of self-government and are entitled to certain federal benefits, services, and protections because of a special trust relationship.

Native Americans Perceptions

- Congress and courts have disregarded the history, religion, property and culture of Native Americans.
- In the past, Native American graves and cultural sites have been excavated and the objects removed and sold or transferred to collectors and museums for profit and curiosity.
- Federal laws restrict the use of items such as eagle feathers sacred to Native Americans except through a very narrow permit process.

International Law

- 1970 UNESCO Convention
 - Ratified by the United States with reservations
- 1995 UNIDROIT Convention
 - Not ratified by the United States
- 2007 UN Declaration on the Rights of Indigenous People
 - The US agreed to support the Declaration; it carries moral force but is not binding
- 2016 OAS American Declaration on the Rights of Indigenous Peoples
 - The US objected to the text of the Declaration and reiterated that the focus of the OAS should be on the implementation of the 2007 UN Declaration

1970 UNESCO Convention

- The United States ratified the Convention with certain reservations.
- Responsibilities under the Convention:
 1. Prevent illegal export of cultural property
 2. Return stolen property to other states
 3. Strengthen international cooperation when cultural property is in jeopardy
- The US has not implemented export restrictions based on its reservation
- The United States enacted the Cultural Property Implementation Act (CPIA) authorizing bilateral agreements with other countries prohibiting import of certain cultural property into the US

Federal Laws Addressing Native American Culture

- Antiquities Act of 1906
- National Historic Preservation Act of 1966
- American Indian Religious Freedom Act of 1978
- Archaeological Resources Protection Act of 1979
- Indian Arts and Crafts Act of 1990
- Native American Graves Protection and Repatriation Act of 1991

Antiquities Act of 1906

- Prohibits the appropriation, injury, or destruction of any historic or prehistoric ruin, monument or object of antiquities on lands owned or controlled by the federal government.
- The destruction or appropriation of Indian antiquities or ruins are prohibited because of federal control of Indian lands.
- Few prosecutions were brought for violation of the act and at least one court held the act unconstitutional for vagueness. Penalties were low and did not effectively deter looters and traffickers.

National Historic Preservation Act of 1966 (NHPA)

- Mandates that the Secretary of the Interior “foster communication and cooperation between Indian tribes and State Historic Preservation Officers ... to ensure that all types of historic properties and all public interests in such properties are given due consideration.”
- Section 106 of the Act requires Federal agencies to consider the effects of their actions on historic properties and to seek comments from the Advisory Council on Historic Preservation (ACHP).
- ACHP regulations require Federal agencies to consult with Indian tribes that attach religious and culturally significance to historic properties that may be affected by their undertakings.

- In addition to buildings, structure, sites, districts and objects that are eligible for listing in the National The Department of the Interior has developed guidelines for designating traditional cultural properties. Many Native American properties fall under these guidelines.
- A traditional cultural property can be defined generally as:
 - one that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that
 - (a) are rooted in that community's history, and
 - (b) are important in maintaining the continuing cultural identity of the community.
 - a location associated with the traditional beliefs of a Native American group about its origins, its cultural history, or the nature of the world;
 - a location where Native American religious practitioners have historically gone, and are known or thought to go today, to perform ceremonial activities in accordance with traditional cultural rules of practice

Advisory Council on Historic Preservation

- A Federal agency established by the National Historic Preservation Act to promote preservation, enhancement and sustainable use of the nation's diverse historic resources and advise the President and Congress on national historic preservation policy.
- The Office of Native American Affairs oversees the Council's Native American initiatives, ensuring the Council meets its government-to-government trust obligations to Indian Tribes, provide technical assistance and outreach and consultation in the Section 106 process, and participate in inter-agency initiatives focused on Native Americans.

Other Executive Orders and Memoranda

- Executive Order 13175 of November 6, 2000, “Consultation and Coordination With Indian Tribal Governments” reaffirms the Federal government’s commitment to tribal sovereignty, self determination and self-government and ensures all Executive departments and agencies consult with Indian tribes and respect tribal sovereignty as they develop policy on issues that impact Indian communities.
- In January 2021 the Biden Administration issued a “Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships” reaffirming the earlier Executive Order as part of a broader initiative to strengthen relationships with Tribal Nations.

American Indian Religious Freedom Act of 1978

- Enacted to protect the right and freedom of American Indians, Eskimos, Aleuts, and Native Hawaiians to believe, express, and exercise their traditional religious rights and cultural practices.
- These rights include:
 - Access to sacred sites
 - Freedom to worship through ceremonial and traditional rites, and use and possession of objects considered sacred

- Points of Conflict:

- American Indians did not have access to a number of sacred places that the tribes had traditionally used in religious ceremonies.
- The possession by tribal members of ceremonial items that are restricted under United States law, such as eagle feathers or bones (under laws to protect threatened species), or peyote, a ritual plant spirit and restricted substance.
- Sacred ceremonies were sometimes subject to interference from overzealous officials or curious onlookers.
- Even hair styles that are an important aspect of Indian cultural and religious identity are prohibited in some instances.

- The act acknowledged prior federal infringement on the right of freedom of religion for American Indians by denying them their First Amendment right of "free exercise" of religion.
- It also directs federal agencies to consult with American Indian spiritual leaders to determine appropriate procedures to protect the inherent rights of American Indians, as laid out in the act.
- Courts have held that this is merely a statement of government policy to recognize religious beliefs of Native Americans and did not authorize Native Americans to obtain the return of Indian religious artifacts and human remains through legal proceedings as they had contended.
- Courts did hold that the 1994 amendments to the act supported the Secretary of the Interior's plan to prevent rock climbing on Devil's Tower during June when Indians engage in religious ceremonies.

Archaeological Resources Protection Act of 1979

- Strengthened protection of archaeological resources and sites on Native American and other public lands.
- Prohibits the sale, purchase, transport, exchange, or receipt of any archaeobotanical resources removed without permission from public or Tribal lands after 1979.
- Defines archaeological resources as “any material remains of past human life or activities which are of archaeological interest” and at least 100 years old.
- Requires the consent of the Native American tribe for excavation on Indian lands.

Indian Arts and Crafts Act of 1990

- Criminalizes any sale or offer of a craft product that falsely suggests it is Indian produces, an Indian product, or product of a particular Indian or Indian tribe or tribal organization including objects frequently copied by non-Indians including jewelry, pottery, baskets, carved stone fetishes, woven rugs kachina dolls and clothing.
- Under the act an Indian is defined as a member of any federally or State recognized Indian Tribe, or an individual certified as an Indian artisan by an Indian Tribe.

Native American Graves Protection and Repatriation Act of 1991 (NAGPRA)

- Purpose: The Act addresses the rights of lineal descendants and members of Indian Tribes and Native Hawaiian organizations to certain Native American human remains and cultural items
- Requires federal agencies and museums with collections of Native American remains and associated or unassociated funerary objects to compile inventories of such items in consultation with tribal governments or Native Hawaiian organizations, identifying their cultural affiliation and repatriating the objects on request from lineal descendants of affiliated Tribes.
- The cultural affiliation provisions of NAGPRA acknowledges the community property concept that is common in Native American culture. The U.S. government may prosecute an individual who purchases a communal artifact from a member of a Native American tribe.
- However, the act is not retroactive, only applying to artifacts obtained prior to 1990.

Safeguarding Tribal Objects of Patrimony Act (STOP Act)

- Many countries do not recognize the sovereignty of Native American tribes, thwarting their efforts to seek return of illegally obtained tribal cultural items.
- US does not have specific cultural property export restrictions.
- NAGPRA does not prevent the export of protected Native American objects of cultural patrimony to foreign countries.
- The proposed STOP Act would specifically prohibit export of items obtained in violation of federal acts and facilitate inter-governmental coordination to expedite return of items from foreign countries to Native American tribes.

Ongoing Issues

- Native people's claims do not fit easily into intellectual property law or international cultural property law, so their claims cannot be heard in these forums.
- Cultural appropriation is also a major concern of Native Americans. Their images and names are often trademarked by other parties and their use is dehumanizing to many Native Americans.
- Courts have often failed to see how general legal standards can fit situations involving Indian religion and culture.

Conclusion

- The United States has made progress in recognizing the cultural and religious rights of Native Americans, but much still needs to be done.
- Sources from outside the United States such as the UN Declaration on the Rights of Indigenous Peoples, while not legally binding, can serve as a guide for advocates, legislatures, government agencies, and courts as they work to eliminate discrimination and ensure that Native Americans are “free and equal to all other peoples and individuals.”