



## NAGPRA and Congress's Foresight

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Recently JURIST Guest Columnist Walter Olson of the Cato Institute Center for Constitutional Studies [wrote](#) about the [Native American Graves Protection and Repatriation Act](#), or NAGPRA. In the article Mr. Olson claims that NAGPRA is one example of a law passed by Congress whose effect is the opposite of what Congress intended. Rather than "respecting the rights of the dead, the right to an undisturbed resting place" as articulated by the late Congressman Morris Udall in 1990 when NAGPRA passed the House of Representatives, according to Mr. Olson, NAGPRA "has come to the point of threatening to order that otherwise undisturbed graves from long ago be dug up."

Mr. Olson was led to the above view as a result of a legal case that [originated](#) [PDF] in the US District Court for the Middle District of Pennsylvania and was appealed to the US Court of Appeals for the Third Circuit. In [Thorpe v. Borough of Jim Thorpe](#), the surviving sons of legendary athlete Jim Thorpe sued the Borough of Jim Thorpe, Pennsylvania for failing to comply with the requirements of NAGPRA. In that case the court declared that NAGPRA (specifically, its provisions governing inventories and repatriation of Native American human remains and associated funerary objects in museum and federal agency holdings or collections) is applicable to the remains of Jim Thorpe, an enrolled member of the Sac and Fox Nation, that are presently interred in municipal land in the Borough of Jim Thorpe. According to the court's interpretation of NAGPRA, interred human remains are deemed to be "holdings or collections" and therefore the statute authorizes—even *requires*—that where human remains are in a grave controlled by an institution or a state or local government agency that receives federal funds, the human remains must be disinterred and transferred to a lineal descendant or culturally affiliated Indian tribe when requested. Thus according to the court, Native American graves *protection* occurs through disinterment or, in other words, we need to destroy graves in order to protect them.

On appeal the Third Circuit [reversed](#) [PDF] the District Court, holding that "the Borough is not a 'museum' under NAGPRA for the purposes of Thorpe's burial." Concluding that it was "confronted with the unusual situation in which the literal application of NAGPRA will produce a result demonstrably at odds with the intention of its drafters," the court felt it had to "look beyond the text of NAGPRA to identify the intentions of the drafters of the statute, and that intent must control our analysis."

The Third Circuit reversed the District Court on the grounds that "Congress did not intend the result required by a literal application of the text of NAGPRA." The court did not find the law in the text of the statute.

Reading and digesting the reasoning used by both courts to reach their opposite decisions in *Thorpe v. Borough of Jim Thorpe*, Mr. Olson cannot be blamed for asserting that few if any lawmakers had foreseen such a fact pattern in the original debate over NAGPRA. Still contrary to Mr. Olson's assertion, Congress *had* foreseen it. The text of NAGPRA *should* have been used to decide *Thorpe v. Borough of Jim Thorpe*. The courts were not looking in the right place.

In NAGPRA, Congress included a provision stating that "[n]othing in this [Act] shall be construed to ... limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations." Jim Thorpe, who died intestate in March 1953, was a California resident. At the time of his death, California law provided that the priority of right to control the disposition of his remains and the duty of interment devolved upon his surviving spouse, Patricia Thorpe. In May 1954 Patricia Thorpe entered into an agreement with the Boroughs of Mauch Chunk and East Mauch Chunk, Pennsylvania. The parties agreed on the terms and conditions for consolidating the Boroughs and renaming them the Borough of Jim Thorpe, and for the interment in Borough land of Jim Thorpe's remains.

To apply NAGPRA to the buried remains of Jim Thorpe would limit the right of his surviving spouse, Patricia Thorpe, to control the disposition of his remains under California law. That outcome contradicts the text of NAGPRA.

Perhaps one reason that Congress included limitations on applying NAGPRA was in order not to place the Act in tension with the [Tenth Amendment](#) of the US Constitution ("The powers not delegated to the US by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). The power to determine the priority of the right of custody of a corpse for the purpose of the disposition of the corpse (including burial) has traditionally been reserved to the states. Similarly the states traditionally have exercised authority over the disinterment of human remains that are buried on non-federal and non-tribal lands. Thus, the plaintiffs in *Thorpe v. Borough of Jim Thorpe* may ask that Jim Thorpe's remains be transferred to them, but they should be doing so before a Pennsylvania state court and not a federal one. For its part though, NAGPRA is the antithesis of a law that disrupts the physical repose of the dead by authorizing the disinterment of Native American burials.

As 2014 came to a close, the remains of more than 180,000 Native American individuals had been listed in museum and federal agency inventories. More than 50,000 individuals had been included in Federal Register notices of inventory completion, which established the right of the

Indian tribes and Native Hawaiian organizations listed in the notices to receive control of those ancestors. In addition approximately \$40 million had been awarded by the Secretary of the Interior to museums, Indian tribes and Native Hawaiian organizations to assist with fulfilling the consultation, documentation and transfer requirements of NAGPRA.

The NAGPRA compliance process is ongoing and, based on the annual reports published by the [National NAGPRA Program](#), the progress has been profound. According to two NAGPRA representatives from for the Caddo Nation, "[w]ith the help of the Native American Graves Protection and Repatriation Act ... we have continued to not only claim and rename our past but also have asserted the identity of the Caddo as being the 'Real Chiefs' governing our history and culture." The NAGPRA coordinator for a museum adds,

From the consultations and conversations that result from dealing with NAGPRA, museums have the potential of creating new kinds of relationships with Native American communities. When tribes see that museums are genuinely committed to NAGPRA ... new friendships and partnerships can develop.

NAGPRA is not an example of a law whose effect is the opposite of what Congress intended. Rather Congress may proudly claim, in the words of Morris Udall, "[i]n the larger scope of history, this is a very small thing. In the smaller scope of conscience, it may be the biggest thing we have ever done."

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