NAGPRA, Indian Burials, and the Unquiet Grave

By Walter Olson
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Does Congress really mean for the laws it passes to achieve the opposite of their stated intent, or does it just seem that way sometimes? Consider the Native American Graves Protection and Repatriation Act, or NAGPRA, signed into law by President George H.W. Bush in 1990 following a relatively uncontroversial passage through Congress. On its face, NAGPRA is meant to prevent the untimely disturbance of human remains and ensure respect for their final resting place as directed by their survivors. Twenty-five years later the law has come to the point of threatening to order that otherwise undisturbed graves from long ago be dug up. For the moment the US Court of Appeals for the Third Circuit has drawn the line and said no, turning down a suit under the law seeking to order a Pennsylvania town to yield up the remains of Native American sports great Jim Thorpe for reburial under tribal auspices in Oklahoma.

Jim Thorpe was one of America's greatest athletes, some would say the very greatest. After his death in 1953, following the wishes of his widow, his remains were laid to rest in the newly renamed town of Jim Thorpe (formerly Mauch Chunk and East Mauch Chunk). More than a half century later, and twenty years after NAGPRA's passage, two of his sons from an earlier marriage filed suit demanding that Thorpe be reburied in Oklahoma on ancestral lands of his Sac and Fox tribe. Other Thorpe relatives, meanwhile, disagreed and wanted him left in the town where he had been laid to rest in accord with Patsy Thorpe's arrangements.

Few if any lawmakers had foreseen such a fact pattern in the original debate over NAGPRA, which built on outrage at the desecration of Indian burial sites by looters and sensation-seekers. Along with providing for review of federally funded disturbance of burial grounds, the law aimed at requiring cultural institutions that receive federal funds to return holdings of human remains and related objects to persons who can show they are descendants of the deceased.

Almost from the moment the law was enacted, it began to see tactical use as a way for opponents to block land development. In a recent piece in the New York Times, George Johnson cited ways in which the law has frustrated legitimate scientific endeavor, including the emplacement of astronomical observatories on reputedly sacred mountains.

The provisions pertaining to human remains have also blocked scientific advance. The most notable example is the Kennewick Man episode, recounted recently in a riveting article by Douglas Preston in Smithsonian. There, aggressive interpretation of the law by the federal government closed down an important archaeological dig even though the prehistoric remains that had been discovered had no evident link to any current tribe.

To return to the Thorpe suit, perhaps the most curious hurdle it faced was showing that the borough of Jim Thorpe counts as a "museum" subject to the law. If that sounds wacky, blame Congress, because it is a completely straightforward reading of the statute. Drafters in their wisdom chose to define a "museum" for NAGPRA purposes as "any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items." Since the town is a government agency and does receive federal funds, it would seem to count as a museum under the law. At least so the US District Court for the Middle District of Pennsylvania found [PDF].

The US Court of Appeals for the Third Circuit, however, reversed [PDF]. While agreeing that this was the law's literal reading, it took issue with the "clearly absurd result" of letting the law provide "a sword to settle familial disputes within Native American families." There is already talk of a possible appeal, which—like the pending King v. Burwell challenge to ObamaCare—may turn on how readily courts can lay aside plain statutory language as "absurd" as opposed to merely unwelcome to some litigants. And the fact is that to some on the plaintiffs' side, there is nothing unwelcome, let alone absurd, about the prospective outcome. The case has become a *cause célèbre* in Indian Country, where it has been described as the first of more actions to come intended to "repatriate" persons of Indian blood who died in modern times.

Even should the tribal advocates prevail on the museum definition question, they will still need to overcome another NAGPRA provision that provide immunity to institutions acquiring Indian remains with "full knowledge and consent of the next of kin." Presumably that will require challenging whether Patsy Thorpe—who, as supporters of the lawsuit point out with some frequency, was of non-Indian descent—had appropriate legal authority to make decisions at the time.

In a nation where people regularly fall in love across ethnic lines, laws that assign rights differentially to some members of families based on descent or tribal affiliation are especially hard to justify under US Constitution's Equal Protection Clause. We have already seen how by entitling tribes to a role in family law proceedings, the Indian Child Welfare Act of 1978 undermines the rights of non-Indians, such as the birth mother in last year's Baby Veronica case. Say what you will about the Third Circuit's reasoning, it at least postpones the day when tribal enmities extend into our very cemeteries, and even the dead cannot escape counting based on race.

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