

# The Native American Graves Protection and Repatriation Act: Background and Legislative History

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I. INTRODUCTION

On November 23, 1990, President George Bush signed into law important human rights legislation: the Native American Graves Protection and Repatriation Act ("NAGPRA").<sup>1</sup> This legislation culminates decades of struggle by Native American tribal governments and people to protect against grave desecration, to repatriate thousands of dead relatives or ancestors, and to retrieve stolen or improperly acquired religious and cultural property back to Native owners.

In many ways, NAGPRA is historic, landmark legislation for Native Americans. It represents fundamental changes in basic social attitudes toward Native peoples by the museum and scientific communities and

1. 25 U.S.C.A. §§ 3001-3013 (West Supp. 1991) (reprinted in appendix).

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The Native Ame complex, and some rights, race relations has been written o interests.<sup>3</sup> Admitted considering these of that the law play a s values and ethics of

Across the nation, years. Museums and have scientific and e for these important sepulchre of the de protection includes tives—can take for protects the sanctity failed to protect Na laws have indeed f resulting disparate

2. Human rights laws long time to implement. Fo implemented today.

3. See, e.g., AMERICA REBURIAL: A RESOURCE GU bibliography for the burgeon with related policies, regulat

4. General legal article MARCUS PRICE III, DISPUTI (1991); Margaret Bowman, Resolution of a Conflict, 1 Efforts to Protect Against L Laws, 14 N.A.R.F. L. REV. for the Dead: Return of Ind & CONTEMP. L. 195 (1991).



the public at large. NAGPRA provides nationwide repatriation standards and procedures for the return of Native remains and certain protected materials from federal agencies and federally funded institutions. Because of the massive scope of the repatriation problem, however, a lengthy implementation period can be expected for this human rights legislation.<sup>2</sup> This article seeks to facilitate implementation of the new national policy by providing attorneys, Indian tribes, museums, and scientists with (1) background on the repatriation issue; and (2) an informed analysis of the provisions of NAGPRA and their interaction.

The Native American repatriation topic involves a wide array of complex, and sometimes competing, social interests, including human rights, race relations, religion, science, education, ethics, and law. Much has been written on the topic from the perspective of these social interests.<sup>3</sup> Admittedly, the law has played a relatively minor role in considering these often conflicting interests. It is appropriate, however, that the law play a significant role because it should embody the highest values and ethics of the society that it is intended to serve.<sup>4</sup>

Across the nation, society has vigorously debated these issues in recent years. Museums and scientists have argued that Native human remains have scientific and educational value and, therefore, should be preserved for these important purposes. Tribes have argued that protection of the sepulchre of the dead is an important attribute in our society. This protection includes fundamental legal rights that everyone—except Natives—can take for granted. Unfortunately, the law and policy that protects the sanctity of the dead and the sensibilities of the living has failed to protect Native Americans. This article suggests that American laws have indeed failed to accord Equal Protection. Moreover, the resulting disparate racial treatment has caused painful human rights

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2. Human rights laws that seek to alleviate widespread civil rights violations usually take a long time to implement. For example, the federal civil rights legislation of the 1960s is still being implemented today.

3. See, e.g., AMERICAN INDIAN SACRED OBJECTS', SKELETAL REMAINS', REPATRIATION AND REBURIAL: A RESOURCE GUIDE (Rayna Green & Nancy Marie Mitchell eds., 1990) (providing a bibliography for the burgeoning literature on the subject; it references almost 200 articles together with related policies, regulations, decisions, and laws).

4. General legal articles on repatriation of Native human remains are sparse. See generally H. MARCUS PRICE III, *DISPUTING THE DEAD: U.S. LAW ON ABORIGINAL REMAINS AND GRAVE GOODS* (1991); Margaret Bowman, *The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict*, 13 HARV. ENVTL. L. REV. 147 (1989); Walter R. Echo-Hawk, *Tribal Efforts to Protect Against Mistreatment of Indian Dead: The Quest for Equal Protection of the Laws*, 14 N.A.R.F. L. REV. 1 (1988); David J. Harris, Note, *Respect for the Living and Respect for the Dead: Return of Indian and Other Native American Burial Remains*, 39 WASH. U. J. URB. & CONTEMP. L. 195 (1991).

violations in tribal communities. As the repatriation struggle became protracted and reached the federal level, it became a test for our country's commitment to the underlying values of the Bill of Rights and to our American sense of social justice.

Much of the national debate culminated in the passage of NAGPRA—though implementation of that law and its new national policy remain. NAGPRA is a primary subject of this article, which will cover four areas: 1) the historical origins, nature, and scope of the controversy from a Native American perspective; 2) a summary of legal and political rights that are at stake when Indian tribes seek to repatriate their dead relatives; 3) legal and legislative activities in this area of rapid social change; and 4) a description of the background, legislative history, and provisions of NAGPRA.

## II. THE ORIGINS, SCOPE, AND NATURE OF THE REPATRIATION ISSUE

### A. Human Remains and Funerary Objects

In all ages, Mankind has protected the sanctity of the dead. Indeed, respect for the dead is a mark of humanity and is as old as religion itself. British Prime Minister William Ewart Gladstone once wrote:

Show me the manner in which a nation or a community cares for its dead, and I will measure with mathematical exactness the tender sympathies of its people, their respect for the laws of the land, and their loyalty to high ideals.<sup>5</sup>

Like most other nations, respect for the dead is deeply ingrained in American social fabric and jurisprudence. One legal commentator noted:

After a lifetime of investigation of the origin of religious structure, the great Sir James G. Frazier concluded that awe toward the dead was probably the most powerful force in forming primitive systems for grappling with the supernatural.

The sepulture of the dead has, in all ages of the world been regarded as a religious rite. The place where the dead are deposited all civilized nations, and many barbarous ones, regard in some measure at least, as consecrated ground. In the old Saxon tongue the burial ground of the dead was "God's Acre."

[American cases] all agree in principle: The normal treatment of a

5. Quoted in, Wynne Woolley, *Caring for Old Cemetary Has Been a Lifetime Job*, RICHMOND NEWS LEADER, May 16, 1990, at 1.

corpse, once it is deeply woven into our to hear it spoken of quick. [No] system of what are considered w

These basic values are District of Columbia, by and protect graves from prohibit grave robbing and remains are not mistreat persons—including pauper unclaimed dead—are enti

Disinterment of the de mon law except under the under close judicial sup requirements, which may to great lengths to protec

Unfortunately, the abo for granted—have failed people. Massive numbers graves and carried away and two million deceasee graves for storage or disp sities and tourist attractio every Indian tribe or Na non-Indian grave looting

6. R.F. Martin, Annotation (1950) (citations omitted).

7. See generally Catherine B. *Repatriation and Burial Protection*

8. See, e.g., *Hearings on S. Affairs*, 101st Cong., 2d Sess. (M [hereinafter *Senate Hearing on S.*

9. See, e.g., *Stastny v. Tach*

10. E.g., NEB. REV. STAT. § done by a licensed funeral director next of kin; if more than one hu order that must specify the place

11. See generally PERCIVAL E. PLACES (2d ed. 1950).

12. No accurate national cens are compiled in Harris, *supra* note 600,000 in U.S. alone), National C (2 million). NAGPRA requires fe dead within five years. 25 U.S.C.



corpse, once it is decently buried, is to let it lie. This idea is so deeply woven into our legal and cultural fabric that it is commonplace to hear it spoken of as a "right" of the dead and a charge on the quick. [No] system of jurisprudence permits exhumation for less than what are considered weighty, and sometimes compelling reasons.<sup>6</sup>

These basic values are strictly protected in all fifty states, and the District of Columbia, by statutes that comprehensively regulate cemeteries and protect graves from vandalism and desecration.<sup>7</sup> Criminal laws prohibit grave robbing and mutilation of the dead and ensure that human remains are not mistreated. Statutes in most states guarantee that all persons—including paupers, indigents, prisoners, strangers, and other unclaimed dead—are entitled to a decent burial.<sup>8</sup>

Disinterment of the dead is strongly disfavored under American common law except under the most compelling circumstances,<sup>9</sup> and then only under close judicial supervision or under carefully prescribed permit requirements, which may include judicial consent.<sup>10</sup> Common law goes to great lengths to protect the sanctity of the dead.<sup>11</sup>

Unfortunately, the above legal protections—which most citizens take for granted—have failed to protect the graves and the dead of Native people. Massive numbers of Indian dead have been dug up from their graves and carried away. National estimates are that between 100,000 and two million deceased Native people have been dug up from their graves for storage or display by government agencies, museums, universities and tourist attractions.<sup>12</sup> The practice is so widespread that virtually every Indian tribe or Native group in the country has been affected by non-Indian grave looting.

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6. R.F. Martin, Annotation, *Corpse Removal and Reinterment*, 21 A.L.R.2d 472, 475-76 (1950) (citations omitted).

7. See generally Catherine Bergin Yalung & Laurel I. Wala, Statutory Survey, *Survey of State Repatriation and Burial Protection Statutes*, 24 ARIZ. ST. L.J. 419 (1992).

8. See, e.g., *Hearings on S. 1021 and S. 1980 Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 2d Sess. (May 14, 1990) (exhibit 5 to statement of Walter R. Echo-Hawk) [hereinafter *Senate Hearing on S. 1021 & S. 1980*].

9. See, e.g., *Stastny v. Tachovsky*, 132 N.W.2d 317, 325 (Neb. 1964).

10. E.g., NEB. REV. STAT. § 71-605(5), (6) (1989) (specifying that disinterment may *only* be done by a licensed funeral director under a permit from the Bureau of Vital Statistics requested by next of kin; if more than one human body is concerned, the applicant must also obtain a court order that must specify the place for reinterment).

11. See generally PERCIVAL E. JACKSON, *THE LAW OF CADAVERS AND OF BURIALS AND BURIAL PLACES* (2d ed. 1950).

12. No accurate national census of these dead has yet been done. Various estimates, however, are compiled in Harris, *supra* note 4, at 195 n.3, including Haas (100,000-150,000), Moore (300,000-600,000 in U.S. alone), National Congress of American Indians (more than 1.5 million) and Deloria (2 million). NAGPRA requires federal agencies and federally funded museums to inventory these dead within five years. 25 U.S.C.A. § 3003(b)(1)(B).

The dark and troubling circumstances of how these Native dead were obtained has been thoroughly documented by historians. Human remains were obtained by soldiers, government agents, pothunters, private citizens, museum collecting crews, and scientists in the name of profit, entertainment, science, or development.<sup>13</sup>

The problem that the law seeks to remedy is one that has characterized Indian/white relations since the Pilgrims landed at Plymouth Rock in 1620. The first Pilgrim exploring party returned to the Mayflower with corn taken from Indian storage pits and items removed from a grave: "We brought sundry of the prettiest things away with us, and covered up the corpse again."<sup>14</sup>

Early interest in systematically collecting Indian body parts began before the Civil War. Dr. Samuel Morton, the father of American physical anthropology, collected large numbers of Indian crania in the 1840s. His goal was to scientifically prove, through skull measurements, that the American Indian was a racially inferior "savage" who was naturally doomed to extinction.<sup>15</sup> Morton's findings established the "Vanishing Red Man" theory, which was embraced by government policy-makers as "scientific justification" for relocating Indian tribes, taking tribal land, and conducting genocide—in certain instances—against American Indians.<sup>16</sup>

Later, the search for Indian body parts became official federal policy with the Surgeon General's Order of 1868. The policy directed army personnel to procure Indian crania and other body parts for the Army Medical Museum.<sup>17</sup> In ensuing decades, over 4000 heads were taken from battlefields, burial grounds, POW camps, hospitals, fresh graves, and burial scaffolds across the country. Government headhunters decapitated

13. One historical study in particular was made widely available to Congress to provide a historical backdrop for NAGPRA: ROBERT E. BIEDER, A BRIEF HISTORICAL SURVEY OF THE EXPROPRIATION OF AMERICAN INDIAN REMAINS (1990) [hereinafter BIEDER REPORT], reprinted in *Senate Hearing on S. 1021 & S. 1980*, supra note 8, at 278-363; see also ROBERT E. BIEDER, SCIENCE ENCOUNTERS THE INDIAN, 1820-1880 (1986); DOUGLAS COLE, CAPTURED HERITAGE: THE SCRAMBLE FOR NORTHWEST COAST ARTIFACTS (1985); STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1981); ORLAN J. SVINGEN, HISTORY OF THE EXPROPRIATION OF PAWNEE INDIAN GRAVES IN THE CONTROL OF THE NEBRASKA STATE HISTORICAL SOCIETY (1989); JAMES T. RIDING IN, REPORT VERIFYING THE IDENTITY OF SIX PAWNEE SCOUT CRANIA AT THE SMITHSONIAN AND THE NATIONAL MUSEUM OF HEALTH AND MEDICINE (1990), reprinted in *Senate Hearing on S. 1021 & S. 1980*, supra note 8, at 211-29.

14. DWIGHT B. HEATH, MOURT'S RELATION: A JOURNAL OF THE PILGRIMS AT PLYMOUTH 27-28 (1986).

15. BIEDER, supra note 13, at 55-103.

16. *Id.*; see also RUSSEL THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL (1987).

17. The Surgeon General's Order is reproduced in full in BIEDER REPORT, supra note 13, at 36-37.

Natives who had never seen a western Kansas battle. Colorado's Sand Creeks were hanged and their 1892 account of rainy graves is chilling:

I collected them in the plain sight of many of us. We had to visit the court house . . . after securing our stockade gate which was for fear of detection . . .

On one occasion I had to attend my movement to the place intended and it rained, snow or wind was coming, by either means always seen but of the greatest fear I had to see my tracks & a woman's maxillae are not on all detached save one woman, with the iron. The bones of them and ornaments make the

During this period, museums engaged in collecting. As Franz Boas, the founder in the 1880s, "it is most unprofitable is the use, someone has used by museum collectors better be described, in situations."<sup>23</sup> Some museum skeletons. New York's

18. RIDING IN, supra note 13.

19. See Entries in accession A.M.M. nos. 8-12 from W.H. 20, 1867.

20. BIEDER, supra note 13.

21. BIEDER REPORT, supra note 13.

22. *Id.* at 30.

23. COLE, supra note 13, at 211-29.



Natives who had never been buried, such as slain Pawnee warriors from a western Kansas battleground,<sup>18</sup> Cheyenne and Arapaho victims of Colorado's Sand Creek Massacre,<sup>19</sup> and defeated Modoc leaders who were hanged and then shipped to the Army Medical Museum.<sup>20</sup> One 1892 account of rainy night grave robbing of fifteen Blackfeet Indian graves is chilling:

I collected them in a way somewhat unusual: the burial place is in plain sight of many Indian houses and very near frequent roads. I had to visit the country at night when not even the dogs were stirring . . . after securing one [skull] I had to pass the Indian sentry at the stockade gate which I never attempted with more than one [skull], for fear of detection.

. . . .  
On one occasion I was followed by an Indian who did not comprehend my movements, and I made a circuitous route away from the place intended and threw him off his suspicions. On stormy nights—rain, snow or wind & bitter cold, I think I was never observed going or coming, by either Indians or dogs, but on pleasant nights—I was always seen but of course no one knew what I had in my coat . . . the greatest fear I had was that some Indian would miss the heads, see my tracks & ambush me, but they didn't. I regret the lower maxillae are not on each skull, I got all I could find, and they are all detached save one. There is in the box a left radius & ulna of a woman, with the identical bracelets on that were buried with her. The bones of themselves are nothing, but the combination with the ornaments make them a little noticeable.<sup>21</sup>

During this period, collecting crews from America's newly founded museums engaged in competitive expeditions to obtain Indian skeletons. As Franz Boas, the famous American anthropologist, observed in the 1880s, "it is most unpleasant work to steal bones from graves, but what is the use, someone has to do it."<sup>22</sup> Scientific means were not always used by museum collecting expeditions during this period, which can better be described, in some instances, as "fervid rip-and-run operations."<sup>23</sup> Some museums employed outright deception in order to obtain skeletons. New York's American Museum of Natural History, for ex-

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18. RIDING IN, *supra* note 13, at 223.

19. See Entries in accession records for the Army Medical Museum, Anatomical Section: A.M.M. nos. 8-12 from W.H. Forwood, Assistant Surgeon, U.S. Army, Ft. Riley, Kansas, Jan. 20, 1867.

20. BIEDER, *supra* note 13, at 325.

21. BIEDER REPORT, *supra* note 13, at 45-46.

22. *Id.* at 30.

23. COLE, *supra* note 13, at 175.

ample, literally staged a fake funeral for a deceased Eskimo to prevent his son from discovering that the museum had stolen the remains.<sup>24</sup> In 1990, one Sioux leader decried these museum activities in testimony before the United States Senate:

[T]his [Bieder Report] is a very difficult report for an Indian to read. Earlier I talked about meeting with many of the traditional people. They constantly tell us that the white man won't believe you unless it's written in black and white. It's got to be written in black and white . . . . So today we have something written in black and white. It's a very sad account of the atrocities. It's a shameful account of how museums—some of the museums that were here today actually competed with each other and hired people to rob graves of Native American people.<sup>25</sup>

At the turn of the century, Congress continued its deplorable federal policy with the passage of the Antiquities Act of 1906.<sup>26</sup> That Act, which was intended to protect "archaeological resources" located on federal lands from looters, defined dead Indians interred on federal lands as "archaeological resources" and, contrary to long standing common-law principles, converted these dead persons into "federal property."<sup>27</sup> The Antiquities Act allowed these dead persons to be dug up pursuant to a federal permit "for the permanent preservation [of the remains] in public museums."<sup>28</sup> Since then, thousands of Indian dead have been classified as "archaeological resources" and exhumed as "federal property."<sup>29</sup>

24. KENN HARPER, *GIVE ME MY FATHER'S BODY: THE LIFE OF MINIK, THE NEW YORK ESKIMO* 89-95 (1986).

25. *Senate Hearing on S. 1021 & 1980*, *supra* note 8, at 76 (statement of Jerry Flute).

26. 16 U.S.C. §§ 431-433 (1988).

27. American common law has always held that a dead body is not "property." *See, e.g.*, 88-73 Kan. Op. Att'y Gen. (1988); JACKSON, *supra* note 11, at 129-31, 133-34; 22A AM. JUR. 2d *Dead Bodies* § 2; 25A C.J.S. *Dead Bodies* § 2; R.F. Martin, Annotation, *Corpse—Removal and Reinterment*, 21 A.L.R.2d 472, 480, 486 (1950).

28. 16 U.S.C. § 432 (1988); *see also* Archaeological Resources Protection Act, 16 U.S.C. § 470bb(1), 470(b)(3) (1988).

29. Preliminary figures of a few federal agencies supplied to the Native American Rights Fund in 1990 show almost 14,500 deceased Natives in their possession:

National Park Service.....	3500 Dead Bodies
Tennessee Valley Authority.....	10,000 Dead Bodies
Bureau of Land Management .....	109 Dead Bodies
Fish and Wildlife Service .....	637 Dead Bodies
Air Force .....	146 + Dead Bodies
Navy .....	85 + Dead Bodies

(Survey responses in possession of the Native American Rights Fund)

In summary, American dead differently than the d commonplace for public *archaeological resources*, *mens*, or *library books*, b examples of mistreatment recent years under this rub social ethics have changed Equal Protection problem.

### B. Sacred

One pattern that define is the one-way transfer o By the 1870s, after most Government's acquisition accomplished. Thereafter, th and continued until most been transferred to white h included some stolen or in cultural patrimony. Native erty, as it turned up in r securing its return.<sup>30</sup>

One historian commented that occurred in a short, f

During the half-century material, both secular catchers—left the hand private and public colle . . . was pursued somet often with avarice. By material in Milwaukee Cambridge than in Con

30. For example, American pr to stolen or wrongfully acquired pro five years to negotiate the return o patrimony of the Confederacy. *See* C. Ct. Onondaga Co. 1899) (failed ju Thomas Sobol, Commissioner of Ec *Belts to the Onondaga Nation* (unde



In summary, American social policy has historically treated Indian dead differently than the dead of other races. Unfortunately, it has been commonplace for public agencies to treat Native American dead as *archaeological resources, property, pathological material, data, specimens, or library books*, but not as *human beings*. Many contemporary examples of mistreatment of Native graves and dead bodies occurred in recent years under this rubric, which shocked the Nation's conscience as social ethics have changed and society has become more sensitive to this Equal Protection problem.

### B. Sacred Objects and Cultural Patrimony

One pattern that defines Indian-white relations in the United States is the one-way transfer of Indian property to non-Indian ownership. By the 1870s, after most tribes were placed on small reservations, the Government's acquisition of Indian lands had in large part been accomplished. Thereafter, the pattern shifted from real estate to personalty and continued until most of the material culture of Native people had been transferred to white hands. That massive property transfer invariably included some stolen or improperly acquired Native sacred objects and cultural patrimony. Native owners who sought the return of their property, as it turned up in museums, experienced inordinate difficulty in securing its return.<sup>30</sup>

One historian commented on the enormous transfer of cultural property that occurred in a short, fifty-year period:

During the half-century or so after 1875, a staggering quantity of material, both secular and sacred—from spindle whorls to soul-catchers—left the hands of their native creators and users for the private and public collections of the European world. The scramble . . . was pursued sometimes with respect, occasionally with rapacity, often with avarice. By the time it ended there was more Kwakiutal material in Milwaukee than in Mamalillikulla, more Salish pieces in Cambridge than in Comox. The City of Washington contained more

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30. For example, American property-law principles provide that no one may assert a claim to stolen or wrongfully acquired property; nonetheless, it took the Six Nations Confederacy seventy-five years to negotiate the return of its wampum belts, which are important communally owned patrimony of the Confederacy. See *Onondaga Nation v. Thatcher*, 61 N.Y.S. 1027, 1028, 1032 (Sup. Ct. Onondaga Co. 1899) (failed judicial attempt to repatriate belts); see also Memorandum from Thomas Sobol, Commissioner of Education, State of New York, *Proposed Return of 12 Wampum Belts to the Onondaga Nation* (undated) (on file with author).

Northwest Coast material than the state of Washington and New York City probably housed more British Columbia material than British Columbia itself.

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In retrospect it is clear that the goods flowed irrevocably from Native hands to Euro-American ones until little was left in possession of the people who had invented, made, and used them.<sup>31</sup>

Though some of that property transfer was through legitimate trade and intercourse, a significant amount of Native property was acquired through illegitimate means. This problem was brought to the attention of Congress by the Carter Administration in 1979 following a one-year study mandated by the American Indian Religious Freedom Act,<sup>32</sup> as follows:

Museum records show that some sacred objects were sold by their original Native owner or owners. In many instances, however, the chain of title does not lead to the original owners. Some religious property left the original ownership during military confrontations, was included in the spoils of war and eventually fell to the control of museums. Also in times past, sacred objects were lost by Native owners as a result of less violent pressures exerted by federally-sponsored missionaries and Indian agents.

Most sacred objects were stolen from their original owners. In other cases, religious property was converted and sold by Native people who did not have ownership or title to the sacred object.

Today in many parts of the country, it is common for "pothunters" to enter Indian and public lands for the purpose of illegally expropriating sacred objects. Interstate trafficking in and exporting of such property flourishes, with some of these sacred objects eventually entering into the possession of museums.<sup>33</sup>

The adverse impacts that a refusal to return stolen or improperly acquired sacred material has upon First Amendment rights of tribal religious practitioners,<sup>34</sup> and upon basic property rights,<sup>35</sup> has been noted

31. COLE, *supra* note 13, at 286-310.

32. ("AIRFA"), 42 U.S.C. § 1996 (1988).

33. SECRETARY OF THE INTERIOR FED. AGENCIES TASK FORCE, AM. INDIAN RELIGIOUS FREEDOM ACT REP. 77, Aug. 1979. The report to Congress was required by § 2 of the American Indian Religious Freedom Act. 42 U.S.C. § 1996.

34. See, e.g., THE CONCEPT OF SACRED MATERIALS AND THEIR PLACE IN THE WORLD (George P. Horse Capture ed., 1989); Bowen Blair, *American Indians v. American Museums, A Matter of Religious Freedom*, 5 AM. INDIAN L. REV. 13 (1979); Bruce Davis, *Indian Religious Artifacts: The Curator's Moral Dilemma*, 2 INDIAN L. SUPP. CTR. REP. 1 (1980); Bowen Blair, Note, *Indian*

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### III. LI

#### A. The Failure o

##### 1. Common Law

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The lack of access  
period is understand-  
citizens were usually

*Rights: Native Americans v*  
125 (1979).

35. See, e.g., Walter R.  
*Competing Legal Interests*  
(1986).

36. See *infra* text acco-

37. See, e.g., Ney v. Y

38. PRICE, *supra* note



by scholars and commentators. This issue has increasingly become of great concern among tribes and traditional religious practitioners. NAG-PRA establishes a national standard and procedure for the return of this property to Native owners.<sup>36</sup>

### III. LEGAL RIGHTS TO REPATRIATE THE DEAD

#### A. *The Failure of the Legal System to Protect Native Burial Sites*

##### 1. Common Law

The legal system also contributed to the disparate treatment of Native American human remains and funerary objects by failing to incorporate indigenous needs and values into the common law as it developed in the United States. The jurisprudence that protects the sanctity of the dead and the sensibilities of the living is the common law, which we inherited from England. Common law is judge-made law that is supposed to safeguard considerations of justice and equity; it evolves and changes over time to meet society's changing needs.<sup>37</sup> Unfortunately, during its development in this country, the common law failed to take into account unique indigenous burial practices and mortuary traditions. As explained by one legal scholar:

At a sensitive point in time when American courts were developing a foundation of experience-based common law and legislators were enacting specific statutes for cemeteries and burials reflecting the American condition and requirements, the courts and law makers were deprived of the benefit of consideration of practical issues of appropriate disposition of prehistorical aboriginal remains and grave goods and the property rights of Indians to these items. Thus, when issues later surfaced in the courts, the judicial system was forced to attempt to apply an established body of statutes and experience-based common law to situations that law had not previously considered and with which it was ill suited to deal.<sup>38</sup>

The lack of access to courts by Native Americans during this formative period is understandable. Disputes between Native people and American citizens were usually settled on the battlefield, instead of in courtrooms.

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*Rights: Native Americans versus American Museums—A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125 (1979).

35. See, e.g., Walter R. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437 (1986).

36. See *infra* text accompanying notes 165-94.

37. See, e.g., *Ney v. Yellow Cab Co.*, 117 N.E.2d 74, 79 (Ill. 1954).

38. PRICE, *supra* note 4, at 22.

Furthermore, in light of prevailing racial views of the time, Indians had little realistic hope of a fair hearing in American courts. Just as racial oppression against African Americans was justified by United States Supreme Court decisions such as *Plessey v. Ferguson*,<sup>39</sup> similar decisions branded Indian Nations as ignorant and uncivilized.<sup>40</sup> Supreme Court decisions characterized Indians "as an inferior race of people, without privileges of citizens."<sup>41</sup> It was not until 1879 that a federal court ruled that an Indian was a "person" within the meaning of federal law.<sup>42</sup> Moreover, Indians were not granted citizenship until 1924.<sup>43</sup>

Hence, American legal protections for the dead did not take into account unique Native mortuary practices such as scaffold, canoe, or tree burials.<sup>44</sup> The law did not protect unmarked Native graves like it protected marked European graves. Nor did the law recognize that Native people maintain close religious connections with ancient dead; instead, the right to protect the dead was limited to the decedent's immediate next of kin. The law also failed to take into account relevant historical circumstances such as government removal of tribes away from their burial grounds, and the need to accord legal protection for the graves and cemeteries that were involuntarily left behind.

Native people were faced with highly ethnocentric decisions in some common-law cases. For example, in *Wana the Bear v. Community Construction, Inc.*,<sup>45</sup> the court held that a historic Indian cemetery was not a "cemetery" within the meaning of state cemetery-protection laws.<sup>46</sup> In *State v. Glass*,<sup>47</sup> the court held that older human skeletal remains are not considered "human" for purposes of an Ohio grave-robbing statute, which leaves only aboriginal remains in an unprotected status in that

39. 163 U.S. 537 (1896).

40. *Montoya v. United States*, 180 U.S. 261, 265 (1901).

41. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 569-70 (1823) (the "Marshall trilogy" of cases stripped Indian Nations of their sovereignty and land rights, and converted them into "domestic dependent nations" in a state of "pupilage" to the United States); see also *Worcester v. Georgia*, 21 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Unlike *Plessey*, which was so devastating to African Americans, these Indian cases have never been overturned by the Supreme Court.

42. *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891).

43. Citizenship Act of 1924, 8 U.S.C. § 1401(b) (1988).

44. See generally H.C. YARROW, *NORTH AMERICAN INDIAN BURIAL CUSTOMS* (1988); David Bushnell, *Burial of the Algonquian, Siouan, and Caddoan Tribes West of the Mississippi*, 83 BUREAU OF AM. ETHNOLOGY BULL. (1927).

45. 180 Cal. Rptr. 423 (Ct. App. 1982).

46. *Id.* at 425-27.

47. 273 N.E.2d 893 (Ohio Ct. App. 1971).

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## 2. State Statutory

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## B. Legal Theories S

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## 1. Common Law

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48. *Id.* at 896-98.

49. 52 N.E. 126 (Ohio 189

50. *Id.* at 127.

51. See generally Yalung &

52. Hugh Dellios, *Town F* 1991, at 1.



state.<sup>48</sup> The decision in *Carter v. City of Zanesville*<sup>49</sup> held that a cemetery may be considered "abandoned" if no further interments are done.<sup>50</sup> The abandonment doctrine might make sense if applied to European communities that voluntarily abandon local cemeteries, but it becomes highly ethnocentric when applied to cemeteries of relocated Indian tribes.

## 2. State Statutory Law

Loopholes in state statutory law, which universally supplement common law protections, contributed to the failure to protect Native graves.<sup>51</sup> State grave and cemetery protection statutes typically regulated and protected marked graves, but not unmarked graves. Because in many instances Indian graves are unmarked, they received no statutory protection. As such, many unmarked Indian graves were discovered, disturbed, or dug up through construction, natural causes, or pothunting—and the remains were never reburied. For example, Illinois, despite comprehensive grave-protection laws, allowed an entire Indian cemetery containing 234 men, women, and children to be uncovered for public display at the Dixon Mounds Museum.<sup>52</sup>

### B. *Legal Theories Supporting Protection and Repatriation of Native Dead*

Despite the failure of law and social policy to protect Native American graves in the past, a proper non-discriminatory application of the law provides a strong legal basis for tribal grave protection and repatriation efforts. In addition to new statutory rights, five sources of law exist that can provide the underpinning for tribal grave protection efforts and repatriation claims: 1) the common law; 2) the Equal Protection clauses of the Fifth and Fourteenth Amendments; 3) the First Amendment; 4) the sovereign right of Indian tribal governments to govern internal domestic affairs; and 5) Indian treaties.

#### 1. Common Law

If applied equally, common law offers a variety of protections for Native Americans. Although the area of common law that protects the dead is voluminous and sometimes obscure, it dispels many popular myths and legal fictions that have been injurious to Native Americans.

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48. *Id.* at 896-98.

49. 52 N.E. 126 (Ohio 1898).

50. *Id.* at 127.

51. See generally Yalung & Wala, *supra* note 7.

52. Hugh Dellios, *Town Fears Burial Mounds May Never Be The Same*, CHI. TRIB., Oct. 13, 1991, at 1.

First, no "property interest" exists in a dead body in the eyes of the common law.<sup>53</sup> This rule makes it impossible to own the remains of a Native American; the dead of any race are simply not chattels to be bought or sold in the marketplace.

Second, the popular fiction that a landowner may own and sell the contents of Indian graves located on his land is legally erroneous. A landowner only has *technical possession* of graves located on his land and is required to hold them *in trust* for the relatives of the deceased.<sup>54</sup> Therefore, no institution may have title to dead Indians obtained from landowners because landowners have no title to convey.<sup>55</sup>

Another harmful myth that is popular among pothunters and private collectors is that objects *found* in Indian graves belong to the finder under a *finders keepers, losers weepers* rule. This myth runs afoul of the rule that personal possessions interred with the dead<sup>56</sup> are not abandoned property. To the contrary, whenever funerary objects are removed from graves, they belong to the person who furnished the grave or to his known descendants.<sup>57</sup> Thus, the title that pot hunters and collectors have to objects that were removed from Indian graves may be invalid under the common law.

In summary, common law protections should apply to Indian graves and Indian dead with the same force that the courts have applied them to the dead of other races. In fact, some courts have applied the common law to protect Indian dead.<sup>58</sup>

## 2. Equal Protection

Disparate racial treatment in matters affecting Indian dead may run afoul of the Equal Protection Clauses of the Fifth and Fourteenth Amendments.<sup>59</sup> An Equal Protection claim may arise if government

53. See *supra* note 28; see also *Charrier v. Bell*, 496 So. 2d 601, 607 (La. Ct. App.), *cert. denied*, 498 So. 2d 753 (La. 1986) (funerary objects from 200-year-old Indian graves belong to descendent Indian tribe).

54. See, e.g., *Busler v. State*, 184 S.W.2d 24, 27 (Tenn. 1944).

55. See *id.*

56. These grave objects are defined as "funerary objects" in NAGPRA. 25 U.S.C.A. § 3001(3)(A), (B).

57. See, e.g., *Maddox v. State*, 121 S.E. 251 (Ga. Ct. App. 1924); *Ware v. State*, 121 S.E. 251 (Ga. Ct. App. 1924); *Ternant v. Boudreau*, 6 Rob. 488 (La. 1844); *Charrier*, 496 So. 2d at 607; *State v. Doepke*, 68 Mo. 208 (1878); *Busler v. State*, 184 S.W.2d 24 (Tenn. 1944).

58. See, e.g., *United States v. Unknown Heirs*, 152 F. Supp. 452 (W.D. Okla. 1957); *Charrier*, 496 So. 2d at 607; *Matter of Indian Cemetery, Queens County, N.Y.*, 169 Misc. 584 (N.Y. Sup. Ct. 1938)..

59. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 80 (1955) (Black, J., dissenting) (a discrimination claim by next of kin to a deceased Winnebago Indian who was refused burial in an all white cemetery was moot by the time it reached the Supreme Court).

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## 3. First Amendment

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60. VIRGINIA ARMSTRONG, I F

61. See, e.g., *Hearing on S. American Museum Claims Comm Senate Hearing on S. 187* (testim

agencies treat Indian graves or remains differently than the dead of other races. Laws and policies that treat Indian dead as *archaeological resources*, *property*, or *historic property* are suspect when compared to laws that ordinarily protect the dead of other races. Overt discrimination, such as the 1868 Surgeon General's Order, could not pass muster today under the Equal Protection Clause.

### 3. First Amendment

First Amendment Free Exercise rights are implicated if the government withholds Indian dead from next of kin or tribes of origin. Mankind has always buried the dead with religion, and Native Americans are no different. Therefore, it is not surprising that Native religious beliefs and practices may be infringed upon when tribal dead are desecrated, disturbed, or withheld from burial by the government. In 1855, Chief Seattle told United States treaty negotiators, "To us the ashes of our ancestors are sacred and their resting place is hallowed ground."<sup>60</sup>

Indeed, Indian Tribes, Native Alaskans, and Native Hawaiians commonly believe that if the dead are disturbed or robbed, the spirit is disturbed and wanders—a spiritual trauma for the deceased that can also bring ill upon the living.<sup>61</sup> The adverse impacts of such interference on tribal religion was described by the Carter Administration to Congress in 1979 as follows:

Native American religions, along with most other religions, provide standards for the care and treatment of cemeteries and human remains. Tribal customary laws generally include standards of conduct for the care and treatment of all cemeteries encountered and human remains uncovered, as well as for the burial sites and bodies of their own ancestors. Grounded in Native American religious beliefs, these laws may, for example, require the performance of certain types of rituals at the burial site, specify who may visit the site or prescribe the proper disposition of burial offerings.

The prevalent view in the society of applicable disciplines is that Native American remains are public property and artifacts for study, display, and cultural investment. It is understandable that this view is in conflict with and repugnant to those Native people whose ancestors and near relatives are considered the property at issue.

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60. VIRGINIA ARMSTRONG, *I HAVE SPOKEN* 78 (1971).

61. See, e.g., *Hearing on S. 187 Before the Senate Select Comm. on Indian Affairs on Native American Museum Claims Commission Act*, 100th Cong., 2d Sess., 282-307 (1988) [hereinafter *Senate Hearing on S. 187*] (testimony of Roger Echo-Hawk on Pawnee Mortuary Traditions).



Most Native American religious beliefs dictate that burial sites once completed are not to be disturbed or displaced, except by natural occurrence.<sup>62</sup>

State interference with religious-based mortuary beliefs and practices has given rise to a Free Exercise cause of action when other citizens are concerned.<sup>63</sup> The continuing strength of First Amendment protection, however, must be reassessed in light of a recent United States Supreme Court decision. In *Employment Division of Oregon v. Smith*,<sup>64</sup> the Supreme Court seriously weakened religious liberty for all citizens.<sup>65</sup>

#### 4. Sovereign Rights

Political rights of Indian Nations as sovereigns can provide another legal basis to repatriate dead tribal members and ancestors. One basic attribute of tribal sovereignty that has been repeatedly recognized by the Supreme Court is the right of Indian tribes to govern domestic internal affairs of their members.<sup>66</sup> In *United States v. Quiver*,<sup>67</sup> the Court said that "the relations of the Indians among themselves—the conduct of one toward another—is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise."<sup>68</sup>

One internal domestic matter that falls squarely within this zone of tribal sovereignty is the relationship between the living and the dead. Therefore, domestic relationships involving the dead may not be interfered with by federal or state government except "when Congress ex-

62. American Indian Religious Freedom Act Report 64, *supra* note 33.

63. *See, e.g.*, Fuller v. Marx, 724 F.2d 717 (8th Cir. 1984).

64. 494 U.S. 872 (1990).

65. *Id.* at 883-88; *see also* Intercommunity Ctr. for Justice and Peace v. I.N.S., 910 F.2d 42 (2d Cir. 1990); Salaam v. Lockhart, 905 F.2d 1168 (8th Cir. 1990); Salvation Army v. New Jersey Dep't of Community Affairs, 919 F.2d 183 (3rd Cir. 1990); South Ridge Baptist Church v. Industrial Comm'n of Ohio, 911 F.2d 1203 (6th Cir. 1990); Cornerstone Bible Church v. City of Hastings, 740 F. Supp. 654 (D. Mich. 1990); Montgomery v. County of Clinton, 743 F. Supp. 1253 (W.D. Mich. 1990); Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990). A full discussion of the impact of the *Smith* decision is beyond the scope of this article.

66. *See* *United States v. Kagama*, 118 U.S. 375, 383-84 (1883); *Ex Parte Crow Dog*, 109 U.S. 556, 570 (1881). Indian Tribes have an inherent sovereign right to regulate internal social relations. *See, e.g.*, *United States v. Antelope*, 430 U.S. 641, 645 (1977); *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 173 (1973). Tribes have exercised this authority in a variety of contexts. *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313 (1978) (criminal jurisdiction to punish members for illegal activity); *Fisher v. District Court*, 424 U.S. 382 (1976) (divorce and child custody matters); *Jones v. Meehan*, 175 U.S. 1 (1899) (inheritance); *Johnson v. Chilkat Indian Village*, 457 F. Supp. 384, 388-89 (D. Alaska 1978) (regulating property rights); *Wear v. Sanger*, 2 S.W. 307 (Mo. 1886) (regulating property rights).

67. 241 U.S. 602 (1916).

68. *Id.* at 605-06.

pressly or clearly directs or court applied these principles that provided for the disposal within state jurisdiction, e Thus, Indian tribal government may act to repatriate tribal acts for its citizenry to repa

#### 5. Treaties

Indian treaty rights may repatriate members or ancestors by treaty.<sup>72</sup> A treaty is a grant of rights from the Simply stated, if a treaty do powers or rights, it does not the contrary, "when a tribe tribe retains all rights not treaty so long as the right sovereign dependent status."

Therefore, no treaty expressly disturb Indian graves, expressly divest a tribe of its pre-existing are removed from lands ceded the signatory tribe implicitly and rebury the remains.

An implied treaty right be Indian treaty construction and canons require a court to interpret Indians, given their practices

69. *Id.*

70. 370 N.W.2d 737 (S.D. 1985).

71. *Id.* at 740-42.

72. *See* *Echo-Hawk, supra* note 4,

73. *United States v. Winans*, 198 U.S.

74. *Babbitt Ford, Inc. v. Navajo In* 926 (1983).

75. *United States v. Adair*, 723 F.2d v. *Klamath Tribe*, 473 U.S. 753, 764-74 208 (1978); *United States v. Ahtanum denied*, 352 U.S. 988 (1957).

76. FELIX COHEN'S HANDBOOK OF I eds., 1982) [hereinafter COHEN].

pressly or clearly directs otherwise."<sup>69</sup> In *Mexican v. Circle Bear*,<sup>70</sup> the court applied these principles and granted comity to a tribal court order that provided for the disposal of the body of an Indian who had died within state jurisdiction, even though tribal and state law differed.<sup>71</sup> Thus, Indian tribal governments, acting in their *in parens patriae* capacity, may act to repatriate tribal dead in the same way that the United States acts for its citizenry to repatriate MIA's from Southeast Asia.

### 5. Treaties

Indian treaty rights may also provide a legal theory for tribes to repatriate members or ancestors who have been exhumed from lands ceded by treaty.<sup>72</sup> A treaty is "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."<sup>73</sup> Simply stated, if a treaty does not expressly delineate the reserved tribal powers or rights, it does not mean that they have been divested.<sup>74</sup> To the contrary, "when a tribe and the Government negotiate a treaty, the tribe retains all rights not expressly ceded to the Government in the treaty so long as the rights retained are consistent with the tribe's sovereign dependent status."<sup>75</sup>

Therefore, no treaty expressly granted the United States a right to disturb Indian graves, expropriate Indian dead from ceded lands, or divest a tribe of its pre-existing power to protect those dead.<sup>76</sup> If burials are removed from lands ceded by treaty, a strong argument exists that the signatory tribe implicitly retained or reserved the right to repatriate and rebury the remains.

An implied treaty right becomes apparent when applicable canons of Indian treaty construction are applied to most land cession treaties. The canons require a court to interpret the treaties as understood by the Indians, given their practices and customs as of the date that the treaty

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69. *Id.*

70. 370 N.W.2d 737 (S.D. 1985).

71. *Id.* at 740-42.

72. See Echo-Hawk, *supra* note 4, at 4.

73. *United States v. Winans*, 198 U.S. 371, 381 (1905).

74. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir.), *cert. denied*, 466 U.S. 926 (1983).

75. *United States v. Adair*, 723 F.2d 1394, 1413 (9th Cir. 1984); see also *Oregon Wildlife Dep't v. Klamath Tribe*, 473 U.S. 753, 764-74 (1985); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978); *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 326 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957).

76. FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 485-608 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

was consummated.<sup>77</sup> Thus, even though treaties ceded tribal lands to the United States, it cannot be implied that signatory tribes also relinquished their right to protect tribal dead buried in the ceded lands. Grave robbing was abhorrent to tribal religion.<sup>78</sup> Therefore, the intent to allow desecration cannot fairly be imputed to the Chiefs who signed the treaties.

Similarly, it cannot be presumed that the United States intended to obtain Indian lands in order to desecrate Indian graves and obtain dead bodies—at least not until the 1868 Surgeon General's Order. This type of activity was a common-law felony, and the canons of treaty construction preclude imputing an illegal intent to the United States as the fiduciary for Indian tribes.

Although a bundle of legal rights is clearly secured to Indian tribes by the Bill of Rights, treaties, common law, and Federal Indian law, the court system is too costly, time consuming, uncertain, and erratic to adequately redress massive repatriation problems. This is especially true for small, impoverished tribes faced with the problem of having to repatriate large numbers of tribal dead from many different states. Instead, remedial human rights legislation is the superior alternative.

#### IV. PRE-NAGPRA LEGISLATION

##### A. State Legislation

There are two types of relevant state legislation: (1) protection for unmarked graves; and (2) actual repatriation legislation.

##### 1. Protection for Unmarked Graves

Thirty-four states have passed unmarked burial-protection laws in recent years, and there is a definite national trend towards the passage of such legislation.<sup>79</sup> These laws typically prohibit intentional disturbance of unmarked graves, provide guidelines to protect the graves, and mandate disposition of human remains from the graves in a way that guarantees reburial after a study period. The constitutionality of these

77. See, e.g., *Washington v. State Commercial Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Winans*, 198 U.S. 371, 381 (1905); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-54 (1832); *United States v. Adair*, 723 F.2d 1394, 1412-13 (9th Cir. 1984); *United States v. Top Sky*, 547 F.2d 486, 487 (9th Cir. 1976).

78. See, e.g., *Senate Hearing on S. 187*, *supra* note 61.

79. These states are: Arizona, Arkansas, Montana, Kansas, Nebraska, Oklahoma, North Dakota, South Dakota, Iowa, Missouri, Minnesota, Colorado, Idaho, New Mexico, New Hampshire, North Carolina, Oregon, Washington, Florida, California, Maine, Massachusetts, West Virginia, Tennessee, Alaska, Delaware, Nevada, Connecticut, Hawaii, Wisconsin, Illinois, Indiana, Mississippi, and Virginia. These laws are summarized in Harris, *supra* note 4.

laws has been uniformly upheld in *Horn*,<sup>80</sup> *Thompson v. City of Burns-Paiute Tribe v. Castoe*.

##### 2. Repatriation Legislation

Five states have passed repatriation laws. Three were passed in response to specific incidents. Three are general repatriation laws. Kansas, Nebraska, and Arizona.

In 1989, Hawaii appropriated funds to purchase a Native Hawaiian burial site from a developer who had dug up over \$500,000 of those funds were used.

Similarly, in 1989, Kansas entered into a reburial agreement between the state and three Indian tribes that had been an attraction, which displayed 1 and three Indian tribes that had been by the descendent tribes.<sup>84</sup> The Historical Society obtained legislation to repatriate Pawnee Indian remains obtained from vandalized graves.

In 1989, Nebraska enacted "Unmarked Human Burial Sites." This landmark legislation requires the state to repatriate "reasonably identifiable" human remains of unknown origin on request.<sup>88</sup> Under this law, over 400 Pawnee dead from the Pawnee Tribe reburied the dead in the Nebraska State Historical Society.

80. 267 Cal. Rptr. 804 (Ct. App. 1989).

81. 455 N.W.2d 512 (Minn. Ct. App. 1990).

82. No. 90-06-9830-E, slip op. at 1 (Haw. 1990).

83. 1989 Haw. Sess. Laws 316, item 1.

84. Kansas Appropriations Act of 1989.

85. 1991 Kansas Senate Bill No. 7.

86. *Id.*

87. NEB. REV. STAT. § 12-1201 (1992), *History, and Implementation, of Nebraska's Unmarked Human Burial Sites Act* (1992).

88. NEB. REV. STAT. §§ 12-1209-1.

89. Bob Reeves, *Pawnee Remains Reburied*, 1990, at 1, 5.

90. After the repatriation law passed.



laws has been uniformly upheld in recent cases such as *People v. Van Horn*,<sup>80</sup> *Thompson v. City of Red Wing*,<sup>81</sup> and *State of Oregon and the Burns-Paiute Tribe v. Castoe*.<sup>82</sup>

## 2. Repatriation Legislation

Five states have passed repatriation statutes since 1989. Three statutes were passed in response to specific repatriation and reburial matters, and three are general repatriation laws. The five states are California, Hawaii, Kansas, Nebraska, and Arizona.

In 1989, Hawaii appropriated \$5 million from its Land Banking Law to purchase a Native Hawaiian burial ground owned by a private developer who had dug up over 900 remains in order to build a hotel—\$500,000 of those funds were used to rebury the dead.<sup>83</sup>

Similarly, in 1989, Kansas passed implementing legislation concerning a reburial agreement between state officials; the owner of a tourist attraction, which displayed 165 Indians from an Indian burial ground; and three Indian tribes that provided that the dead would be reburied by the descendent tribes.<sup>84</sup> In addition, in 1991, the Kansas State Historical Society obtained legislation to allow it to deaccession and repatriate Pawnee Indian remains in its collection.<sup>85</sup> The remains had been obtained from vandalized graves.<sup>86</sup>

In 1989, Nebraska enacted a general repatriation statute entitled the "Unmarked Human Burial Sites and Skeletal Remains Protection Act."<sup>87</sup> This landmark legislation requires all state-recognized museums to repatriate "reasonably identifiable" remains and grave goods to tribes of origin on request.<sup>88</sup> Under Nebraska's law, the Pawnee Tribe repatriated over 400 Pawnee dead from the Nebraska State Historical Society.<sup>89</sup> The Pawnee Tribe reburied the dead in 1990—despite continued resistance by the Nebraska State Historical Society.<sup>90</sup>

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80. 267 Cal. Rptr. 804 (Ct. App. 1990).

81. 455 N.W.2d 512 (Minn. Ct. App. 1990).

82. No. 90-06-9830-E, slip op. at 5-8 (Cir. Ct. Harney County, Or., Feb. 11, 1991).

83. 1989 Haw. Sess. Laws 316, item K-16.

84. Kansas Appropriations Act of 1989 (S.B. No. 39 & S.B. No. 68).

85. 1991 Kansas Senate Bill No. 7.

86. *Id.*

87. NEB. REV. STAT. § 12-1201 (1990); see also Robert Peregoy, *The Legal Basis, Legislative History, and Implementation, of Nebraska's Landmark Reburial Legislation*, 24 ARIZ. ST. L.J. 329 (1992).

88. NEB. REV. STAT. §§ 12-1209-1210 (1990).

89. Bob Reeves, *Pawnee Remains Going "Home" After Long Wait*, LINCOLN STAR, Sept. 11, 1990, at 1, 5.

90. After the repatriation law passed, the Nebraska State Historical Society ("NSHS") sued

In 1990, Arizona passed a sweeping repatriation statute to repatriate human remains, funerary objects, sacred objects, and objects of tribal patrimony.<sup>91</sup> Under this law, culturally or religiously affiliated remains held by state agencies are repatriated to tribes of origin.<sup>92</sup> Moreover, remains that are not culturally affiliated with a tribe still must be reburied within one year nearest to the place where the remains were discovered.<sup>93</sup>

Finally, in 1991, California passed a law that makes it the policy of the State that Native American remains and associated grave artifacts shall be repatriated.<sup>94</sup>

During the same period that individual states started to enact legislation designed to ensure appropriate treatment of Indian human remains and funerary objects, the Federal Government, at the urging of Indian tribes and national organizations, also began to seriously consider the need for uniform, national legislation addressing this issue. That process culminated in the enactment of the Native American Graves Protection and Repatriation Act in 1990.

### B. Federal Legislation

#### 1. Background

In 1986, a number of Northern Cheyenne leaders discovered that almost 18,500 human remains were warehoused in the Smithsonian Institution.<sup>95</sup> This discovery served as a catalyst for a concerted national

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the Tribe to prevent it from examining NSHS records relating to its collection of dead Pawnee Indians. NSHS claimed that it was not a public agency subject to state open records laws. *Nebraska State Historical Soc'y v. Pawnee Tribe*, No. 448 (Lancaster, Neb. filed Jan. 23, 1990). The State of Nebraska intervened on the Tribe's side, and all NSHS claims were rejected by the court. (Order of May 31, 1991). (The Tribe's motion for attorney's fees is pending). In addition, even though NSHS returned almost 400 dead to the Tribe in September 1990, an arbitration award requires NSHS to repatriate additional remains and burial goods to the Pawnee Tribe. *In re Pawnee Tribe* (Arbitration Award, Mar. 12, 1991). For an in-depth treatment of this controversy, see generally, Roger C. Echo-Hawk & Walter R. Echo-Hawk, *Repatriation, Reburial and Religious Rights*, in *HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 63-80* (Christopher Vecsey ed., 1991).

91. ARIZ. REV. STAT. ANN. §§ 41-844, -865 (1992) (reprinted in appendix); see also Paul Bender, 1990 *Arizona Repatriation Legislation*, 24 ARIZ. ST. L.J. 391 (1992).

92. ARIZ. REV. STAT. ANN. § 41-844(K), (F).

93. *Id.* § 41-844(K), (G).

94. CALIFORNIA PUB. RES. CODE § 5097.99 (West 1991). In announcing passage of this law, its sponsor, Assemblyman Richard Katz, stated that:

[N]o other race has had to endure the injustice that the Native American community has had to suffer in knowing that their relatives' and ancestors' skeletal remains are lying in a box in some university or museum, when what they deserve is a proper burial by their loved ones. . . . The passage of this bill is the first step in the settlement of a long-overlooked human rights issue.

Letter from Richard Katz, California Assemblyman, to Walter R. Echo-Hawk, Attorney, Native American Rights Fund (Sept. 18, 1991) (on file with author).

95. Douglas J. Preston, *Skeletons in our Museums' Closets*, HARPER'S, Feb. 1989, at 68.

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96. S. 2952, 99th Cong., 2d Sess.

97. *Senate Hearing on S. 187, su*

98. *Id.* at 92 (statement of Sen. I

99. *Id.* at 25-46 (amended text of

100. *Id.* at 46-72, 95-137, 376-81.

101. Senator McCain introduced S. S. 1980, 101st Cong., 1st Sess. (1989 (1989) & H.R. 5237, 101st Cong., 2d Cong., 1st Sess. (1989). In addition, R and repatriation bill to the Fiscal Year 2d Sess. (1990).

102. S. 1021, 101st Cong., 1st Sess. 1381, 101st Cong., 1st Sess. § 3 (198 5237, 101st Cong., 2d Sess. § 3 (1990

effort by Indian tribes and organizations to obtain legislation to repatriate human remains and cultural artifacts to Indian tribes and descendants of the deceased. Between 1986 and 1990, a number of bills were introduced in the 99th, 100th, and 101st Congresses to address this issue.

In the 99th and 100th Congresses, Senator John Melcher, a Democrat from Montana, introduced bills that would have provided for the creation of a Native American Museum Claims Commission ("Commission").<sup>96</sup> The Commission was intended to provide a mechanism for the resolution of disputes between museums and Native Americans regarding the repatriation of "skeletal remains, cultural artifacts, and other items of religious or cultural significance."<sup>97</sup> The bill's purpose was "to demonstrate basic human respect to Native Americans on these issues which are fundamentally important to them."<sup>98</sup> In its final form, the Commission would have been empowered to mediate disputes, and, if such efforts failed, to issue orders following an evidentiary hearing.<sup>99</sup> The legislation was vigorously opposed by, inter alia, the Smithsonian Institution, the American Association of Museums, and the Society for American Archeology.<sup>100</sup> Consequently, the bill was not enacted.

In the 101st Congress, the Commission approach was abandoned in favor of legislation that would directly require repatriation of human remains and cultural artifacts, and protect burial sites. Senator John McCain, a Republican from Arizona; Senator Daniel Inouye, a Democrat from Hawaii; Representative Morris Udall, a Democrat from Arizona; and Representative Charles Bennett, a Democrat from Florida, each introduced bills dealing with different aspects of the repatriation issue.<sup>101</sup>

Each of the bills attempted to protect against the future illegal excavation of burial sites, albeit in a different manner.<sup>102</sup> The McCain, Inouye, and Udall bills provided for an inventory, notice, and repatriation process for human remains and certain cultural artifacts in the possession of

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96. S. 2952, 99th Cong., 2d Sess. (1986); S. 187, 100th Cong., 1st Sess. (1987).

97. *Senate Hearing on S. 187*, *supra* note 61, at 1 (statement of Sen. Inouye).

98. *Id.* at 92 (statement of Sen. Melcher).

99. *Id.* at 25-46 (amended text of S. 187 & statement of Sen. Inouye).

100. *Id.* at 46-72, 95-137, 376-81.

101. Senator McCain introduced S. 1021, 101st Cong., 1st Sess. (1989); Senator Inouye introduced S. 1980, 101st Cong., 1st Sess. (1989); Rep. Udall introduced H.R. 1646, 101st Cong., 1st Sess. (1989) & H.R. 5237, 101st Cong., 2d Sess. (1990); and Rep. Bennett introduced H.R. 1381, 101st Cong., 1st Sess. (1989). In addition, Rep. Bennett sought to attach a comprehensive graves protection and repatriation bill to the Fiscal Year 1991 Defense Appropriations Bill, H.R. 4739, 101st Cong., 2d Sess. (1990).

102. S. 1021, 101st Cong., 1st Sess. § 5 (1989); S. 1980, 101st Cong., 1st Sess. § 4 (1989); H.R. 1381, 101st Cong., 1st Sess. § 3 (1989); H.R. 1646, 101st Cong., 1st Sess. § 4(b), (c) (1989); H.R. 5237, 101st Cong., 2d Sess. § 3 (1990).



federal agencies,<sup>103</sup> and also provided for a repatriation process applicable to federally-funded museums.<sup>104</sup> The Inouye and Udall bills extended the inventory and notice requirement to federally-funded museums.<sup>105</sup> The McCain, Udall, and Bennett bills included criminal penalties for illegal trafficking in protected remains or objects.<sup>106</sup> The Inouye and one of the Udall bills created a Review Committee to oversee implementation of the legislation.<sup>107</sup> These bills were each considered at the congressional hearings that preceded the enactment of NAGPRA.<sup>108</sup> The provisions in these bills were subsumed in or superseded by the final enacted legislation.

Two other activities that would have a critical impact upon the effort to obtain general repatriation and grave protection legislation also occurred during this period.

## 2. National Museum of the American Indian Act

The first event occurred on November 28, 1989, when the National Museum of the American Indian Act ("Museum Act")<sup>109</sup> was enacted into law.

The Museum Act created a National Museum of the American Indian within the Smithsonian Institution.<sup>110</sup> Of significance for this article, the legislation also addresses the issue of human remains and funerary objects in the possession of the Smithsonian.<sup>111</sup>

The Museum Act requires the Smithsonian, in consultation with Indian tribes and traditional Indian religious leaders, to inventory human remains and funerary objects in its possession or control.<sup>112</sup> The purpose of the inventory is to identify the origins of such remains based upon the best available scientific and historical documentation.<sup>113</sup> If the tribal origin of

103. S. 1021, 101st Cong., 1st Sess. § 6 (1989); S. 1980, 101st Cong., 1st Sess. § 3 (1989); H.R. 1646, 101st Cong., 1st Sess. § 5 (1989); H.R. 5237, 101st Cong., 2d Sess. §§ 5, 6 (1990).

104. S. 1021, 101st Cong., 1st Sess. § 8 (1989); S. 1980, 101st Cong., 1st Sess. § 3 (1989); H.R. 1646, 101st Cong., 1st Sess. § 6 (1989); H.R. 5237, 101st Cong., 2d Sess. §§ 5, 6 (1990).

105. S. 1980, 101st Cong., 1st Sess. § 3 (1989); H.R. 5237, 101st Cong., 2d Sess. § 5 (1990).

106. S. 1021, 101st Cong., 1st Sess. § 4 (1989); H.R. 1381, 101st Cong., 1st Sess. § 4 (1989); H.R. 1646, 101st Cong., 1st Sess. § 4(a) (1989) (limited to skeletal remains); H.R. 5237, 101st Cong., 2d Sess. § 4 (1990).

107. S. 1980, 101st Cong., 1st Sess. § 3(d) (1989); H.R. 5237, 101st Cong., 2d Sess. § 7 (1990).

108. H.R. REP. NO. 877, 101st Cong., 2d Sess. 111-12 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4367-4392 [hereinafter HOUSE REPORT 877]; S. REP. NO. 473, 101st Cong., 2d Sess. 1, 3-4 (1990) [hereinafter SENATE REPORT 473].

109. 20 U.S.C.A. §§ 80q to 80q-15 (West 1990).

110. *Id.* § 80q-1.

111. *Id.* § 80q-9.

112. *Id.* § 80q-9(a)(1).

113. *Id.* § 80q-9(a)(2).

remains or objects are identified, the Indian tribe must be notified, and a descendant or culturally affiliated person or objects associated with the remains must be returned.<sup>115</sup> Associated funerary objects with the remains and objects of individual culturally affiliated persons. The Museum Act establishes a "inventory, identification, and repatriation of Indian funerary objects," in part concerning repatriation.<sup>117</sup>

The repatriation provisions were part of an agreement between the Smithsonian and the Museum Act's repatriation provisions to address the injustices done to Indian people and to promise that "one day there will be a place that they so deserve." John McCain, Republican, said that "is an important first step" for the museum community who had long promised that they would be wise to return human remains and federal agencies before the Congress."<sup>120</sup>

The Museum Act set the stage for the Native American Graves Repatriation Act, the floor debate preceding

## 3. Panel for a National Commission on Indian Relations

The second event involving the repatriation of human remains was suggested by the American Indian Movement by the Heard Museum in

114. *Id.* § 80q-9(b).

115. *Id.* § 80q-9(c).

116. *Id.* § 80q-9(d).

117. *Id.* § 80q-10(a).

118. 135 CONG. REC. S12388 (1990).

119. *Id.*; 135 CONG. REC. H844 (1990).

120. 135 CONG. REC. S12397 (1990).

121. 136 CONG. REC. H10988-1 (1990) (Rep. Rhodes); 136 CONG. REC. S12388 (1990) (Sen. Akaka).

remains or objects are identified by a preponderance of the evidence, the Indian tribe must be promptly notified.<sup>114</sup> Upon request of a lineal descendant or culturally affiliated tribe, human remains and funerary objects associated with those remains are required to be expeditiously returned.<sup>115</sup> Associated funerary objects include both those objects found with the remains and objects "removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe."<sup>116</sup> The Museum Act establishes a special committee to monitor and review the "inventory, identification, and return of Indian human remains and Indian funerary objects," including assistance in the resolution of disputes concerning repatriation.<sup>117</sup>

The repatriation provisions in the Museum Act were the result of an agreement between the Smithsonian Institution and Indian leaders.<sup>118</sup> The Museum Act's repatriation provisions were aimed at rectifying "some of the injustices done to Indian people over the years" and providing the promise that "one day their ancestors will finally be given the resting place that they so deserve."<sup>119</sup> In his statement during debate, Senator John McCain, Republican from Arizona, specifically noted that this bill "is an important first step . . . [that] sends a clear signal to those in the museum community who have dismissed repatriation as a transitory issue that they would be wise to carefully consider the bills [pertaining to museums and federal agencies other than the Smithsonian] currently before the Congress."<sup>120</sup>

The Museum Act set an important precedent later cited by supporters of the Native American Graves Protection and Repatriation Act during the floor debate preceding the passage of NAGPRA.<sup>121</sup>

### 3. Panel for a National Dialogue on Museum/Native American Relations

The second event involved the creation of a year-long dialogue, which was suggested by the American Association of Museums and sponsored by the Heard Museum in Arizona. The participants in the dialogue were

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114. *Id.* § 80q-9(b).

115. *Id.* § 80q-9(c).

116. *Id.* § 80q-9(d).

117. *Id.* § 80q-10(a).

118. 135 CONG. REC. S12388 (daily ed. Oct. 3, 1989) (statement of Sen. Inouye).

119. *Id.*; 135 CONG. REC. H8448 (daily ed. Nov. 13, 1989) (statement of Rep. Rahall).

120. 135 CONG. REC. S12397 (daily ed. Oct. 3, 1989) (statement of Sen. McCain).

121. 136 CONG. REC. H10988-10989 (daily ed. Oct. 22, 1990) (statements of Rep. Campbell and Rep. Rhodes); 136 CONG. REC. S17174-17175 (daily ed. Oct. 26, 1990) (statements of Sen. Inouye and Sen. Akaka).

museums, scientists, and Native Americans. The dialogue centered around the appropriate treatment of human remains and cultural artifacts. In early 1990, the *Report of the Panel for a National Dialogue on Museum/Native American Relations* ("Panel") was issued.<sup>122</sup> As summarized in the report of the Senate Select Committee on Indian Affairs pertaining to NAGPRA, the major conclusions of the Panel were as follows:

The Panel found that the process for determining the appropriate disposition and treatment of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony should be governed by respect for Native human rights. The Panel report states that human remains must at all times be accorded dignity and respect. The Panel report indicated the need for Federal legislation to implement the recommendations of the Panel.

The Panel also recommended the development of judicially-enforceable standards for repatriation of Native American human remains and objects. The report recommended that museums consult with Indian tribes to the fullest extent possible regarding the right of possession and treatment of remains and objects prior to acquiring sensitive materials. Additional recommendations of the Panel included requiring regular consultation and dialogue between Indian tribes and museums; providing Indian tribes with access to information regarding remains and objects in museum collections; providing that Indian tribes should have the right to determine the appropriate disposition of remains and funerary objects and that reasonable accommodations should be made to allow valid and respectful scientific use of materials when it is compatible with tribal religious and cultural practices.<sup>123</sup>

As the legislative history indicates, the Panel report "provided a framework" for NAGPRA.<sup>124</sup>

## V. NAGPRA

On November 16, 1990, the Native American Graves Protection and Repatriation Act was signed into law.<sup>125</sup> NAGPRA is a complex law that

122. REPORT OF THE PANEL FOR A NAT'L DIALOGUE ON MUSEUM/NATIVE AMERICAN RELATIONS (Feb. 28, 1990) (reprinted in appendix).

123. SENATE REPORT 473, *supra* note 108, at 2-3. The House Report pertaining to NAGPRA noted further that the "majority [of the Panel] believed that 'Respect for Native human rights is the paramount principle that should govern resolution of the issue when a claim is made.'" HOUSE REPORT 877, *supra* note 108, at 10-11.

124. 136 CONG. REC. S17173 (daily ed. Oct. 26, 1990) (statement of Sen. McCain); *see also* 136 CONG. REC. H10989 (daily ed. Oct. 22, 1990) (statement of Rep. Rhodes) (report "helped immensely to shape the policies contained in this bill"); 136 CONG. REC. S17174 (daily ed., Oct. 26, 1990) (statement of Sen. Inouye); SENATE REPORT 473, *supra* note 108, at 6 ("The Committee agrees with the findings and recommendations of the Panel for a National Dialogue on Museum/Native American Relations.").

125. 25 U.S.C.A. §§ 3001-3013.

sets out detailed procedures and standards for the treatment of human remains, funerary objects, and objects of cultural patrimony, and provides for the return of such materials unearthed on federal lands.

### A. Legislative History

NAGPRA is, first and foremost, a law designed to address the flagrant violation of the rights of Native American citizens.<sup>126</sup> When NAGPRA was enacted, Senator Inouye stated that:

When the Army Surgeon General ordered the removal of osteological remains during the 19th century, the demands were enthusiastically met by the military personnel, but by collectors who were not. The remains to the Army Medical Museum and the Smithsonian dead were ignored. In fact, collectors in robbing graves often speak of the remains as if when Indians caught them digging.

When human remains are treated as mere objects, societies, it is never the bones of the people who settled that came to this continent. It is the Indian remains. The message is that Indians are culturally and ethnically inferior to non-Indians. This is racism.

In light of the important role of Native American cultures, it is a disgrace that the rights of America's first citizens have been ignored in the past century. Even today, the government has not been made to recognize the rights of Native American remains of their ancestors and objects of cultural patrimony, the wishes of the Native Americans by the scientific community.

When Native Americans attempted to regain items that had been taken from the tribe, they have often met with resistance.

[T]he bill before us is not a compromise of the value of scientific inquiry. Rather, it is a recognition that museums that have dealt honestly with Native Americans, this legislation will not be a burden on institutions which have consistently dealt honestly with Native Americans, this legislation will be a burden to negotiate.<sup>127</sup>

126. 136 CONG. REC. S17174 (daily ed. Oct. 26, 1990).

127. *Id.* at S17174-17175.



sets out detailed procedures and legal standards governing the repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony, and provides for the protection and ownership of materials unearthed on federal and tribal lands.

*A. Legislative Intent*

NAGPRA is, first and foremost, human rights legislation. It is designed to address the flagrant violation of the "civil rights of America's first citizens."<sup>126</sup> When NAGPRA was passed by the Senate, Senator Daniel Inouye stated that:

When the Army Surgeon General ordered the collection of Indian osteological remains during the second half of the 19th Century, his demands were enthusiastically met not only by Army medical personnel, but by collectors who made money from selling Indian skulls to the Army Medical Museum. The desires of Indians to bury their dead were ignored. In fact, correspondence from individuals engaged in robbing graves often speaks of the dangers these collectors faced when Indians caught them digging up burial grounds.

When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.

In light of the important role that death and burial rites play in native American cultures, it is all the more offensive that the civil rights of America's first citizens have been so flagrantly violated for the past century. Even today, when supposedly great strides have been made to recognize the rights of Indians to recover the skeletal remains of their ancestors and to repossess items of sacred value or cultural patrimony, the wishes of native Americans are often ignored by the scientific community. In cases where native Americans have attempted to regain items that were inappropriately alienated from the tribe, they have often met with resistance from museums. . . .

[T]he bill before us is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights. . . . For museums that have dealt honestly and in good faith with native Americans, this legislation will have little effect. For museums and institutions which have consistently ignored the requests of native Americans, this legislation will give native Americans greater ability to negotiate.<sup>127</sup>

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126. 136 CONG. REC. S17174 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye).

127. *Id.* at S17174-17175.

Other parts of the legislative history also emphasize the "human rights" genesis of NAGPRA. The antecedents and progenitors of NAGPRA were repatriation provisions of the National Museum of the American Indian Act and the Report of the Panel for a National Dialogue on Museum/Native American Relations—both of which placed a major emphasis upon "human rights."<sup>128</sup>

Congress viewed NAGPRA as a part of its trust responsibility to Indian tribes and people, specifically stating that it "reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations."<sup>129</sup> The trust responsibility of the Federal Government to Indian tribes and people is a judicially-created concept that requires the United States to "adhere strictly to fiduciary standards in its dealings with Indians."<sup>130</sup> The trust doctrine has given rise to the principle that enactments dealing with Indian affairs are to be liberally construed for the benefit of Indian people and tribes<sup>131</sup>—a canon of construction similar to that applicable to remedial civil rights legislation.<sup>132</sup>

The bill that was enacted reflected a compromise forged by representatives of the museum, scientific, and Indian communities.<sup>133</sup> NAGPRA was designed to create a process that would reflect both the needs of museums as repositories of the nation's cultural heritage and the rights of Indian people. Most importantly, NAGPRA was intended to "establish a process that provides the dignity and respect that our Nation's first citizens deserve."<sup>134</sup> Congress believed that NAGPRA would "encourage a continuing dialogue between museums and Indian tribes and Native

128. See *supra* text accompanying notes 117-22.

129. 25 U.S.C.A. § 3010. For this reason, Congress stated in this section that NAGPRA should not be interpreted "to establish a precedent with respect to any other individual, organization or foreign government." *Id.*

130. COHEN, *supra* note 76, at 207.

131. *Id.* at 223-24.

132. See, e.g., *Green v. Dumke*, 480 F.2d 624, 628 n.7 (9th Cir. 1973); *Schorle v. City of Greenhills*, 524 F. Supp. 821, 825 (S.D. Ohio 1981).

133. 136 CONG. REC. S17173 (daily ed. Oct. 26, 1990) (statement of Sen. McCain); see also Daniel Monroe & Walter Echo-Hawk, *Deft Deliberations*, MUSEUM NEWS, July/Aug. 1991, at 55-58. In fact, a broad spectrum of national museum, scientific, and Native American organizations jointly sent a letter to President Bush urging him to sign this legislation. Letter from American Anthropological Association, Association of Physical Anthropologists, Archeological Institute of America, Association on American Indian Affairs, Native American Rights Fund, National Conference of State Historic Preservation Officers, National Congress of American Indians, National Trust for Historic Places, Preservation Action, Society for American Archaeology, Society for Historical Archaeology, and Society for Professional Archaeology to President Bush. (Nov. 2, 1990) (on file with author).

134. 136 CONG. REC. S17173 (daily ed. Oct. 26, 1990) (statement of Sen. McCain). Both Senators McCain and Inouye recognized the importance of museums in maintaining our cultural heritage, as well as the interest of Native Americans in the return of ancestral human remains and funerary

Hawaiian organizations and the groups."<sup>135</sup> The primary Protection and Repatriation

### B. Repatriation: Human

NAGPRA requires federal (institution)<sup>136</sup> and museums (including educational institutions)<sup>137</sup> to return objects upon request of a Native Hawaiian organization<sup>139</sup> with the cultural affiliation of the process.<sup>140</sup> In addition, if a museum has the affiliation of the human remains of an Indian tribe or Native Hawaiian organization, the remains or objects in

objects, sacred objects, and items of cultural heritage. (Oct. 26, 1990).

135. SENATE REPORT 473, *supra* note 134.

136. 25 U.S.C.A. § 3001(8). The definition of "culturally-affiliated human remains and objects" in the American Indian Act, 20 U.S.C.A. § 3001(8), notes 109-21. The Museum Act does not define the term. *Id.* Senator Daniel K. Inouye, *Demostrating the Smithsonian Institution in the 102d Congress*, 102d CONG. REC. S. 235, 236 (1990). The American Indian ("NMAI") has adopted a policy of repatriation of communally-owned property. The NMAI, however, consists at present of the Heye collection in New York prior to 1906. *Id.* See 20 U.S.C.A. § 80q-2. The Museum Act does not possess a large number of human remains.

137. "Museum" is defined as "any institution of higher learning that has in its possession, custody, or control Native American cultural items." 25 U.S.C.A. § 3001(7). This definition is used to refer to institutions that meet this definition.

138. "Indian tribe" is defined as a group of Indians, including any Alaska Native village, and programs and services provided by the tribe. 25 U.S.C.A. § 3001(7). This definition includes tribes of the United States government, not just those of the United States. See *id.*

139. "Native Hawaiian organization" is defined as "any organization that represents the interests of Native Hawaiians and provides services to Native Hawaiians, and (b) is recognized by the Office of Hawaiian Affairs and included in the definition. *Id.*

140. 25 U.S.C.A. § 3005(a)(1); see

Hawaiian organizations and . . . promote greater understanding between the groups."<sup>135</sup> The primary features of the Native American Graves Protection and Repatriation Act of 1990 are summarized below.

*B. Repatriation: Human Remains and Associated Funerary Objects*

NAGPRA requires federal agencies (excluding the Smithsonian Institution)<sup>136</sup> and museums (including state and local governments and educational institutions)<sup>137</sup> to return human remains and associated funerary objects upon request of a lineal descendent, Indian tribe,<sup>138</sup> or Native Hawaiian organization<sup>139</sup> where the museum or agency itself identifies the cultural affiliation of the items through the required inventory process.<sup>140</sup> In addition, if a museum or agency inventory does not establish the affiliation of the human remains or associated funerary objects, the Indian tribe or Native Hawaiian organization may still obtain the return of the remains or objects if it can prove, by a preponderance of the

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objects, sacred objects, and items of cultural patrimony. 136 CONG. REC. S17173-17175 (daily ed. Oct. 26, 1990).

135. SENATE REPORT 473, *supra* note 108, at 6.

136. 25 U.S.C.A. § 3001(8). The Smithsonian Institution is required to inventory and return culturally-affiliated human remains and funerary objects pursuant to the National Museum of the American Indian Act, 20 U.S.C.A. §§ 80q to 80q-15 (West 1990). *See supra* text accompanying notes 109-21. The Museum Act does not cover sacred objects and items of cultural patrimony. *See id.* Senator Daniel K. Inouye, Democrat from Hawaii, has introduced a bill pertaining to the Smithsonian Institution in the 102d Congress that includes provisions addressing sacred objects and items of cultural patrimony. S. 235, 102d Cong., 1st Sess. (1991). The National Museum of the American Indian ("NMAI") has adopted its own repatriation policy, which provides for the repatriation of communally-owned property and sacred objects pursuant to certain criteria. Most of the NMAI, however, consists at present of those Indian remains and cultural objects that were part of the Heye collection in New York prior to the absorption of the Heye collection by the Smithsonian Institution. *See* 20 U.S.C.A. § 80q-2. It does not cover the Smithsonian Institution itself, which possesses a large number of human remains and funerary objects.

137. "Museum" is defined 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." 25 U.S.C.A. § 3001(8). The term *museum* is used in this article to refer to institutions that meet this definition unless otherwise indicated.

138. "Indian tribe" is defined as a "tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *Id.* § 3001(7). This definition includes tribes eligible for special programs and services from any part of the United States government, not merely those receiving services from the Secretary of Interior. *See id.*

139. "Native Hawaiian organization" is defined as "any organization which: (A) serves and represents the interests of Native Hawaiians, (B) has as a primary and stated purpose the provision of services to Native Hawaiians, and (C) has expertise in Native Hawaiian affairs." *Id.* § 3001(11). The Office of Hawaiian Affairs and Hui Mālama I Nā Kūpuna 'O Hawai'i Nei are specifically included in the definition. *Id.*

140. 25 U.S.C.A. § 3005(a)(1); *see also infra* text accompanying notes 147-50.



evidence, that it has a cultural affiliation with the item.<sup>141</sup> In seeking to prove cultural affiliation, a claimant may utilize "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion."<sup>142</sup>

Upon request, Indian tribes and Native Hawaiian organizations must be provided with available documentation by agencies and museums.<sup>143</sup> NAGPRA indicates that such documentation shall be made available to Indian tribes or Native Hawaiian organizations that receive or should have received notice pursuant to 25 U.S.C.A. § 3003(d)—namely, those tribes that are believed to be culturally affiliated with specific items. The legislative history recognizes that § 3003(d) is to be liberally construed to include all tribes that have "a potential cultural affiliation (regardless of whether the showing of such affiliation would be based upon museum records or non-museum sources)."<sup>144</sup> Available documentation includes "a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data."<sup>145</sup> This requirement, however, is not an authorization for the initiation of new scientific studies—although it does not preclude further scientific study either.<sup>146</sup>

"Cultural affiliation" is defined as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group."<sup>147</sup> The House committee explained that this requirement "is intended to ensure that the claimant has a reasonable connection with the materials."<sup>148</sup> Congress recognized, however, that

141. 25 U.S.C.A. § 3005(a)(4). Section 3005(a)(4) does not explicitly provide for a claim to be filed by a known lineal descendant. *Id.* It is unlikely that § 3005(a)(4) was intended to exclude claims by descendants, however, because 25 U.S.C.A. § 3005(a)(1) specifically permits descendant claims for human remains and associated funerary objects if the inventory process leads to the identification of a known descendant. Moreover, 25 U.S.C.A. § 3005(a)(5)(A) permits a lineal descendant of an individual who owned a sacred object to claim that object. Indeed, NAGPRA is based, in part, upon common law pertaining to the control of human remains and funerary objects. Common law recognizes that the next of kin retains control over buried human remains and associated funerary objects. *See supra* text accompanying notes 53-57. Thus, the exclusion of descendants from § 3005(a)(4) is undoubtedly because that section establishes rules for proving cultural affiliation—a requirement not applicable to descendants. The legislative history supports this interpretation. The House report describes § 3005 as requiring "all returns to be completed in consultation with the requesting descendent, tribe or Native Hawaiian organization." HOUSE REPORT 877, *supra* note 108, at 19.

142. 25 U.S.C.A. § 3005(a)(4).

143. *Id.* § 3003(b)(2).

144. HOUSE REPORT 877, *supra* note 108, at 16.

145. 25 U.S.C.A. § 3003(b)(2).

146. *Id.*

147. *Id.* § 3001(2).

148. HOUSE REPORT 877, *supra* note 108, at 14.

[I]t may be extremely difficult to trace an item from museum to museum without some reasonable evidence. In such instances, a finding is based upon an overall evaluation of the evidence pertaining to the material being claimed and the material of some gaps in the record.

Therefore, claimants need not have a high degree of certainty."<sup>150</sup>

"Associated funerary objects" includes objects "reasonably believed to be associated with an individual human remains either as part of the death rite or ceremony, or are presently in the possession of the same agency or museum." The remains and objects of the same agency or museum or agency so that a claim is possible.<sup>152</sup> Moreover, the congressional intent to include museums not covered under NAGPRA in the disposition of those objects covered by NAGPRA.<sup>153</sup>

Second, "associated funerary objects" made for burial purposes of

Two exceptions exist to the requirement that associated funerary objects have a cultural affiliation has been determined.

149. *Id.*

150. SENATE REPORT 473, *supra* note 108, at 16. The application of a stricter definition of "associated funerary objects" under NAGPRA. S. 1980, 101st Cong., 2d Sess., 1980, "associated funerary objects" that would have required a claimant to prove that the object "is reasonably believed to be associated with a present day group" be "reasonably es-

151. 25 U.S.C.A. § 3001(3)(A).

152. *Id.*

153. *See, e.g., id.* §§ 3001(3)(A), (4)(A).

154. *Id.* § 3001(3)(A). If the human remains are not in the possession of an agency or covered museum (and the object is not in the possession of an agency or covered museum or to contain human remains), the object is not an associated funerary object. § 3001(3)(B); *see infra* text accompanying notes 155-156.

155. 25 U.S.C.A. § 3005(a)(1) and (2). The term "associated funerary objects" refers only to those objects that are associated with human remains and to the requirement that the remains are

[I]t may be extremely difficult, in many instances, for claimants to trace an item from modern Indian tribes to prehistoric remains without some reasonable gaps in the historic or prehistoric record. In such instances, a finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.<sup>149</sup>

Therefore, claimants need not establish cultural affiliation with "scientific certainty."<sup>150</sup>

"Associated funerary objects" includes two categories of objects. First, it includes objects "reasonably believed to have been placed with individual human remains either at the time of death or later . . . as part of the death rite or ceremony" where both the human remains or objects are presently in the possession or control of a federal agency or museum.<sup>151</sup> The remains and objects need not be in the possession or control of the same agency or museum—only in the possession or control of a museum or agency so that a connection between the objects and remains is possible.<sup>152</sup> Moreover, the "possession or control" language indicates congressional intent to include objects consigned to individuals or museums not covered under NAGPRA if the ultimate determination as to the disposition of those objects is reposed in a federal agency or museum covered by NAGPRA.<sup>153</sup>

Second, "associated funerary objects" includes objects "exclusively made for burial purposes or to contain human remains."<sup>154</sup>

Two exceptions exist to the requirement that human remains and associated funerary objects be "expeditiously returned" after cultural affiliation has been determined.<sup>155</sup> The first exception is in those circum-

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149. *Id.*

150. SENATE REPORT 473, *supra* note 108, at 8. The Senate Report's statement referred to the application of a stricter definition of cultural affiliation that was contained in an earlier version of NAGPRA. S. 1980, 101st Cong., 2d Sess. (1990). That version included a definition of "cultural affiliation" that would have required that "a continuity of group identity from the earlier to the present day group" be "reasonably establishe[d]." *Id.*

151. 25 U.S.C.A. § 3001(3)(A).

152. *Id.*

153. *See, e.g., id.* §§ 3001(3)(A),(B), 3001(8), 3003(a), 3004(a).

154. *Id.* § 3001(3)(A). If the human remains are no longer in the possession or control of an agency or covered museum (and the funerary objects were not specifically made for burial purposes or to contain human remains), the objects may be classified as "unassociated funerary objects." *Id.* § 3001(3)(B); *see infra* text accompanying note 165.

155. 25 U.S.C.A. § 3005(a)(1) and the portion of § 3005(a)(4) applicable to human remains and associated funerary objects refer only to subsections (b) and (e) of 25 U.S.C.A. § 3005 as exceptions to the requirement that the remains and associated funerary objects be expeditiously returned.

stances where the item is "indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States."<sup>156</sup> If this exception applies, the items must be returned within 90 days after the completion of the study.<sup>157</sup> There is no prohibition, however, against voluntary agreements between claimants and agencies or museums that would permit additional studies or other arrangements in regard to cultural items.<sup>158</sup>

The second exception applies if multiple requests for a cultural item are made, and the federal agency or museum "cannot clearly determine which requesting party is the most appropriate claimant."<sup>159</sup> In such a case, the federal agency or museum may retain the item until the parties agree upon disposition (with the Review Committee available for a mediating role) or the dispute is resolved by a court of competent jurisdiction.<sup>160</sup>

As for human remains and associated funerary objects whose cultural affiliation cannot be determined, NAGPRA provides that the statutorily-created Review Committee<sup>161</sup> compile an inventory of culturally unidentifiable human remains and recommend "specific actions for developing a process for disposition of such remains."<sup>162</sup> The Review Committee's recommendations are to be made "in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups."<sup>163</sup> This issue was referred to the Review Committee because there was "general disagreement on the proper disposition of such unidentifiable remains. Some believe that they should be left solely to science while others contend that, since they are not identifiable, they would be of little use to science and should be buried and laid to rest."<sup>164</sup>

156. 25 U.S.C.A. § 3005(b).

157. *Id.*

158. *Id.* § 3009(1)(B).

159. *Id.* § 3005(e).

160. *Id.* Section 3005(e) also provides that the dispute may be settled "pursuant to the provisions of the Act." *Id.* This refers to the authority of the Review Committee created by 25 U.S.C.A. § 3006 to "facilitat[e] the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable." *Id.* § 3006(c)(4). Although any findings of the Committee are admissible in a court proceeding, the Committee has no binding authority upon any of the parties. *Id.* § 3006(d). Thus, while the Committee can certainly play an important role in resolving these disputes, ultimately the disputes must be resolved by agreement or judicial determination.

161. 25 U.S.C.A. § 3006.

162. *Id.* § 3006(c)(5).

163. *Id.* § 3006(e).

164. HOUSE REPORT 877, *supra* note 108, at 16. The House Interior Committee indicated that it

### C. Repatriation: Unassociated Funerary Objects

NAGPRA requires museums to repatriate unassociated funerary objects, sacred objects, and objects of ceremonial importance pursuant to a four-step process:

#### 1. Identification of the Items

First, the claimant must show that the object is a "sacred object, sacred object, or unassociated funerary object" which "is known to have been placed with individuals or groups of individuals at the time of death or later . . . as part of a ceremony, rite, or religious observance." If human remains are *not* present, the federal agency or museum, Indian tribe, individual, family, or known person must identify the site of a culturally affiliated individual.

"Sacred objects" are defined as "objects that are needed by traditional Native Americans for the practice of traditional Native American religious practices and ceremonies." <sup>167</sup> As the House report

[T]he definition of "sacred objects" includes objects needed for ceremonial purposes. American religious practitioners have identified ceremonies that are part of traditional Native American religious practices. The definition is that there must be a ceremonial instance.<sup>168</sup>

In explaining its legislative intent, the House instructed American religious leaders to "renewal of ceremonies," the "practice of some ceremonial practices," and "environmental coercion, adverse s

"look[ed] forward" to the Review Committee's report in a National Dialogue on Museum/Native American Relations. *Id.* at 11.

165. See generally 25 U.S.C.A. §§ 3001-3006.

166. *Id.* § 3001(3)(B).

167. *Id.* § 3001(3)(C).

168. HOUSE REPORT 877, *supra* note 108, at 16.



C. *Repatriation: Unassociated Funerary Objects, Sacred Objects, and Items of Cultural Patrimony*

NAGPRA requires museums and federal agencies to repatriate unassociated funerary objects, sacred objects, and items of cultural patrimony pursuant to a four-step process.

1. Identification of the Item

First, the claimant must show that the item claimed is an unassociated funerary object, sacred object, or item of cultural patrimony.<sup>165</sup> "Unassociated funerary object" is defined as an object "reasonably believed to have been placed with individual human remains either at the time of death or later . . . as part of a death rite or ceremony" where the human remains are *not* presently "in the possession or control of" a federal agency or museum, but the object can be related to specific individuals, families, or known human remains, or to a specific burial site of a culturally affiliated individual.<sup>166</sup>

"Sacred objects" are defined as "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents."<sup>167</sup> As the House report explains,

[T]he definition of "sacred objects" is intended to include both objects needed for ceremonies currently practiced by traditional Native American religious practitioners and objects needed to renew ceremonies that are part of traditional religions. The operative part of the definition is that there must be "present day adherents" in either instance.<sup>168</sup>

In explaining its legislative "intent . . . to permit traditional Native American religious leaders to obtain such objects as are needed for the renewal of ceremonies," the House Interior Committee recognized that "the practice of some ceremonies has been interrupted because of governmental coercion, adverse societal conditions or the loss of certain

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"look[ed] forward" to the Review Committee's recommendations. *Id.* The Report of the Panel for a National Dialogue on Museum/Native American Relations also reflected a division on this issue. *Id.* at 11.

165. See generally 25 U.S.C.A. §§ 3001(3), 3005.

166. *Id.* § 3001(3)(B).

167. *Id.* § 3001(3)(C).

168. HOUSE REPORT 877, *supra* note 108, at 14.

objects through means beyond the control of the tribe at the time."<sup>169</sup> Significantly, the definition recognizes that the ultimate determination of continuing sacredness must be made by the Native American religious leaders themselves because they must determine the current ceremonial need for the object. Thus, the term *sacred* is not defined explicitly in the legislative definition. Rather the definition will vary according to the traditions of the tribe or community.<sup>170</sup> Of course, a religious leader's "determination" of sacredness could be challenged on the basis of its "sincerity" just as a First Amendment claim might be similarly challenged.<sup>171</sup> Moreover, the leader cannot simply proclaim that an object is sacred—the object must meet the statutory criteria of having traditional religious significance and future use in a religious ceremony before it can be classified as a "sacred object."<sup>172</sup>

"Cultural patrimony" is defined as "an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself."<sup>173</sup> Further, the object must have been considered inalienable by the Native American group when the object was separated from such group, rather than property that was owned and transferrable by an individual Native American; thus, tribal law or custom is determinative of the legal question of alienability at the time that the item was transferred.<sup>174</sup> The Senate Committee report, explaining a similar cultural patrimony provision in an earlier version of the NAGPRA bill, indicated that cultural patrimony refers to items of "great importance" such as Zuni war gods or the Wampum belts of the Iroquois.<sup>175</sup>

## 2. Cultural Affiliation and Prior Ownership or Control

Once it has been shown that an item is an unassociated funerary object, sacred object, or item of cultural patrimony, either the cultural affiliation must be determined<sup>176</sup> or, in the case of sacred objects and items of cultural patrimony, the requesting tribe or Native Hawaiian

169. *Id.*

170. SENATE REPORT 473, *supra* note 108, at 6.

171. *See, e.g.*, *United States v. Ballard*, 322 U.S. 78 (1944); *Martinelli v. Dugger*, 817 F.2d 1499, 1503 (11th Cir. 1987); *United States v. Kuch*, 288 F. Supp. 439, 445 (D.D.C. 1968).

172. 25 U.S.C.A. § 3001(3)(C).

173. *Id.* § 3001(3)(D).

174. *Id.*; *see also* *Echo-Hawk*, *supra* note 35, at 441-44.

175. SENATE REPORT 473, *supra* note 108, at 7-8.

176. Cultural affiliation can be determined by the summary process, 25 U.S.C.A. §§ 3004, 3005(a)(2), or, in the case of unassociated funerary objects, by the claimant making a showing by a preponderance of the evidence. *Id.* § 3005(a)(4). *See supra* text accompanying notes 140-49 for a discussion of requirements of 25 U.S.C.A. § 3005(a)(4).

organization must show control by the tribe, organization may also be a descendant may also be an ancestor.<sup>178</sup> If a tribe claim based upon prior opposition to the tribe, the descendants exist or that have failed to make a claim

## 3. Right of Possession

The third step in the process, which, if standing alone, contrary, would support a claim did not have the right of "transfer" of many of such transactions was the impossibility of proving by necessity, may include as documentary evidence is entitled access to "relevant data" possessed by "basic facts surrounding the claimed."<sup>181</sup>

"Right of possession" consent of an individual. This term was intended to determine the circumstances of possession of these . . . . Right of possession is that "an individual may by the transferor."<sup>184</sup> Au

177. 25 U.S.C.A. § 3005(a)(5).

178. *Id.* § 3005(a)(5)(A).

179. *Id.* § 3005(a)(5)(C).

180. *Id.* § 3005(c).

181. *Id.* § 3004(b)(2).

182. *Id.* § 3001(13).

183. SENATE REPORT 473, *supra* note 108, at 7-8. *National Policy of Understanding, Native Hawaiians: Human Rights*, (1992).

184. 136 CONG. REC. S17176 (C)

organization must show that the object was previously owned or controlled by the tribe, organization, or a member thereof.<sup>177</sup> A direct lineal descendant may also request repatriation of a sacred object owned by an ancestor.<sup>178</sup> If a tribe or Native Hawaiian organization is making a claim based upon prior ownership or control by a tribal member, as opposed to the tribe, the claimant must show that no identifiable lineal descendants exist or that the lineal descendants have been notified and have failed to make a claim.<sup>179</sup>

### 3. Right of Possession: Claimant's Prima Facie Case

The third step in the process requires a claimant to present "evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession" of the items.<sup>180</sup> Because the original "transfer" of many of these objects occurred when recordkeeping of such transactions was virtually nonexistent—and because of the near impossibility of proving that a legal document does not exist—evidence, by necessity, may include oral traditional and historical evidence, as well as documentary evidence. In making its prima facie case, the claimant is entitled access to "records, catalogues, relevant studies or other pertinent data" possessed by the federal agency or museum that relate to "basic facts surrounding acquisition and accession" of the items being claimed.<sup>181</sup>

"Right of possession" means "possession obtained with the voluntary consent of an individual or group that had authority of alienation."<sup>182</sup> This term was intended "to provide a legal framework in which to determine the circumstances by which a museum or agency came into possession of these . . . objects."<sup>183</sup>

Right of possession is based upon the general property law principle that "an individual may only acquire the title to property that is held by the transferor."<sup>184</sup> Authority to alienate would be determined by the

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177. 25 U.S.C.A. § 3005(a)(5).

178. *Id.* § 3005(a)(5)(A).

179. *Id.* § 3005(a)(5)(C).

180. *Id.* § 3005(c).

181. *Id.* § 3004(b)(2).

182. *Id.* § 3001(13).

183. SENATE REPORT 473, *supra* note 108, at 8; see also Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175 (1992).

184. 136 CONG. REC. S17176 (daily ed. Oct. 26, 1990) (statement of Sen. McCain).



law of the governmental entity having jurisdiction over a transaction.<sup>185</sup> In most cases, the initial transfer of the item out of tribal control would presumably be governed by tribal law or custom.<sup>186</sup> The definition does not apply only in the rare instance when its application would result in a Fifth Amendment taking of private property for a public purpose without just compensation.<sup>187</sup> If there would be a taking within the meaning of the constitutional provision, applicable federal, state, or tribal law would apply.<sup>188</sup> In this rare instance, however, the party asserting a Fifth Amendment taking first would be required to obtain a ruling from the Court of Claims upholding such an assertion before federal, state, or tribal laws would be used to replace the statutory standard.<sup>189</sup> In summary, the definition of "right to possession" is designed to ensure that the object did not pass out of tribal or individual Native American possession without appropriate consent.<sup>190</sup>

#### 4. Right of Possession: Burden of Proof

If the claimant surmounts these three hurdles, the fourth step places a burden upon the museum or agency to prove that it has a right of possession in regard to the items in question.<sup>191</sup> If the museum or agency cannot prove right of possession, the unassociated funerary object, sacred object, or item of cultural patrimony must be returned—unless the scientific study or competing claims exceptions apply.<sup>192</sup>

NAGPRA makes clear that these provisions, as well as those pertaining to human remains and associated funerary objects, are not meant to limit the general repatriation authority of federal agencies and museums.<sup>193</sup> Further, NAGPRA does not preclude agencies or museums from entering into agreements with tribes and organizations regarding any Native American objects owned or controlled by museums or agencies.<sup>194</sup>

185. See generally 16 Am. Jur. 2d *Conflict of Laws* §§ 43, 44 (1979 & Supp. 1991).

186. See generally Echo-Hawk, *supra* note 35.

187. 25 U.S.C.A. § 3001(13).

188. *Id.*; see also House Report 877, *supra* note 108, at 15; Ralph Johnson & Sharon Haensly, *Fifth Amendment Takings Implications of the 1990 Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 151 (1992).

189. 25 U.S.C.A. § 3001(13).

190. See SENATE REPORT 473, *supra* note 108, at 8.

191. 25 U.S.C.A. § 3005(c).

192. *Id.* § 3005(b), (e). See *supra* text accompanying notes 154-59.

193. 25 U.S.C.A. § 3009(1)(A).

194. *Id.* § 3009(1)(B).

#### D. Inventory: Human

NAGPRA requires museum by-item inventory of human "Inventory" is defined as information called for by museum or agency is required affiliation of each item," within its possession.<sup>197</sup> The to conduct exhaustive studies exclusively determine . . . specifically states that it "shall the initiation of new scientific funerary objects or other scientific information from PRA's intent is merely to affiliation based upon pre-

The inventory is to be governmental and traditional inventory must be completed however, may be granted Interaction between tribes inventory process. The interactive exchange of information organizations and museums Moreover, the inventory actions on repatriation required identified in the inventory not merely after completion after the completion of the

195. *Id.* § 3003(a).

196. *Id.* § 3003(e).

197. *Id.* § 3003(a).

198. SENATE REPORT 473, *supra*

199. 25 U.S.C.A. § 3003(b)(2).

200. SENATE REPORT 473, *supra*

201. 25 U.S.C.A. § 3003(b)(1)(A).

202. *Id.* § 3003(b)(1)(B).

203. *Id.* § 3003(c).

204. SENATE REPORT 473, *supra*

205. 25 U.S.C.A. § 3009(2).

206. SENATE REPORT 473, *supra*

*D. Inventory: Human Remains and Associated Funerary Objects*

NAGPRA requires museums and federal agencies to complete an item-by-item inventory of human remains and associated funerary objects.<sup>195</sup> "Inventory" is defined as a "simple itemized list that summarizes the information called for by this section."<sup>196</sup> As part of the inventory, the museum or agency is required to "identify the geographical and cultural affiliation of each item," to the extent possible, based upon information within its possession.<sup>197</sup> This provision does *not* "require museums . . . to conduct exhaustive studies and additional scientific research to conclusively determine . . . cultural affiliation."<sup>198</sup> In fact, NAGPRA specifically states that it "shall not be construed to be an authorization for the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects."<sup>199</sup> Rather, NAGPRA's intent is merely to require a good faith effort to identify cultural affiliation based upon presently available evidence.<sup>200</sup>

The inventory is to be conducted in consultation with Native American governmental and traditional leaders and the Review Committee.<sup>201</sup> The inventory must be completed by November 16, 1995.<sup>202</sup> Extensions, however, may be granted by the Secretary of Interior for good cause.<sup>203</sup> Interaction between tribes and museums is expected to occur during the inventory process. The intent of the process is to "allow for the cooperative exchange of information between Indian tribes or Native Hawaiian organizations and museums regarding objects in museum collections."<sup>204</sup> Moreover, the inventory process is not intended to delay any pending actions on repatriation requests.<sup>205</sup> Notice of culturally affiliated objects identified in the inventory is to be provided "throughout the process"—not merely after completion of the entire inventory.<sup>206</sup> Within six months after the completion of the inventory, final notice must be sent to all

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195. *Id.* § 3003(a).

196. *Id.* § 3003(e).

197. *Id.* § 3003(a).

198. SENATE REPORT 473, *supra* note 108, at 12.

199. 25 U.S.C.A. § 3003(b)(2).

200. SENATE REPORT 473, *supra* note 108, at 12.

201. 25 U.S.C.A. § 3003(b)(1)(A), (C).

202. *Id.* § 3003(b)(1)(B).

203. *Id.* § 3003(c).

204. SENATE REPORT 473, *supra* note 108, at 11.

205. 25 U.S.C.A. § 3009(2).

206. SENATE REPORT 473, *supra* note 108, at 12.

tribes that are reasonably believed to be culturally affiliated with human remains or associated funerary objects in the possession or control of the museum or agency.<sup>207</sup>

The notice shall include information about the circumstances surrounding the acquisition of each identified item and information about cultural affiliation.<sup>208</sup> NAGPRA broadly intends that all potential tribal claimants, including Native Hawaiian organizations, receive notice.<sup>209</sup> A tribe or Native Hawaiian organization that receives, or should have received, notice may request additional background information from the museum or agency relevant to the "geographical origin, cultural affiliation and basic facts surrounding [the item's] acquisition and accession."<sup>210</sup> The requirement to perform the inventory is not made contingent upon a museum receiving federal funds.<sup>211</sup>

*E. Summary: Unassociated Funerary Objects, Sacred Objects, and Items of Cultural Patrimony*

NAGPRA requires that federal agencies and museums summarize their collections of unassociated funerary objects, sacred objects, and items of cultural patrimony.<sup>212</sup> The summary is "in lieu of an object-by-object inventory" and requires the museum or agency to "describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable."<sup>213</sup>

The museum or agency has three years to compile the summary.<sup>214</sup> After the summary is completed—and presumably during its compilation—a consultation process with Native American governmental and traditional leaders is to occur.<sup>215</sup> As with the inventory process, the summary process is not meant to delay action on pending repatriation requests.<sup>216</sup> The House committee expressed its hope and expectation that the summary would lead to "open discussions" between tribes, museums,

207. 25 U.S.C.A. § 3003(d)(1), (2).

208. *Id.* § 3003(d)(2).

209. *See supra* text accompanying note 144.

210. 25 U.S.C.A. § 3003(b)(2); *see also supra* text accompanying notes 143-46.

211. 25 U.S.C.A. 3008(b) permits, but does not require, the Secretary of Interior to make grants to museums to conduct the inventory and summary required by the Act. *See infra* text accompanying notes 263-65.

212. 25 U.S.C.A. § 3004; *see also supra* text accompanying notes 166-75 for the definitions of these items.

213. 25 U.S.C.A. § 3004(a), (b)(1)(A).

214. *Id.* § 3004(b)(1)(C).

215. *Id.* § 3004(b)(1)(B), (C).

216. *Id.* § 3009(2).

and federal agencies.<sup>217</sup> Organizations are entitled to cultural affiliation, acq

*F. Tribal Owner*

NAGPRA expressly of cultural items<sup>219</sup> that land.<sup>220</sup> In the case of any lineal descendants If lineal descendants objects cannot be asc sacred objects, and iter or control is determine

1. The tribe or Na disposition of all c land is defined to in a reservation, all administered for Na Commission Act of Bill.<sup>223</sup>

2. In the case of fe zation with the clos or control.<sup>224</sup> If ther plates that the statu mediator of the disp disputed items could

3. If cultural affilia objects are discover of a final judicial or United States C

217. HOUSE REPORT 877, *supra*

218. 25 U.S.C.A. § 3004(b)

219. NAGPRA defines cult funerary objects, sacred objects

220. *Id.* § 3002.

221. *Id.* § 3002(a)(1).

222. *Id.* § 3002(a)(2)(A).

223. *Id.* § 3001(15).

224. *Id.* § 3002(a)(2)(B). N owned by the United States, i corporations and groups pursu 3001(5).

225. SENATE REPORT 473, *supra*



and federal agencies.<sup>217</sup> Upon request, all tribes and Native Hawaiian organizations are entitled to obtain data pertaining to geographical origin, cultural affiliation, acquisition, and accession of these objects.<sup>218</sup>

*F. Tribal Ownership and Control: Imbedded Cultural Items*

NAGPRA expressly provides rules that address ownership or control of cultural items<sup>219</sup> that are discovered in the future on federal and tribal land.<sup>220</sup> In the case of human remains and associated funerary objects, any lineal descendants have the initial right of ownership or control.<sup>221</sup> If lineal descendants of the human remains and associated funerary objects cannot be ascertained or when unassociated funerary objects, sacred objects, and items of cultural patrimony are involved, ownership or control is determined in the following statutory order of priority:

1. The tribe or Native Hawaiian organization owns or controls the disposition of all cultural items discovered on tribal land.<sup>222</sup> Tribal land is defined to include all lands within the exterior boundaries of a reservation, all dependent Indian communities, and any lands administered for Native Hawaiians pursuant to the Hawaiian Homes Commission Act of 1920, as amended, and the Hawaii Statehood Bill.<sup>223</sup>
2. In the case of federal land, the tribe or Native Hawaiian organization with the closest cultural affiliation to the items has ownership or control.<sup>224</sup> If there is a dispute between tribes, NAGPRA contemplates that the statutorily-created Review Committee may serve as a mediator of the dispute, and that agreements between tribes regarding disputed items could occur.<sup>225</sup>
3. If cultural affiliation of the items cannot be established, but the objects are discovered on aboriginal land that has been the subject of a final judicial determination by the Indian Claims Commission or United States Court of Claims, the tribe that has obtained the

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217. HOUSE REPORT 877, *supra* note 108, at 15.

218. 25 U.S.C.A. § 3004(b)(2).

219. NAGPRA defines cultural items to include human remains, associated and unassociated funerary objects, sacred objects, and items of cultural patrimony. *See id.* § 3001(3).

220. *Id.* § 3002.

221. *Id.* § 3002(a)(1).

222. *Id.* § 3002(a)(2)(A).

223. *Id.* § 3001(15).

224. *Id.* § 3002(a)(2)(B). NAGPRA defines "Federal lands" as non-tribal land "controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native corporations and groups pursuant to the Alaska Native Claims Settlement Act of 1971." *Id.* § 3001(5).

225. SENATE REPORT 473, *supra* note 108, at 9.



judgment has the right of ownership and control over the items, unless another tribe can show a stronger cultural relationship.<sup>226</sup>

The Secretary of the Interior is authorized to promulgate regulations pertaining to the disposition of cultural items unclaimed under this section in consultation with the Review Committee, Native American groups, museums, and scientists.<sup>227</sup>

Whenever a party intends to intentionally excavate cultural items for any purpose, that party must obtain a permit pursuant to the Archeological Resources Protection Act of 1979.<sup>228</sup> If tribal lands are involved, the items may be excavated only after notice to and consent of the tribe or Native Hawaiian organization.<sup>229</sup> If federal lands are involved, the items may be excavated only after notice and consultation with the appropriate tribe or Native Hawaiian organization.<sup>230</sup> As described previously, the tribe or Native Hawaiian organization retains ownership or control over remains and objects unearthed on lands covered by this provision.<sup>231</sup>

If imbedded cultural items have been inadvertently discovered as part of another activity, such as construction, mining, logging, or agriculture, the person who has discovered the items must temporarily cease activity and notify the responsible federal agency in the case of federal land or the appropriate tribe or Native Hawaiian organization in the case of tribal land.<sup>232</sup> When notice is provided to the federal agency, that agency has the responsibility to promptly notify the appropriate tribe or Native

226. 25 U.S.C.A. § 3002(a)(2)(C).

227. *Id.* § 3002(b).

228. *Id.* § 3002(c)(1); 16 U.S.C. §§ 470aa-mm (1988 & West Supp. 1991). A permit may be issued pursuant to the Archeological Resources Protection Act of 1979 ("ARPA") upon a showing that the applicant is qualified; the undertaking is designed to advance archaeological knowledge in the public interest; the resources will remain the property of the United States and be preserved in an appropriate institution (this is modified by the NAGPRA); and the activity is consistent with the applicable land management plan. 16 U.S.C. § 470cc(b) (1988). Notice must be provided to tribes which may consider a site of religious or cultural importance. *Id.* § 470cc(c). Tribal consent is required for excavations located on tribal land. *Id.* § 470cc(g)(2). NAGPRA expands upon these requirements only marginally. NAGPRA requires notice to tribes with an aboriginal claim to the land. Notice is not limited to sites that are specifically of religious or cultural importance as under ARPA. Moreover, NAGPRA specifically requires consultation with the appropriate tribes if excavation involves culturally affiliated material or if it occurs on Federal land that has been the subject of adjudicated aboriginal claims. ARPA speaks only to notice, not consultation, although the regulations allow (but do not require) "discussions" with interested tribes. Compare 25 U.S.C.A. § 3002(c)(2), (3) with 16 U.S.C. § 470cc(c) and 43 C.F.R. § 7.7 (1990).

229. See 25 U.S.C.A. § 3002(c)(2).

230. See *id.*

231. *Id.* § 3002(c); see also text accompanying notes 222-26.

232. 25 U.S.C.A. § 3002(d)(1). In the case of Alaska Native Claims Settlement Act lands (still owned by the Federal government) selected by, but not conveyed to, the Alaska Native corporation or group, that corporation or group is the appropriate organization to be notified. *Id.*

Hawaiian organization.<sup>233</sup> The process whereby Indian tribes are given an opportunity to intervene on tribal lands to safeguard Native American sacred objects or objects of

If there is inadvertent discovery, organizations are afforded an opportunity for appropriate disposition of the items. The process may resume thirty days after the department or the Indian tribe certifies that notice has been given. The tribe may delegate their responsibilities to the Secretary of Interior.<sup>237</sup> Ownership and control are governed by the provisions of

#### G. Prohibition

NAGPRA prohibits all trade in cultural items for sale or profit except for items that were obtained with the consent of the tribe or the official governing body of the Indian tribe or Native Hawaiian organization. NAGPRA intended to prevent trafficking in cultural items acquired, regardless of when they were moved prior to the enactment of the act, a fine of up to \$100,000 for a first offense; subsequent violations carry a fine up to \$250,000 and a maximum term of imprisonment of

NAGPRA also prohibits trafficking in violation of the act.<sup>242</sup> The provisions are the same as for trafficking in cultural items, as it applies to

233. See SENATE REPORT 473, *supra*.

234. *Id.*; see also 136 CONG. REC.

235. *Id.*

236. 25 U.S.C.A. § 3002(d)(1).

237. *Id.* § 3002(d)(3).

238. *Id.* § 3002(d)(2).

239. *Id.* § 3001(13); 18 U.S.C.A.

240. SENATE REPORT 473, *supra* note 233.

241. 18 U.S.C.A. § 1170(a).

242. *Id.* § 1170(b).

243. *Id.*; see also *supra* text accompanying



Hawaiian organization.<sup>233</sup> The intent of this provision is to "provide a process whereby Indian tribes and Native Hawaiian organizations have an opportunity to intervene in development activity on Federal or tribal lands to safeguard Native American human remains, funerary objects, sacred objects or objects of cultural patrimony."<sup>234</sup>

If there is inadvertent discovery, Indian tribes or Native Hawaiian organizations are afforded thirty days to make a determination as to the appropriate disposition of the human remains and objects.<sup>235</sup> Activity may resume thirty days after the Secretary of the appropriate federal department or the Indian tribe or the Native Hawaiian organization certifies that notice has been received.<sup>236</sup> Federal department secretaries may delegate their responsibilities under this provision to the Secretary of Interior.<sup>237</sup> Ownership and control of items inadvertently discovered are governed by the provisions described previously.<sup>238</sup>

#### G. Prohibitions Against Trafficking

NAGPRA prohibits all trafficking in Native American human remains for sale or profit except for remains that have been "excavated, exhumed or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization."<sup>239</sup> The prohibition is intended to prevent trafficking in human remains that were wrongfully acquired, regardless of when and where obtained, including those removed prior to the enactment of NAGPRA.<sup>240</sup> Violators are subject to a fine of up to \$100,000 and face up to a one year jail sentence for a first offense; subsequent violations subject the offender to a fine of up to \$250,000 and a maximum of five years in jail.<sup>241</sup>

NAGPRA also prohibits trafficking in other cultural items obtained in violation of the act.<sup>242</sup> Penalties for violation of this prohibition are the same as for trafficking in human remains.<sup>243</sup> The anti-trafficking provision, as it applies to funerary objects, sacred objects, and items of

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233. See SENATE REPORT 473, *supra* note 108, at 10.

234. *Id.*; see also 136 CONG. REC. S17176 (daily ed. Oct. 26, 1990) (statement of Sen. McCain).

235. *Id.*

236. 25 U.S.C.A. § 3002(d)(1).

237. *Id.* § 3002(d)(3).

238. *Id.* § 3002(d)(2).

239. *Id.* § 3001(13); 18 U.S.C.A. § 1170(a) (West Supp. 1991).

240. SENATE REPORT 473, *supra* note 108, at 11.

241. 18 U.S.C.A. § 1170(a).

242. *Id.* § 1170(b).

243. *Id.*; see also *supra* text accompanying note 241.



cultural patrimony is for prospective acquisitions only.<sup>244</sup> The prospective limitation, however, does not prevent the application of existing state or federal law involving theft or stolen property if relevant to the possession or sale of Indian cultural items.<sup>245</sup>

#### H. Review Committee

NAGPRA creates a Review Committee, appointed by the Secretary of Interior, to monitor and review the implementation of NAGPRA.<sup>246</sup> The Review Committee consists of seven members—three appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders (at least two of the three must be traditional Native American religious leaders); three appointed from nominations submitted by national museum and scientific organizations; and one person chosen from a list compiled by the other six members.<sup>247</sup> Federal officers and employees may not serve on the Review Committee.<sup>248</sup>

The Review Committee composition and nomination process differ from that of the National Museum of the American Indian Act special review committee, which has been heavily criticized as being biased in favor of archaeological interests.<sup>249</sup> NAGPRA seeks to secure a more diverse composition.<sup>250</sup>

The Review Committee's function is to:

- (1) monitor the inventory and identification process;<sup>251</sup>
- (2) upon request, make findings related to the cultural affiliation and return of cultural items, and facilitate the resolution of disputes between interested parties;<sup>252</sup> these findings are non-binding, but are admissible in any court proceeding filed pursuant to NAGPRA;<sup>253</sup>

244. *See id.*

245. 25 U.S.C.A. § 3009(5).

246. *Id.* § 3006(a). NAGPRA required that the Review Committee be appointed by March 16, 1991. *Id.* The Secretary did not meet this deadline. In fact, a notice in the Federal Register soliciting nominations to the Review Committee was not published until August 28, 1991. 56 Fed. Reg. 42635 (1991). The Committee's initial six members were not appointed until March 3, 1992, and as of the date of this article, the seventh member had yet to be chosen. The Review Committee ceases existence 120 days after the Secretary certifies that its work has been completed. 25 U.S.C.A. § 3006(i).

247. 25 U.S.C.A. § 3006(b)(1).

248. *Id.* § 3006(b)(2).

249. *See, e.g., Senate Hearing on S. 1021 & S. 1980, supra* note 8, at 79 (testimony of Suzan Shown Harjo, Director, Morningstar Foundation).

250. In the Museum of the American Indian Act, three of the five special review committee members are selected from nominations of Indian tribes and organizations. The members, however, are neither required to be Native American, nor traditional leaders. 20 U.S.C.A. § 80q-10(b) (1990).

251. 25 U.S.C.A. § 3006(c)(2).

252. *Id.* § 3006(c)(3), (4).

253. *Id.* § 3006(d); *see also* SENATE REPORT 473, *supra* note 108, at 13.

- (3) compile an inventory of cultural items and make recommendations as to their disposition;<sup>254</sup>
- (4) consult with the Secretary of the Interior regarding regulations to implement NAGPRA;
- (5) make recommendations as to the return of items;<sup>256</sup> and
- (6) submit an annual report to the Secretary.

#### I. Enforcement and Penalties

NAGPRA provides for the Secretary to take action against museums that do not comply with the law. The penalties are determined by the commercial value of the item involved and the damages suffered by an aggrieved party.<sup>259</sup>

The penalty provision is not retroactive to violations of NAGPRA. NAGPRA provides that a party can allege a violation of NAGPRA only to enforce NAGPRA's provisions and to obtain any necessary orders.<sup>260</sup> This act does not create a procedural or substantive legal rights for museums or organizations.<sup>261</sup> If a museum repatriates an item, it is not liable for claims against the museum for repatriation, breach of fiduciary duty, or violation of law.<sup>262</sup>

To facilitate implementation, the Secretary of Interior to make grants to museums for the purpose of summary.<sup>263</sup> Tribes and Native Hawaiian

254. 25 U.S.C.A. § 3006(c)(5); *see also* note 253.

255. 25 U.S.C.A. § 3006(c)(7).

256. *Id.* § 3006(c)(9).

257. *Id.* § 3006(h).

258. *Id.* § 3007.

259. *Id.* § 3007(b).

260. *Id.* § 3013. The language in the NAGPRA statute enforces the law's provisions. The Senate Report, including an Indian tribe, Native Hawaiian organization, and action. SENATE REPORT 473, *supra* note 108.

261. 25 U.S.C.A. § 3009(3), (4).

262. *Id.* § 3005(f).

263. *Id.* § 3008(b).

- (3) compile an inventory of culturally unidentifiable human remains and make recommendations as to an appropriate process for their disposition;<sup>254</sup>
- (4) consult with the Secretary of the Interior in the development of regulations to implement NAGPRA;<sup>255</sup>
- (5) make recommendations as to the future care of repatriated cultural items;<sup>256</sup> and
- (6) submit an annual report to Congress.<sup>257</sup>

### I. Enforcement and Implementation of NAGPRA

NAGPRA provides for the Secretary of Interior to assess civil penalties against museums that do not comply with NAGPRA.<sup>258</sup> The amount of the penalties are determined by (1) the archaeological, historical, or commercial value of the item involved; (2) economic and noneconomic damages suffered by an aggrieved party; and (3) the number of violations.<sup>259</sup>

The penalty provision is not meant to be an exclusive remedy for violations of NAGPRA. NAGPRA specifically provides that an aggrieved party can allege a violation of NAGPRA through a legal cause of action to enforce NAGPRA's provisions. Federal courts have authority to issue any necessary orders.<sup>260</sup> This action is in addition to any existing procedural or substantive legal rights secured to tribes or Native Hawaiian organizations.<sup>261</sup> If a museum repatriates an item in good faith, however, it is not liable for claims against it predicated upon a claim of wrongful repatriation, breach of fiduciary duty, public trust, or violations of state law.<sup>262</sup>

To facilitate implementation, NAGPRA authorizes the Secretary of Interior to make grants to museums to undertake the inventory and the summary.<sup>263</sup> Tribes and Native Hawaiian organizations may also receive

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254. 25 U.S.C.A. § 3006(c)(5); *see also* text accompanying notes 161-64.

255. 25 U.S.C.A. § 3006(c)(7).

256. *Id.* § 3006(c)(9).

257. *Id.* § 3006(h).

258. *Id.* § 3007.

259. *Id.* § 3007(b).

260. *Id.* § 3013. The language in the NAGPRA is that "any person" may bring an action to enforce the law's provisions. The Senate Report explains this provision as meaning that "any party; including an Indian tribe, Native Hawaiian organization, museum or agency" may bring a cause of action. SENATE REPORT 473, *supra* note 108, at 14.

261. 25 U.S.C.A. § 3009(3), (4).

262. *Id.* § 3005(f).

263. *Id.* § 3008(b).

grants to assist them in repatriating cultural items.<sup>264</sup> Unfortunately, Congress failed to appropriate any funding under these provisions in 1991.<sup>265</sup> Because sufficient funding is critical to completely fulfill the promise of NAGPRA, funds hopefully will be made available for these purposes in future fiscal years. Finally, the Secretary of the Interior is authorized to issue regulations by November 16, 1991, to carry out NAGPRA's provisions.<sup>266</sup>

## VI. CONCLUSION

After centuries of discriminatory treatment, the Native American Graves Protection and Repatriation Act finally recognizes that Native American human remains and cultural items are the remnants and products of living people, and that descendants have a cultural and spiritual relationship with the deceased. Human remains and cultural items can no longer be thought of as merely "scientific specimens" or "collectibles."

In interpreting NAGPRA, it is critical to remember that it must be liberally interpreted as remedial legislation to benefit the class for whom it was enacted. This article, hopefully, will aid in the interpretation of NAGPRA in a manner consistent not only with the words of the statute, but also its spirit.

This article was also written to remind people that NAGPRA is a part of a larger historical tragedy: the failure of the United States Government, and other institutions, to understand and respect the spiritual and cultural beliefs and practices of Native people. Governmental policies that threaten Native American religions are not merely historical anachronisms, but continue to have a devastating impact upon contemporary Native Americans. Sites sacred to traditional Indian religious practitioners are currently threatened with destructive development. Centuries-old religious peyote use is threatened by ethnocentric court decisions. Native American prisoners are unable to practice their religions in a manner comparable to the respect accorded Judeo-Christian religious practice. Legislation to address this religious discrimination will be considered by Congress in the near future.

NAGPRA is unique legislation because it is the first time that the Federal Government and non-Indian institutions must consider what is *sacred* from an Indian perspective. Future legislation must be imbued with this same heightened consciousness of the nature of Indian culture

and spirituality. The authors hope that the historical and moral outrage that gave rise to NAGPRA will likewise result in across-the-board respect for Native American religions—which has been the last decade of the Twentieth Century.

264. *Id.* § 3008(a).

265. See H.R. 2686, 102d Cong., 1st Sess. (1991).

266. 25 U.S.C.A. § 3011. This deadline has not been met.



and spirituality. The authors hope that the understanding, sensitivity, and moral outrage that gave rise to and is reflected in NAGPRA will likewise result in across-the-board protection and respect for traditional Native American religions—which continue to be under assault in the last decade of the Twentieth Century.