Native Americans: Borough Is Not "Museum" Under Native American Graves Protection and Repatriation Act and Not Required to Disinter Remains

John Thorpe v. Borough of Jim Thorpe, No. 13-2446 (3d Cir. Oct. 23, 2014).

The Third Circuit has overturned a lower court and rebuffed efforts by the estate of Olympian Jim Thorpe to disinter his remains and move them to Sac and Fox tribal lands in Oklahoma, finding that the Pennsylvania borough where Thorpe is buried is not a "museum" for purposes of the Native American Graves Protection and Repatriation Act.

Jim Thorpe was considered by some to be the most outstanding Olympian in history. The gold-medalist died in 1953 without a will. After substantial legal wrangling, his third wife was assigned his estate and ultimately buried him in what has now been named Jim Thorpe, PA. Thorpe was a Native American of Sauk heritage and a member of the Sac and Fox Nation of Oklahoma and, despite his legal final resting place, some of his eight children have long argued that he should be buried in Sac and Fox tribal land in Oklahoma.

The Native American Graves Protection and Repatriation Act ("NAGPRA") was enacted in 1990 by Congress. It was intended to correct past abuses of Native Americans and their culture by returning the remains and cultural artifacts of Native Americans to their ancestral tribesman and lands. The law was long advocated for and many testified before Congress about the breathtaking scope of the cultural plundering. Some experts estimate "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." NAGRPA has two important requirements: 1) that items excavated on federal land after November 16, 1990 can be claimed by Native American peoples and 2) that cultural items currently held by the federal government, including "federally-funded museums," can be repatriated to Native American peoples.

In 2010, John Thorpe, one of the Thorpe's sons, tried to use the law in a novel way: he sued the borough of Jim Thorpe, PA for failing to comply with NAGPRA. He argued the borough was a "federally-funded museum" under the definition of museum in NAGRPA and thus, as a decedent of Jim Thorpe, he could get the remains repatriated to Native American peoples. The District Court agreed, holding that since it was a museum under NAGRA, the remains had to be disinterred and turned over to the Sac and Fox tribe as requested. The borough appealed.

HELD: The Third Circuit held Congress could not have intended the kind of "patently absurd" result that would follow from using NAGPRA in this way and reversed the District Court.

DISCUSSION: The Court looked to whether the borough could be a "museum" as that term is defined in NAGPRA, and found the definition to be "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." Though, literally, the borough fits within this definition under a plain reading, the Court refused to make this holding as it would be "absurd" given the intent of Congress. The Court used various arguments to reach this result. First, though the text was clear and "museum" included the borough, it refused to "blindly

enforce [it] regardless of surrounding circumstances or the practical results of rigidly applying the [statutory] text to a given situation." Second, it refused to "confine" itself "to examining [the] particular statutory provision in isolation" when the statutory meaning and ambiguity became clear when looking to context. Third, the Court said it was "confronted with the unusual situation in which literal application of NAGPRA will produce a result demonstrably at odds with the intentions of its drafters." The Court noted "NAGPRA was intended as a shield against further injustices to Native Americans. It was not intended to be wielded as a sword to settle familial disputes within Native American families." Ultimately, the Court refused to wade into the family dispute and refused to disturb the previous court's legal determination that the athlete's third wife had the legal right to determine the final resting place of Thorpe. It reversed the District Court.

http://www2.ca3.uscourts.gov/opinarch/132446p.pdf (last accessed Nov. 5, 2014)

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