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Archaeological Perspectives on the Native American Graves Protection and Repatriation Act; Underlying Principles

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ABSTRACT

The Native American Graves Protection and Repatriation Act is a carefully crafted legislative consensus achieved among constituencies that have both overlapping and varying interests in human remains. The Society for American Archaeology has acted as a primary voice for archaeological perspectives on repatriation since the mid-1980's. This archaeological

perspective has been guided by several underlying principles which have conditioned the legislative interactions of the SAA in terms of both law and the implementation of regulations. Among these principles are those of face-to-face interaction of concerned groups, issues of demonstrated cultural affiliation between contemporary groups and human remains, and the balance of scientific and Native American interests. This paper explores the application of these principles to the historical development of repatriation legislation in the United States from an archaeological perspective.

Introduction

The Native American Graves Protection and Repatriation Act (NAGPRA; 25 USC 3001; PL 101-601), which was passed by the United States Congress in 1990, is a carefully crafted legislative consensus achieved among parties with interests in human remains and cultural objects that both overlap and differ. The difficult task of achieving consensus required discussion, negotiation, and compromise. This consensus was achieved by parties that had, on numerous occasions, found themselves in direct opposition, due both to differing world views and political exigencies (Goldstein and Kintigh 1990).

The Society for American Archaeology (SAA) was the major scientific organization that rose to this challenge. Over several years prior to the enactment of NAGPRA, the Society internally grappled with the formulation of an effective set of principles to guide its actions concerning repatriation. Since the passage of NAGPRA, the Society has continued to be concerned both with the principles and the practice of repatriation.

In 1986, SAA's board appointed a Task Force on Reburial which later evolved into the Committee on Repatriation. This group's charge has been to advise the board on matters having to do with repatriation; in addition to their advisory role, members of this committee have tracked national legislation, testified at hearings, and represented SAA in discussions and negotiations on repatriation issues. We, the authors of this paper, are long-term members of this committee who were actively involved in the passage of NAGPRA. Thus, we present an "SAA-centric" perspective on NAGPRA, focusing on the principles that have informed SAA's positions on repatriation over the past dozen years.

Defining the Central Issues

With the ascent of repatriation as an active issue on national and state legislative agendas in the mid-1980s, SAA became the primary organizational voice for North American archaeologists, and indeed for scientists of all sorts. In order to respond to legislative initiatives, SAA crafted a policy on repatriation that could guide its public policy efforts. In developing this policy, the organization sought both to understand the considerable range of opinion among its members, and to stimulate a more thorough consideration of these important issues by the membership.

The development of an SAA policy on repatriation was conditioned by a fundamental scientific dissatisfaction with the premises and approaches embodied by the early pieces of proposed legislation. These proposals gave little recognition to scientific and public interests in learning from the physical remains of the past, were overarching, and did not appropriately accommodate ethnic diversity, historical context, or temporal variability. For example, one proposed law stipulated that everything postdating European contact at circa AD 1500 would be

subject to repatriation, implying that contact took place simultaneously across all of the contiguous and non-contiguous United States, and that only materials post-dating contact could be culturally affiliated. Another proposed law specified an earlier date for remains subject to repatriation, assuming that there were uniform relationships between pre- and post-contact indigenous groups that more recently inhabited a particular area. Still other proposed laws addressed only human remains, or even more narrowly, human remains held by government agencies, apparently judging that only human remains were of sufficient concern to Native Americans or that it was not necessary or possible to legislate compliance by non-Federal entities. SAA almost uniformly opposed overarching solutions that disregarded the degree of relationship between the remains and the claimants by failing to take into account such things as ethnic diversity, historic and prehistoric population movements, and temporal differences in contact. Similarly, SAA has also opposed solutions that seemed too narrow or too broad in focus.

SAA-sponsored forums on repatriation (including participation by strong Native American advocates of repatriation) demonstrated that virtually the entire spectrum of opinion was represented within our membership, from omnibus repatriation on demand, to adamant resistance to any repatriation regardless of the circumstances. This debate was particularly informed by the opinions of American Indian archaeologists and archaeologists who worked for tribes. Based on these observations the SAA Board decided that the Society had to do more than react to individual legislative initiatives, that it needed a set of principles from which our public-policy positions and responses to specific proposals could logically be derived.

With this understanding of the range of positions of our members, and an awareness of the issues being raised in proposed legislation, SAA undertook the development of a broader

series of fundamental principles that would recognize the potential of human remains to contribute important knowledge about the past, and also to properly accommodate appropriate scientific information in the decision-making process. These principles provided a philosophical basis on which proposed legislation or regulations could be independently evaluated. While it was recognized that all segments of the membership would not agree with all positions the Society might take, the intent was to incorporate core archaeological values with which the membership was generally comfortable.

SAA's Guiding Principles

The principles guiding SAA were embodied in its “Statement Concerning the Treatment of Human Remains” adopted in 1986 (see Appendix). The statement has four major components:

(1) that both Native American and scientific interests in human remains and funerary objects from archaeological contexts are legitimate and that repatriation procedures should strike an appropriate balance between these sometimes competing interests;

(2) that the scientific value of human remains (as funerary objects) varies with their potential to contribute significant information about the past and that the traditional values of Native American groups should be weighed according to the strength of their relationship to the remains or objects;

(3) that repatriations should be implemented on a case-by-case basis in order to, in each case, balance the scientific value and strength of relationship with modern native groups, and to

account for the variability in belief systems and the wishes of individual groups to which remains may be repatriated; and

(4) that this case-by-case determination should be made in the context of face-to-face contact in order to foster better understanding among concerned tribes, institutions, and scientists.

It was, and is, the Society's assessment that, at least on its face, NAGPRA met all of these concerns, albeit with varying success. However, there remains substantial discussion about the implementation of NAGPRA that revolves around some of these same issues. Furthermore, it is within the context of these principles that SAA continues to evaluate proposed changes to NAGPRA. It is with this in mind that further elaboration of these principles in this forum is warranted.

First Principle: Legitimacy of both Native and Scientific Viewpoints. The SAA Statement begins with: "Archaeologists are committed to understanding and communicating the richness of the cultural heritage of humanity, and they acknowledge and respect the diversity of beliefs about, and interests in, the past and its material remains." It goes on to say: "The Society for American Archaeology recognizes both scientific and traditional interests in human remains. Human skeletal materials must at all times be treated with dignity and respect." As the largest organization of professional archaeologists in the Americas, SAA has a responsibility to argue for the importance of archaeological and physical anthropological collections because of our commitments to a scientific understanding of the past. SAA firmly believes that scientific research has been and can continue to be beneficial to individual tribes, Native Americans at

large, and the nation as a whole. However, as anthropologists we feel an ethical responsibility to *respect* the beliefs of the descendants of those individuals we study.

SAA's position does *not* assert a universal priority of scientific over traditional interests. Instead, it says that these interests must be balanced with the legitimate traditional concerns of Native Americans. Such a balance must be struck in a manner that recognizes the value of both scientific and Native American concerns, is sufficiently flexible to allow negotiations between concerned groups, and can recognize the varying interests of these groups.

Second Principle: Scientific Importance versus Strength of Affinity. A second key point is that this balance of interests should be reached on the basis of evidence. "The scientific importance of particular human remains should be determined by their potential to aid in present and future research, and thus depends on professional judgments concerning the degree of their physical and contextual integrity." Thus, remains or objects lacking context and archaeological associations are generally judged less scientifically valuable than carefully documented collections.

"The weight accorded any claim made by an individual or group concerning particular human remains should depend upon the strength of their demonstrated biological or cultural affinity with the remains in question. If remains can be identified as that of a known individual for whom specific biological descendants can be traced, the disposition of those remains, including possible reburial, should be determined by the closest living relatives." In context of NAGPRA, the scale of closeness of relationship anticipated by the SAA policy is approximated by the concept of "cultural affiliation." While determinations of cultural affiliation under the law

are to be based on a range of acceptable kinds of evidence, SAA has always acknowledged that a broad range of evidence should be considered, including traditional histories of native groups.

The need to demonstrate “cultural affiliation” is not simply a vehicle through which archaeology attempted to exclude collections from repatriation, but rather represents a recognition of things we have learned from archaeology and physical anthropology worldwide—that all biological populations have not survived into the present, and that groups past and present have changed their geographic locations. Indeed, we know that in some cases multiple contemporary groups maintain identities that may be traced from common origins. Cultural affiliation is not as simple as being located in the same geographic area, nor as having a similar economy. The difficulties of this particular principle are well embodied in the legislative history of NAGPRA and continues to be played out as NAGPRA is implemented today (Kintigh 1998). However, it is clear that in some instances it may not be possible, with the evidence at hand, to demonstrate that cultural affiliation is present between a contemporary Native American group and an identifiable earlier group, leading to the current contention over unaffiliated and unclaimed remains and objects. A key point is that the determination of cultural affiliation must be based on a set of evidence that can be examined and evaluated; cultural affiliation cannot be based on assertions alone.

Third Principle: Case-by-Case Implementation. A third principle guiding SAA is that repatriation decisions should be made on a case-by-case basis. This means that repatriation claims should be evaluated on the basis of the specific information available for a particular collection and the concerns of the group with which it is potentially affiliated. Different collections are not equal in available information, content, or significance to concerned parties,

even if potentially affiliated with the same group. The quality of information about provenance, acquisition, and transfers of fiduciary responsibility will vary from collection to collection. Collections may also contain materials where the strength of relationships with modern groups varies and the objects within any given collection may be of differing importance to potentially affiliated groups. This principle argues that, given this range of variation, each case (i.e., collection) requires independent, case-specific evaluation in the context of individual claims.

Fourth Principle: Communication and Consultation. SAA has consistently taken the stance that regular and ongoing communication among tribes, museums, government agencies, and individual archaeologists is the cornerstone of strong and mutually beneficial working relationships. The only fashion in which misunderstandings on different sides of this issue will be minimized is through direct, face-to-face interactions between concerned parties, not between intermediaries representing those parties, whether legal, political, or bureaucratic. Direct interaction is the foundation through which respectful working relationships and trust develop. Most SAA members and the institutions which they represent are regionally focused, thereby allowing long-term engagement with known individuals and groups, and reducing the unknowns associated with sporadic dialogue. It is the intent of this principle to foster communication that will act to educate *all* parties concerned, to put individuals—not institutions—in direct contact, and to lead to greater respect for differing perspectives by all participants, recognizing that this will not necessarily lead to an outcome in which all parties agree. We believe that in the long run, these interactions will serve to alleviate political tensions.

The four principles just outlined have allowed SAA to evaluate the content of different pieces of legislation, proposed regulations, and other repatriation issues in a consistent fashion.

SAA negotiations in the context of NAGPRA have benefitted from this consistency and, it should be pointed out, have sometimes led to positions that are not in interests of maintaining collections. For, example, during the negotiations over NAGPRA, the museum community suggested a sort of statute of limitations on claims—that, in order to be valid, all claims for repatriation by tribes must be made by some specific date. SAA opposed that provision (despite the fact that it would have served to protect collections) on the principled grounds that if repatriation is ethically warranted on the basis of strength of relationship (that is, cultural affiliation), the validity of that claim should not expire.

In 1995, SAA published Ethics in American Archaeology: Challenges for the 1990's (Lynott and Wylie 1995). This volume, the result of an intensive workshop attended by archaeologists representing a broad range of views, and modified by subsequent comment and meetings, outlines seven principles of archaeological ethics. Although these principles go well beyond issues of repatriation, it is worth noting that all four principles outlined above are consistent with the Principles of Archaeological Ethics.

The NAGPRA Consensus and SAA

On its face, NAGPRA incorporates many of the arguments which have been articulated here. The law recognizes both traditional and scientific interests and gives a nod to the issue of scientific research importance. Repatriation decisions are to be made on a case-by-case basis considering the strength of relationship (cultural affiliation) with modern groups. Multiple lines of evidence are incorporated into decisions about cultural affiliation based upon a preponderance of evidence. Consultation between institutions and tribes is emphasized in the law, and face to

face discussions are mandated in the NAGPRA regulations. Finally, it is recognized that not all remains or objects can be culturally affiliated.

NAGPRA is not a perfect document from the position of *any* of the stakeholders. Different Native American individuals and groups, museums, archaeologists and physical anthropologists, can all find components of the law with which they are not satisfied. It is these unresolved issues that continue to shape the ongoing debate on amendments and regulations.

The points on which SAA compromised in order to reach a consensus are glaringly evident to archaeologists and physical anthropologists. Since this paper represents an archaeocentric perspective, these points warrant more detailed examination here. Three items in particular come to the fore in this regard: scientific research, cultural affiliation, and culturally unidentifiable remains.

SAA believes that a large portion of the human remains and other items covered by NAGPRA have substantial scientific importance, and warrant scientific documentation. Indeed, this is one component of the SAA policy that was not embedded in the law: “Whatever their ultimate disposition, all human remains should receive appropriate scientific study.” NAGPRA’s provisions for scientific study of existing museum collections is limited to only those studies whose outcome would be of major benefit to the United States. While NAGPRA does not explicitly address documentation of remains and objects recovered in new excavations, such studies are implicitly required under other applicable law (i.e., the Archaeological Resources Protection Act). In practice, however, much repatriation is done in the absence of even basic documentation of the remains or objects. Perhaps the example which has received the most notoriety is that of so-called Kennewick Man; a controversy over whether these remains

could be studied prior to repatriation has prompted both litigation and proposed remedial legislation.

Determination of cultural affiliation is the cornerstone of NAGPRA, and a central point that SAA employs in its evaluation of legislation, amendments, regulations, and internal agency guidelines. The problems here lie not so much with the provisions of the law as in their quite varied interpretations. Kintigh's (1998) summary of the components of the definition of cultural affiliation includes the concepts of "group identity," "identifiable earlier group," "relationship of shared group identity," and "reasonably traceable." Group identity is not defined in NAGPRA even though it appears in the text. Identifiable earlier groups cannot be generally be described in exactly the same terms as modern tribes; in practice they are usually archaeological "cultures" employing variables which are not strictly comparable with those used for historically defined tribes, and group identity is generally taken to be the terms with which living people reckon their own group membership. The concept of a relationship of shared group identity likewise has implementation issues associated with it. To establish cultural affiliation under the law, one must first recognize an identifiable earlier group and then show that group's identity is traceable through time to the identity of a federally recognized tribe. Finally, as Kintigh concludes, NAGPRA does not explicitly allow recognizing joint affiliations between a single earlier group and several modern groups, although certain Federal agencies are currently making such determinations despite the absence of a clear legal mandate.

For many Native Americans, the key unresolved issue seems to be repatriation of unaffiliated remains. Culturally unidentifiable remains were deliberately held in abeyance during the negotiations on NAGPRA because of the recognition that they represented a particularly difficult problem to address. It was hoped that the experience developed by tribes,

federal agencies, and museums through the repatriation of affiliated remains might lead to insights into how to resolve this problem. Regulations for the treatment of culturally unidentifiable remains do not exist. Contrary to the stated opinions of some individuals, we do not believe that the U.S. Congress, when it passed NAGPRA, intended to repatriate *all* Native American human remains, irrespective of cultural affiliation. Congress expressly left this issue open for future consideration.

From a scientific perspective, culturally unidentifiable human remains are a very real category. Some past remains cannot be reasonably traced, under any of the criteria associated with cultural affiliation, to a present-day tribe. As time-depth increases, the likelihood of making an affiliation diminishes. The fact that some institutions and agencies are circumventing Congressional intent (and probably the law) by associating culturally unidentifiable remains with geographically based collectives of unrelated tribes for purposes of rapid repatriation is of particular concern here. Geographical proximity or coincidence is not in itself a sufficient condition for establishing cultural affiliation, and it is cultural affiliation which allows repatriation to be legitimate.

Conclusion

The authors believe that the principles adopted by SAA have served it well in negotiating the language of NAGPRA, in assessing the law's implementation through regulations, and in evaluating proposed legislation. These principles attempt to balance scientific concerns with those of indigenous peoples. As the largest professional organization of archaeologists, it has been the Society's goal to represent archaeology on a national level, while recognizing that some

diversity of opinion remains among archaeologists and that views on repatriation are not static, but change with further experience and consideration. Since the passage of NAGPRA, SAA has not only been open to communication with tribes, but has forcefully urged its members to work closely and openly with tribes in repatriation and on other issues of common concern (such as looting). While we will not always agree, we will always respectfully listen and try to understand all positions, and we will work to use the insights gained to refine our own perspectives. We trust that tribes will approach us in an equally open atmosphere. Such open communication and mutual respect provides us the best path toward developing mutually acceptable solutions to these difficult issues.

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Society for American Archaeology

1986 Statement Concerning the Treatment of Human Remains.

Appendix

Society for American Archaeology Statement Concerning the Treatment of Human Remains

Archaeologists are committed to understanding and communicating the richness of the cultural heritage of humanity, and they acknowledge and respect the diversity of beliefs about, and interests in, the past and its material remains.

It is the ethical responsibility of archaeologists "to advocate and to aid in the conservation of archaeological data," as specified in the Bylaws of the Society for American Archaeology. Mortuary evidence is an integral part of the archaeological record of past culture and behavior in that it informs directly upon social structure and organization and, less directly, upon aspects of religion and ideology. Human remains, as an integral part of the mortuary record, provide unique information about demography, diet, disease, and genetic relationships among human groups. Research in archaeology, bioarchaeology, biological anthropology, and medicine depends upon responsible scholars having collections of human remains available both for replicative research and research that addresses new questions or employs new analytical techniques.

There is great diversity in cultural and religious values concerning the treatment of human remains. Individuals and cultural groups have legitimate concerns derived from cultural and religious beliefs about the treatment and disposition of remains of their ancestors or members that may conflict with legitimate scientific interests in those remains. The concerns of different cultures, as presented by their designated representatives and leaders, must be recognized and respected.

The Society for American Archaeology recognizes both scientific and traditional interests in human remains. Human skeletal materials must at all times be treated with dignity and respect. Commercial exploitation of ancient human remains is abhorrent. Whatever their ultimate disposition, all human remains should receive appropriate scientific study, should be responsibly and carefully conserved, and should be accessible only for legitimate scientific or educational purposes.

The Society for American Archaeology opposes universal or indiscriminate reburial of human remains, either from ongoing excavations or from extant collections. Conflicting claims concerning the proper treatment and disposition of particular human remains must be resolved on a case-by-case basis through consideration of the scientific importance of the material, the cultural and religious values of the interested individuals or groups, and the strength of their relationship to the remains in question.

The scientific importance of particular human remains should be determined by their potential to aid in present and future research, and thus depends on professional judgments concerning the degree of their physical and contextual integrity. The weight accorded any claim made by an individual or group concerning particular human remains should depend upon the strength of their demonstrated biological or cultural affinity with the remains in question. If remains can be identified as that of a known individual for whom specific biological descendants can be traced, the disposition of those remains, including possible reburial, should be determined by the closest living relatives.

The Society for American Archaeology encourages close and effective communication between scholars engaged in the study of human remains and the communities that may have biological or cultural affinities to those remains. Because vandalism and looting threaten the record of the human past, including human remains, the protection of this record necessitates cooperation between archaeologists and others who share that goal.

Because controversies involving the treatment of human remains cannot properly be resolved nationwide in a uniform way, the Society opposes any Federal legislation that seeks to impose a uniform standard for determining the disposition of all human remains.

Recognizing the diversity of potential legal interests in the material record of the human past, archaeologists have a professional responsibility to seek to ensure that laws governing that record are consistent with the objectives, principles, and formal statements of the Society for American Archaeology.

[Approved by the Society for American Archaeology Executive Committee, May 1986]