Altered Meanings: The Department of the Interior’s Rewriting of the Native American Graves Protection and Repatriation Act to Regulate Culturally Unidentifiable Human Remains

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“Congress’s purposes would not be served by requiring the transfer to modern American Indians of human remains that bear no relationship to them.”

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I. **Introduction**

In 1990, following more than twenty years of lobbying on the part of the Native American community, the United States Congress passed the Native American Graves Protection and Repatriation Act (hereafter “NAGPRA”). This piece of legislation set in place a mechanism to allow Native Americans to obtain possession of certain Native American skeletal remains, sacred objects, and other cultural items held in government, museum and university collections across the United States as well as providing for the protection of *in situ* remains. NAGPRA is seen by many as

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legislation [that] effectively balances the interest of Native Americans in the rightful and respectful return of their ancestors with the interests of our Nation’s museums in maintaining our rich cultural heritage, the heritage of all American peoples. Above all, ... this legislation establishes a process that provides the dignity and respect that our Nation’s first citizens deserve.⁵

NAGPRA has now existed for eighteen years and has become a very real part of the legal landscape of modern archaeology and physical anthropology and the relationships of the practitioners of those fields of inquiry with Native peoples. In the years since the passage of NAGPRA, various portions of the law have been expounded upon through regulations issued by the United States Department of the Interior (hereafter “DOI”).⁶ One of the most contentious areas that DOI continues to work on in a regulatory context today is what, if any, regulations should be drafted to deal with culturally unidentifiable human remains. This paper examines the history of these efforts and analyzes DOI’s activities in this regard to assess how well that agency has conformed to the letter of NAGPRA in dealing with culturally unaffiliated human remains.

It is prudent to identify what this paper is and is not about. In the broad view, this paper examines whether DOI, with the assistance of the NAGPRA Review Committee (hereafter “Review Committee”), has stuck to the letter and the spirit of NAGPRA when drafting proposed regulations to deal with culturally unidentifiable human remains. This paper does not consider whether DOI’s draft regulations on associated funerary objects are proper. Nor does this paper address the category of culturally unidentified human remains that are classed as such due to a technical incongruity in the NAGPRA statutory language that does not seem to provide standing to tribes that are not federally recognized.

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⁵ Senator John McCain (R-AZ), Congressional Record, October 26, 1990, p. S17173.
⁶ 43 C.F.R. 10.1, et seq.
The latter class of culturally unidentifiable human remains consists of human remains that can be definitively linked to a particular Native American group or Native Hawaiian organization, but that group or organization is not recognized as a tribal entity by the Bureau of Indian Affairs (hereafter “BIA”). In effect, these remains are culturally affiliated in fact, but not in law. This reality stems from the definition of Native American in NAGPRA that limits repatriation to those tribes recognized by the BIA only. Thus, these affiliated remains sit in a liminal state between affiliated and unaffiliated. These remains present issues that are not the subject of this research.

The Review Committee is charged, under the law to make recommendations regarding the disposition of culturally unidentifiable human remains, not to draft any actual regulations. The Review Committee has noted that charge on several occasions, while also recognizing that it has overstepped its recommending authority on several occasions.

After years of repeated and revised recommendations from the Review Committee regarding culturally unidentifiable human remains, DOI published proposed regulations in 2007. Because the DOI draft regulations are ostensibly based on Review Committee recommendations, the discussions that the Review Committee has had on the issue of culturally unidentifiable human remains are extremely important, as they should form the basis for the recommendations. However, as will be seen, even the Review

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8 25 U.S.C. 3006(c)(5).
9 See e.g., Native American Graves Protection and Repatriation Review Committee Meeting, teleconference, Jan. 8, 2008, transcript (“Meeting 36 transcript”), pp. 7-8.
Committee has been surprised at the departure from its recommendations with the 2007 Draft Regulations, a curious situation that forms the substance of this analysis.

II. NAGPRA’s Function and Purpose

A. How Does NAGPRA Work?

The NAGPRA legislation applies to Native American human remains in two contexts: curated remains held in the institutional collections of any federal agency or any institution (including state and local governments) that receives federal funding and remains found on federal or tribal lands. The 2007 Draft Regulations implicate only the first category of remains (curated collections), but both situations are reviewed here.

1. Curated Remains

Under NAGPRA, as passed in 1990, all federal agencies and federally funded institutions were required to create, by November 16, 1995, an inventory of all “Native American human remains and associated funerary objects” under their control. If, pursuant to the inventory required by NAGPRA, a modern culturally affiliated group can be identified, and such a group requests the return of the remains, the request must be granted. NAGPRA provides for civil penalties for failing to so comply. These inventories are required to be reviewed by a “Review Committee” created by the

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12 Native Americans under NAGPRA includes Native Americans, Native Hawaiians, and Alaskan Inuits. 25 U.S.C. 3001.
16 This date was five years after the passage of the Act as provided for in 25 U.S.C. 3003(b)(1)(B), subject to reasonable extensions under 25 U.S.C. 3003(c).
18 After notice of a violation of the inventory requirements, the Secretary of the Interior must assess a penalty. “The penalty amount must be .25 percent of [the] museum’s annual budget, or $5,000, whichever is less...” 43 CFR §10.12(g)(2). The Secretary of the Interior can also assess additional penalties when considering the value of the materials held by the museum, the damages suffered by the affected groups, and the number of violations. 43 CFR §10.12(g)(2)(i-iii). Additionally, a penalty of up to $1,000 per day may be assessed “after the date that the final administrative decision takes effect ... if [the] museum continues to violate” NAGPRA. 43 CFR §10.12(g)(3).
Secretary of the Interior and composed of seven members. At the request of an “affected party,” the Review Committee must make findings of the cultural affiliation of human remains or other contested items as well as arrange for the repatriation of affiliated remains, when requested.

Under NAGPRA, claims for repatriation can be made by known lineal descendants for remains identified, pursuant to an inventory, as affiliated with that descendant’s Native American group. One of the most complicated parts of NAGPRA, also allows Native American groups to claim remains if the group can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

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19 These seven members are supposed to consist of: three members of the scientific/museum community, three members of Native American organizations, and one “from a list of persons developed and consented to by all of” other six members. 25 U.S.C. 3006(b)(1)(A-C). The following people have been members of the NAGPRA Review Committee for the indicated parenthetical dates: Ms. Rachel Craig, Inupiaq (1992-1997); Ms. Tessie Naranjo, Santa Clara Pueblo Tribe (1992-2000); Dr. Martin E. Sullivan, Heard Museum (1992-2000); Mr. William Tallbull, Northern Cheyenne (1992-1996); Dr. Phillip L. Walker, Dept. of Anthropology, Univ. of California – Santa Barbara (1992-1997); Dr. Dan L. Monroe, Peabody Essex Museum (1992-1997; 2004-present); Dr. Jonathan Haas, Field Museum of Natural History (1992-1997); Mr. Lawrence Hart, Cheyenne Cultural Center (1996-2004); Dr. James Bradley, Robert S. Peabody Museum (1998-2004); Mr. Armand Minthorn, Confederated Tribes of the Umatilla Indian Reservation (1998-2004); Dr. John O’Shea, Museum of Anthropology, Univ. of Michigan (1998-2004); Ms. Vera Metcalf, Yupik (1998-2005); Dr. Garrick Bailey, Dept. of Anthropology, Univ. of Tulsa (2000-2006); Ms. Rosita Worl, Sealaska Heritage Institute (2000-present); Mr. Willie Jones, Lummi Indian Business Council (2004-present); Mr. Lee Staples, Mille Lacs Band (2004-2005); Dr. Vincas Steponaitas, Research Laboratories of Archaeology, Univ. of North Carolina (2004-present); Mr. Colin Kippen, Native Hawaiian Education Council (2005-present); Ms. Donna Augustine, Aroostook Band of Micmacs (2006-present); Dr. Alan H. Goodman, School of Natural Sciences, Hampshire College (2007-present).


22 25 U.S.C. 3005(a)(4). For the purposes of NAGPRA, cultural affiliation means: that there is 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.
Remains that are not identifiable through the means discussed supra must remain in the possession of the holding institution.\(^{23}\) Some remains, even with their cultural affiliation known, may also be temporarily retained by the holding institution under certain circumstances.\(^{24}\) This narrow exception allows for the retention of claimed remains if such items are indispensable for completion of a scientific study, the outcome of which would be of major benefit to the United States.\(^{25}\)

2. Remains Found on Federal or Tribal Lands

NAGPRA also applies to Native American remains discovered on federal and tribal lands.\(^{26}\) If remains are found on such lands, after the date of enactment, NAGPRA applies.\(^{27}\) NAGPRA prioritizes the order of the right of possession of such remains. If lineal descendants can be associated with the remains, those individuals hold the primary position of possession.\(^{28}\) However, where direct lineal descendants cannot be identified, a three part scheme of possession determination is employed (in the following order of priority):

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\(^{23}\) This is the case due to the lack of statutory guidance on the issue of disposition of unaffiliated, unclaimed remains. 43 CFR 10.7; 43 CFR 10.11. Maintaining the status quo by keeping these collections where they are seems reasonable. 43 CFR 10.9(e)(16).

\(^{24}\) 25 U.S.C. 3005(b).

\(^{25}\) Even when such remains are held in this manner, the remains must be returned “no later than 90 days after the date on which the scientific study is completed.” \textit{Id.}

\(^{26}\) 25 U.S.C. 3002. The law also applies to objects of cultural patrimony in this regard.

\(^{27}\) For the purposes of NAGPRA, federal lands means:

- any land other than tribal lands which are controlled and owned by the United States, including the lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971.

25 U.S.C. 3001(5). Tribal land means:

- (A) all lands within the exterior boundaries of any Indian reservation; (B) all dependant Indian communities; (C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.

A. First, ownership shall be “in the Indian tribe...on whose tribal land such objects or remains were discovered,”
and if that does not apply, then;

B. Ownership shall be “in the Indian tribe...which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or”

C. “[I]f cultural affiliation...cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe,” then
  1. The ownership shall be “in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or”
  2. Ownership shall be “in the Indian tribe that has the strongest demonstrated relationship...if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects...”

It must be remembered that these provisions and the order of claims they create only apply to remains or objects discovered after November 16, 1990, and not to remains and objects already curated by that date. Additionally, NAGPRA does not prohibit the excavation of remains after November 16, 1990; it just sets in place a mechanism for

34 Such remains are covered in 25 U.S.C. 3002(a), discussed supra.
determining who ultimately controls the remains.\textsuperscript{35} Finally, and most important for the purposes of this article, NAGPRA provides no mechanism for the disposition of remains that cannot be validly claimed by any person or group (whether found before or after November 16, 1990).

\section*{B. What are culturally unidentifiable human remains?}

One of the fundamental requirements of NAGPRA, as noted above, is that federal agencies and other institutions holding Native American human remains must compile an inventory of those remains.\textsuperscript{36} In compiling this inventory, each institution must make reasonable efforts to identify the cultural affiliation of the human remains that are part of their collections. Such conclusions are generally drawn from nondestructive physical anthropological analyses. Those human remains for which the institutions are not able to make affiliation conclusions become classified as culturally unidentifiable human remains under NAGPRA.

One estimate of the number of culturally unidentifiable individuals in institutions’ collections as of 2007 exceeds 118,000.\textsuperscript{37} Thus, a large number of the human remains that may be subject to NAGPRA that are currently held in institutions’ collections around the United States are classified into the somewhat nebulous category of culturally unidentifiable.

Human remains may fall into the category of culturally unidentifiable human remains for several reasons. As was intimated above, some remains are classified as culturally unidentifiable because, even though their cultural affiliation may be known, the

\textsuperscript{36} 25 U.S.C. 3003(a).
\textsuperscript{37} Andrew Kline, \textit{Who are the Culturally Unidentifiable?} 1. Unpublished report for DOI (2007).
tribe that such remains are affiliated with is not recognized by the BIA. Many other classifications of “culturally unidentifiable” result from the methods of excavation or curation. In other words, either when the remains were removed from the ground or during many years of being held in one or more institutions, the provenience data that would link the remains to either a general region or perhaps a particular group has been lost. In such cases, a general physical analysis of the remains has presumably not led to any better understanding of the cultural affiliation of these individuals.

The final large category of human remains that are classified as culturally unidentifiable are those that are simply too old to reasonably be said to share a cultural link with any currently existing Native American group. In most cases, no amount of analysis will result in an ultimate determination of cultural affiliation. These remains are simply too old to be able to decipher their cultural connections. Kline’s report on culturally unidentifiable human remains is telling of this fact. In his study of culturally unidentifiable human remains held in collections in Alabama, Florida, Illinois, Kentucky, Ohio, and Tennessee, Kline noted that,

Examination of the time period when the [culturally unidentifiable remains] were believed to have been alive presents a near even spread of [culturally unidentifiable] between 8000 B.C.E. and 1400 C.E.

Twenty-nine percent of Klein’s sample came from the Mississippian period (A.D. 1100-1400). Cultural identification of these remains may be possible through advanced (possibly destructive) analyses. However, for the forty-two percent that are classified as

39 See generally, Kline, supra, n. 38, at 3-7
40 Id.
41 60(118) Fed. Reg. 32164.
42 See, Kline, supra, n. 38, at 11. Note that the “B.C.E.” and “C.E.” dates correspond directly to “B.C.” and “A.D.,” respectively.
either “no age information,” “Prehistoric,”43 or “Archaic,”44 cultural identification will be
difficult at best, as it is likely that there are no living cultures that share enough of a link
to these peoples to be considered affiliated under NAGPRA. It is also probable that a
large portion of the “Woodland”45 period remains that are culturally unidentifiable will
also fall into the category of individuals that it is impossible to culturally identify due to
their age. Thus, out of a total sample of 53,182 individuals, it may not be possible to
culturally identify nearly sixty-seven percent, or 35,632 individuals.46

C. NAGPRA’s legislative history and purpose

The NAGPRA legislation cannot be understood properly unless it is placed in its
historical context. Any consideration of the history of NAGPRA must necessarily
incorporate a review of the history of the National Museum of the American Indian Act
(NMAIA).47 This Act started the repatriation ball rolling in the mid-1980s. It was Native
American and lawmaker concerns over the disposition of the Smithsonian Institution’s
skeletal collections during the early NMAIA hearings that ultimately led to the enactment
of NAGPRA. Since that time, both the NMAIA and NAGPRA have been considered
together in Congressional hearings and the legal literature. The histories of both
NAGPRA and the NMAIA are considered in concert here, but are referred to as
NAGPRA for convenience.

The legislative history is virtually devoid of references to material older than A.D.
1492.48 One of the few instances in which Congress made a statement regarding ancient

43 Kline reports a date range of 15000 B.C. to 8000 B.C. for the Prehistoric period. Id.
44 Kline reports a date range of 8000 B.C. to 1000 B.C. for the Archaic period. Id.
45 Kline reports a date range of 1000 B.C. to A.D. 1000 for the Woodland period. Id.
46 This figure leaves out the more recent Mississippian and Historic period remains.
48 See generally, Sen. Comm. on Indian Affairs, Native American Cultural Preservation Act, Hearings on
S.187, 100th Cong. (Feb. 20, 1987) (hereinafter 1987 Senate hearings); Sen. Comm. on Indian Affairs,
remains is the following quote from Senator Inouye (D-HI).

"We are also fully in concurrence with the importance of knowing how we lived a thousand years ago or a million years ago, whatever it may be." 49

What is abundantly evident from the legislative history is that Congress was especially concerned with redressing the wrongs committed against Native Americans since A.D. 1492. 50 For example, repeated references were made to United States Army acquisitions made in the nineteenth century. 51 Little interest was displayed in remains that are very old. Indeed, when members of the museum and anthropological community attempted to

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49 1988 Senate hearings, supra, n. 49, at 66.

50 As noted in S. Rep. No. 100-601, supra, n. 49, at 2:

"It is the view of this Committee that there is a need for legislation in order to rectify the harm which has been inflicted upon Native American religious liberty and cultural integrity by the systematic collection of Native American skeletal remains, grave goods, and certain ceremonial objects which are required for the on-going conduct of religion."

51 This is evidenced by the following quote. "How many were acquired during the Indian Wars?" Question by Senator Inouye, 1988 Senate hearings, supra, n. 49, at 50. See also, 1989 House hearings, supra, n. 49, at 115, 119, 181-185; 1987 Senate hearings, supra, n. 49, at 32. See also, S. Rep. No. 100-494, supra, n. 49, at 28; S. Rep. No. 100-601, supra, n. 49, at 2,4. This conclusion is also supported by comments from the NAGPRA Review Committee many years after the passage of NAGPRA. One such example is the following comment from Review Committee member, Mr. Lawrence Hart, who stated that,

"I think that the intent of this piece of legislation is to rectify an injustice, that horrid two-decade chapter of American history from 1860 beginning with the order of General Otis to 1880 has to be rectified, and NAGPRA is a piece of legislation that can help us do that."

raise questions relating to ancient remains in their testimony before Congress, their concerns were barely noted by the Congressional committees. Instead, Congress immediately reverted to questions of the whereabouts and disposition of recent remains. Indeed, in at least one report issued by Congress subsequent to hearings on the NMAIA, the House of Representatives Committee on Public Works reports that,

H.R. 2668 provides a reasonable method and policy for the repatriation of Indian bones and funerary objects in the possession of the Smithsonian Institution. However, many human remains in the collection are of unknown origin and will, therefore, remain in the collection.

The record from the Congressional hearings on bills that were precursors to NAGPRA are replete with references to and concerns about remains that are 200 or less years old. Indeed, Senator Inouye went as far as stating that remains as old as 2,000 years were not the primary interest of the bill. Senator Melcher, who was the author of the original Senate repatriation bill, also stated that,

remains were also obtained by archaeologists. In general those are older remains, gathered for study to piece together the millennium of our unknown beginning. We do not intend in any way to interfere with this

\footnotesize{\textsuperscript{52} E.g., “I don’t think that it necessarily follows that the bill pertains only to extremely recent remains.” Comment by Dr. Thomas King, 1987 Senate hearings, \textit{supra}, n. 49, at 50. \textit{See also}, Dr. Richard Stamps’ comment that, “I have been told that all artifacts from the Earth are spiritual and should be returned. Where do you draw the line?” 1989 House hearings, \textit{supra}, n. 49, at 276. 

\textit{Immediately after the comment by Dr. King, \textit{supra}, Senator Inouye returned to questions of recent remains, never addressing the issue of the application of the bill to ancient remains. \textit{Id}. See also the comments of Dr. Keith Kintigh, 1990 House hearings, \textit{supra}, n. 49, at 138. In this case, the problem was acknowledged by the Congressmen, but they, too, quickly returned to a discussion of recent remains, admitting that they did not know what to do about ancient, unaffiliated remains. 1990 House hearings, \textit{supra}, n. 49, at 230. \textit{See also} the statements of Dr. Robert Adams, 1989 House hearings, \textit{supra}, n. 49, at 228, 265-267. These discussions did not amount to any resolution of note.

\textit{54} 1987 Senate hearings, \textit{supra}, n. 49, at 50; 1990 House hearings, \textit{supra}, n. 49, at 230. Indeed, S. Rep. No. 100-601, \textit{supra}, n. 49, at 4 indicates that at least the Senate was not at all concerned with remains recovered through legitimate archaeological excavations.

\textit{55} H.R. Rep. No. 101-340 (Part 1), \textit{supra}, n. 49, at 16. \textit{See also}, \textit{id}. at 15, commenting that repatriation was only intended to apply to the remains of known individuals.


\textit{57} 1987 Senate hearings, \textit{supra}, n. 49, at 50.

\textit{58} S.187, 100\textsuperscript{th} Cong. (1987).}
study and science in the bill.\textsuperscript{59}

In only a few places were there vague references to a question of ancient items and the difficulty of cultural affiliation on the part of Congress. One such reference was to cultural material and not human remains.\textsuperscript{60} The remainder of comments addressing the application of this legislation to ancient remains was raised by the archaeological, museum, and Native American communities. In testimony before the Senate Select Committee on Indian Affairs, representatives of the archaeological and museum communities raised issues of problems with the legislation’s application to ancient remains. These issues were ignored by the Senators.\textsuperscript{61} Representative Charles Bennett (D-FL) directly addressed the issue of ancient remains in the House of Representatives hearings in 1990. He commented that,

\begin{quote}
we should not overlook the fact that there are some of the deceased who don’t have modern descendants, and \textit{their remains still should be kept with care}.\textsuperscript{62}
\end{quote}

These comments strongly suggest that Congress did not intend for NAGPRA to apply to ancient remains.\textsuperscript{63} In the same vein is the statement by Senator Daniel Akaka (D-HI)

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\textsuperscript{59}1987 Senate hearings, \textit{supra}, n. 49, at 27 (emphasis added).
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\textsuperscript{60}1990 Senate hearings, \textit{supra}, n. 49, at 68. The House of Representatives hearings in 1989 did address the problematic issue of cultural affiliation. See 1989 House hearings, \textit{supra}, n. 49, at 195. However, the consideration of this important issue was limited to a question posed by Rep. Ben Campbell (R-CO) regarding whether tribes would fight over reburial rights to remains of questionable affiliation. No answer to this question appears in the record, and the issue was not addressed again.
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\textsuperscript{61}See e.g., 1987 Senate hearings, \textit{supra}, n. 49, at 50; 1988 Senate hearings, \textit{supra}, n. 49, at 64. For a similar response in the House of Representatives, see 1989 House hearings, \textit{supra}, n. 49, at 17, 228; 1990 House hearings, \textit{supra}, n. 49, at 138. The Native American community also mentioned ancient remains on several occasions. Their attempts at getting this issue addressed were also largely unsuccessful. See e.g., 1990 House hearings, \textit{supra}, n. 49, at 111, 123; 1989 House hearings, \textit{supra}, n. 49, at 149-153 (Mr. Echo-Hawk addressing the disposition of all remains), 181-185 (Congress’ response by questioning nineteenth century actions, with no reference to ancient remains).
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\textsuperscript{62}1990 House hearings, \textit{supra}, n. 49, at 130 (emphasis added).
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\textsuperscript{63}Although Rep. Bennett’s further statement that, “I think that they would feel that these remains and their ways of being buried should also be respected and taken care of in any legislation we pass” almost seems to suggest an intent to have NAGPRA apply to ancient remains (at least to ensure respect for them), Bennett quickly dissolves this notion by stating that, “[w]e should not overlook the fact that they [sic] are not
I think there should be some consideration in the bill that would speak to this, so that the Government may be ... the caretaker of peoples who are extinct.\footnote{Id. at 135.}

Based upon the legislative history of NAGPRA, it is difficult to argue that the 2007 Draft Regulations, which would provide for the widespread repatriation of ancient human remains, encapsulate the intentions of Congress when it passed this landmark legislation in 1990. On the contrary, the legislative history of the statute clearly indicates that Congress had no desire or intent to mandate that ancient, unaffiliated remains be removed from federal and museum collections and given to unaffiliated present-day groups. Such a contrary purpose is precisely what the currently proposed regulations would seek to carry out.

III. Culturally Unidentifiable Human Remains

A. Who creates the regulations for culturally unidentifiable human remains?

As discussed above, NAGPRA does not contain any language mandating the disposition of culturally unidentifiable human remains. The only thing it provides on this subject is to charge the NAGPRA Review Committee with the obligation to:

\begin{quote}
compile an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommend[] specific actions for developing a process for disposition of such remains.\footnote{25 U.S.C. 3006(c)(5).}
\end{quote}

This provision is clear. The NAGPRA Review Committee is not given authority to adopt regulations for the disposition of culturally unidentifiable human remains. All the Review Committee is authorized to do is to make recommendations regarding what modern descendants to take care of those remains and we as a nation should take care of those remains.” 1990 House hearings, \textit{supra}, n. 49, at 130.
should be done with culturally unidentifiable remains. Nothing in this provision or elsewhere in NAGPRA authorizes DOI to act on the Review Committee’s recommendations or otherwise imbues DOI with the duty to create regulations to determine the disposition of culturally unidentifiable human remains.

It is a general rule of regulatory authority that authority to adopt regulations on a subject must be explicitly granted and cannot be presumed by an agency.\(^{66}\) In addition, the courts have generally stated that when there is language in a statute that directs an agency to regulate certain matters the agency and the courts cannot then expand that language to cover areas of a statute where such language does not exist.\(^{67}\) Thus, in answer the question of who has the authority or obligation to create regulations to deal with culturally unidentifiable human remains, the answer, under NAGPRA, is “no one.” Despite this lack of authority, DOI has interpreted NAGPRA as giving it the authority to create such regulations.\(^{68}\) Insodoing, DOI purportedly looked to the periodic recommendations of the NAGPRA Review Committee on this matter. Those recommendations cannot provide a lawful basis for exercising authority not granted by Congress. However, they are worth examining as they demonstrate that only Congress can resolve the complex issues presented by culturally unidentifiable human remains.

\(^{66}\) See e.g., Amalgamated Transit Union v. Skinner, 894 F.2d 1362, 1368 (D.C. Cir. 1990) (quoting Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988)), which stated that an “agency’s ‘power to promulgate . . . regulations is limited to the authority delegated’ to it by Congress.” See also, Ball, Ball, & Brosamer, Inc. v. Reich, 24 F.3d 1447, 1450 (D.C. Cir. 1994) (an “agency can neither adopt regulations contrary to statute, nor exercise powers not delegated to it by Congress.”).

\(^{67}\) See e.g., Texas v. United States, 497 F.3d 491, 502 (5th Cir. 2007) (stating that, “[w]hen Congress has directly addressed the extent of authority delegated to an administrative agency, neither the agency nor the courts are free to assume that Congress intended the Secretary to act in situations left unspoken.”).

\(^{68}\) Comments of Dr. Francis McManamon, Native American Graves Protection and Repatriation Review Committee Meeting, Anchorage, Oct. 16-18, 1995, transcript (“Meeting 10 transcript”), Vol. 1, p.15.
B. 1995 Draft Recommendations

In 1995, the NAGPRA Review Committee made its first attempt at a proposal for what to do with culturally unidentifiable human remains that are held in federal agency and other institutional collections in the United States.\(^69\) These recommendations, called the Draft Recommendations Regarding the Disposition of Culturally Unidentifiable Human Remains and Associated Funerary Objects (hereinafter, “1995 Draft Recommendations”), were intended to begin a dialogue on the ultimate disposition of culturally unaffiliated human remains under NAGPRA.\(^70\) Unfortunately, this document by the Review Committee was based, in large part, on policies that are either not supported by the law authorizing such recommendations or are out of step with the current scientific reality surrounding the relevant issues.\(^71\)

As an initial matter, the Review Committee correctly notes that “the disposition of culturally ‘unidentifiable human remains’ is left open in NAGPRA.”\(^72\) Indeed, NAGPRA does not define the term “disposition” at all. The absence of such a definition demonstrates that Congress did not want all remains to be viewed as being the same, or for all to be treated the same (i.e., repatriated and then reburied). To the contrary, Congress deliberately “left open” the question of what should happen to unidentifiable

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\(^69\) 60 (118) Fed. Reg. 32163 (6/20/95).
\(^70\) Id.
\(^71\) Indeed, subsequent to the publication of the 1995 Draft Recommendations, the Review Committee members admitted that this draft went so far as to completely eliminate the concept of culturally unidentifiable human remains, a scenario that is simply not scientifically feasible. See, Meeting 10 transcript, supra, n. 69, at Vol. 2, p.215-216. Even with this admission, it is apparent from the same meeting that the Review Committee began its deliberations over the status of culturally unidentifiable human remains with the incorrect premise that NAGPRA mandated the return of all remains, affiliated or not. To achieve this goal, the Review Committee attempted to broaden the scope of the law by interpreting NAGPRA as contemplating the reburial of all remains. See generally, Meeting 10 transcript, supra, n. 69. Such a conclusion is false since nothing in NAGPRA requires reburial of remains after repatriation and because the law clearly contemplates that some remains would be unreachable (i.e., culturally unidentifiable). Thus, such recommendations clearly reach beyond the statutory authority of NAGPRA.

\(^72\) 60(118) Fed. Reg. 32163.
remains. To make this point even clearer, with respect to culturally unidentifiable human remains, NAGPRA states that the Review Committee is merely tasked with the obligation to

compil[e] an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommend[ ] specific actions for developing a process for disposition of such remains.  

Despite this lack of any requirement in the law mandating repatriation of such human remains, the Review Committee, in 1995, concluded that NAGPRA contemplated that it should be left to the Native American community to determine what to do with such remains.  

In addition, the Review Committee stated that,

While the Committee recognizes there may be potential value in such [scientific] analyses, such values do not provide or confer a right of control over Native American human remains that supersedes the spiritual and cultural concerns of Native American people who clearly have the closest general affiliation to these remains.

Such statements by the Review Committee, whatever their motivation, do not comport with the letter of the law, which is silent as to who is to control and retain these remains, nor do they comport with the legislative history of NAGPRA. Because the law itself is silent on this matter, the only available guidance on what Congress intended be done with culturally unaffiliated human remains comes from the legislative history of NAGPRA.

As has been noted at length, supra, it is clear from the legislative history that Congress did not settle on a policy of what should be done with ancient and other

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73 25 U.S.C. 3006(c)(5).
74 60(118) Fed. Reg. 32163.
culturally unidentifiable human remains. Comments in the Congressional committee hearings on the various drafts of NAGPRA demonstrate that Congress contemplated that such remains would continue to “be kept with care”76 and that NAGPRA was not intended to interfere with the scientific study of ancient peoples.77 The balance that Congress struck between the interests of the Native American community and the museum/scientific community in enacting NAGPRA is clear: return fairly recent human remains that can be definitively affiliated with modern Native American groups and leave those that are too old to be affiliated in the curation facilities of this nation to advance scientific study until Congress decides to reopen the issue. The 1995 Draft Recommendations simply do not embody this spirit of the law.

Another interesting component of the 1995 Draft Recommendations is its classification of different types of culturally unidentifiable human remains. The Review Committee created three classes of culturally unidentifiable remains:

1. remains for which there is cultural affiliation with Native American groups who are not formally recognized by the BIA;

2. ancient remains for which there is specific information about the original location and circumstances of the burial; and

3. remains which may be Native American but which lack information about their original burial location.78

Certainly, the second classification, the ancient remains, fall squarely within the intent of Congress not to provide, by statute or regulation, for repatriation when a direct cultural link cannot be established. The third classification, those remains with little or no provenience information, also fall into the category of remains that Congress did not

76 1990 House hearings, supra, n. 49, at 130 (emphasis added).
77 1987 Senate hearings, supra, n. 49, at 27 (emphasis added).
intend to be subject to repatriation unless and until further cultural affiliation information can be acquired on them.

Even the first category is problematic for adoption of regulations (although it does highlight a shortcoming in NAGPRA). The law provided only for the repatriation of remains to federally recognized Native American groups. What this means is that if a preponderance of the evidence shows that certain remains are culturally affiliated with a non-federally recognized Native American group, NAGPRA would see those remains as culturally unaffiliated. This conundrum would seem to frustrate the purposes of the law to allow for the repatriation of recent Native American remains. There does not appear to be any regulatory solution to this problem, as the problem stems from the language of the law itself. During many of the Review Committee meetings, numerous comments were made by representatives of the Native American community that suggest that a simple fix to this problem is not possible.79 Although it would seem that simply amending the law to allow for repatriation requests to be made by non-federally recognized, but culturally affiliated groups would be the common-sense solution, many of the federally recognized groups were concerned that this would improperly grant some measure of federal recognition to non-recognized groups. Consequently, they were opposed to such an amendment.80 However, as was noted above, this matter is largely outside of the scope of this paper and will not be discussed any further.

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79 See e.g., comments of Mr. Dan Weiner, American Museum of Natural History, Native American Graves Protection and Repatriation Review Committee Meeting, Los Angeles, Feb. 16-18, 1995, minutes (“Meeting 9 minutes”), p. 20 (stating that, “not all Indian tribes want non-Federally recognized groups to be included under NAGPRA.”) See also, comments of Mr. William Day, Tunica-Biloxi Indians of Louisiana, Native American Graves Protection and Repatriation Review Committee Meeting, Washington, DC, Jan. 29-31, 1998, transcript (“Meeting 14 minutes”), p.32.

Another ill-informed statement made by the Review Committee in the 1995 Draft Recommendations was that all culturally unidentifiable human remains and objects, “no matter how ancient, are nevertheless Native American.” Unfortunately, this statement does not comport with the emerging science on the peopling of the New World. In addition, this statement rules out the possibility that European (or Asian or African) human remains that predate the arrival of Christopher Columbus may be found in the United States. There is no doubt that Norse seafarers had established settlements in Northeastern North America some five hundred years before the arrival of Columbus. Under the above-quoted statement, any such remains found in the United States would be considered de facto Native American. Certainly, this result was not intended by Congress when it enacted NAGPRA.

The Review Committee, in 1995, also supported the concept that regional consortia of Native American groups should be allowed to claim culturally unaffiliated remains that can only be linked to a general geographic area rather than to a particular culture. However, this recommendation by the Review Committee does not comport with the clear language of the law. NAGPRA provides for repatriation of remains to a

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83 Transcripts of the Review Committee meetings show that the Committee was aware of the possibility that not all culturally unidentifiable human remains are Native American (e.g., culturally unidentifiable remains found in Hawaii that are, in fact, Asian and what should be done with those or Euro- or African-American human remains from the continental United States and whether those remains should be repatriated to Native Americans in the absence of enough information to make a definitive affiliation). See e.g., Meeting 9 transcript, supra, n. 11, at Vol. 1, pp. 110-111. Indeed, Dr. Phillip Walker stated, with respect to this issue that,

the whole basis for this legislation is to give descendants the right to make determinations about the disposition of the remains of their ancestors. And I think that we're obligated to do this by this law, and if there is some question about some other non-Native American group having ancestors represented in a collection, then I think it's incumbent upon us to respect that -- the intent of the law.

Meeting 9 transcript, supra, n. 11, at Vol. 2, p.211. Apparently, DOI did not find this possibility probable enough to draft its regulations in a manner that took such eventualities into account.
Native American tribe, not a consortium of tribes. This reality was analyzed at length in the *Bonnichsen v. United States* matter. In responding to DOI’s assertions that a coalition of tribes was a permissible claimant under NAGPRA, Judge Jelderks commented that,

The Secretary's analysis contradicts the plain language of the statute, which identifies the appropriate recipient in the singular as “the Indian tribe ... which has the closest cultural affiliation.” 25 USC § 3002(a)(2)(B) (emphasis added). Use of the term “tribe” in the singular in 25 USC § 3002(a)(2)(B) is also consistent with references to a single tribe in other NAGPRA provisions and the Secretary's own regulation addressing cultural affiliation.84

Further, Jelderks noted that,

The Secretary's analysis could render part of the statute meaningless. Carried to the logical end, coalition claims would effectively eliminate the statutory requirement that cultural affiliation be established with a particular modern tribe.85

Thus, in the only reported decision to address this issue to date, it was determined that the concept of using tribal consortia to make repatriation claims under NAGPRA is improper since it is contradicted by the plain language of the statute.86

C. 1996 Draft Recommendations

In 1996, the Review Committee published another statement, similar to the 1995 Draft Recommendations. This new statement was also entitled Draft Recommendations Regarding the Disposition of Culturally Unidentifiable Human Remains (“1996 Draft Recommendations”).87 The 1996 Draft Recommendations are particularly significant because in them the Review Committee explicitly recognized that neither it nor DOI had

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85 *Id.* at 1142.
86 This matter was specifically excepted from the Ninth Circuit’s decision. *See, Bonnichsen v. U.S.*, supra, n. 2, at footnote 11.
the authority to create regulations for the disposition of ancient remains. The Review Committee stated:

The committee believes that decisions regarding disposition of a small number of generally very ancient human remains will require amendments to NAGPRA by Congress. 88

Indeed, in the interim between the publication of the 1995 Draft Recommendations and the 1996 Draft Recommendations, Dr. Phillip Walker pointedly observed, with respect to DOI’s authority to promulgate regulations for the disposition of culturally unidentifiable human remains under NAGPRA, that,

the only place the culturally unidentifiable remains are addressed is in the charge to the Committee … it doesn't say anything about the Secretary of Interior making regulations on the disposition of culturally unidentifiable remains. It says that the Committee is supposed to think about this … and make suggestions about the possible disposition of those remains. Now, maybe legally the fact that this says that we're supposed to make suggestions, the Secretary of the Interior might … imply his -- something about his ability to make regulations, but in … other cases where -- it's clear -- clearly states that he has, for example, in the … Inadvertent Discovery section, … it clearly says that he has authority to make regulations. And in the case of culturally unidentifiable material, it does not. So, it seems like there at least is a qualitative, if not legal, difference there in what his authority is. 89

The explicit recognition, both in the 1996 Draft Recommendations and from the comments of various Review Committee members of the Review Committee’s, and indeed DOI’s, lack of statutory authority to mandate the repatriation of ancient human remains is consistent with the legislative history and purpose of NAGPRA, as discussed supra. 90 Dr. Jonathan Haas’ comment that,

88 Id.
89 Meeting 10 transcript, supra, n. 69, at Vol. 2, p.169-170. Dr. Jonathan Haas further commented that, “if they're culturally unidentifiable, then -- then they don't seem to fit under the rest of NAGPRA.” Id. at Vol. 2, p. 170.
90 Interestingly, this portion of the 1996 Draft Recommendations is a departure from what the Review Committee was being repeatedly told by the DOI solicitors. See e.g., the comments of Dr. Francis McManamon:
I think if we said, give the remains back to any Indian who comes in the door of a museum regardless of cultural affiliation that the Secretary of the Interior would have some real difficulty implementing those as regulations under NAGPRA\textsuperscript{91}

appears to have been summarily ignored when the DOI drafted its 2007 Draft Regulations which assume that DOI has the necessary statutory authority. As early as 1996, the Review Committee recognized that there was no statutory authority to mandate the sort of result that would be required by the geographic affiliation provisions of the 2007 Draft Regulations.

The 1996 Draft Recommendations are also relevant because they contemplated using regional consortia to allow for the repatriation of culturally unidentified remains that nonetheless have some geographic information associated with them. In addition to the problems with this approach, as already noted above, it would appear from the comments of many of the Native American groups that testified before the Review Committee that they viewed this approach as being unworkable in most circumstances. Such an approach would permit various differing groups, from possibly different cultures, to claim remains that may or may not be culturally affiliated with any one or more of them. As numerous commentators recognized, this runs the spiritual risk of subjecting the remains of one person to the reburial practices of other, unrelated people.\textsuperscript{92}

\textsuperscript{91}Id. at Vol. 1, p.51. Apparently at this early date, DOI had already decided that it was going to mandate the repatriation of these remains regardless of the recommendations of the Review Committee.

\textsuperscript{92}\textit{See e.g.}, Meeting 9 transcript, \textit{supra}, n. 11, at Vol. 1, p.49.
D. 1999 Draft Principles

In 1999, the Review Committee published a Notice of Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains ("1999 Draft Principles"). These Draft Principles contain statements that stray wildly from the statutory language of NAGPRA and its legislative history. For example, the 1999 Draft Principles state that,

While the statute does not always specify disposition, it is implicit that:

a. The process be primarily in the hands of Native people (as the nearest next of kin),

b. Repatriation is the most reasonable and consistent choice.

There is no support in the letter of NAGPRA, implicit or explicit, for either of these conclusions. There is no doubt that NAGPRA intended for Native Americans to be in the driver’s seat on matters of “disposition” of remains when they were culturally identifiable. That was the whole purpose of the law. However, to state that the same scenario also applies to unidentifiable remains is simply an unwarranted extension of the law, which is silent on the latter issue. As noted above, the position taken by the 1999 Draft Principles is also not consistent with the Congressional hearing testimony that

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94 Id. Committee Member, Dr. Martin Sullivan, noted that,
    some of the commenters [sic] reminded us how important it is to be very, very careful about not being entirely interchangeable in using the words disposition and repatriation. Meeting 18 transcript, supra, n. 52, at Vol. 1, p. 164. This matter was deferred by the drafter of the 1999 Draft Principles and was only minimally reconsidered at the Salt Lake City meeting. Id. See also, Meeting 18 transcript, supra, n. 52, at Vol. 3, p.65. The minor revisiting of the disposition/repatriation issue came on the third day of the Salt Lake City meeting, where Mr. Bradley did recognize that the two words “are not interchangeable.” Id. at 70.
95 The lack of such statutory authority did not dissuade some Review Committee members from impressing their own personal beliefs on to how the resulting regulations should function. For example, Mr. Lawrence Hart commented that, “Bill Tallbull stressed that all of the culturally unidentified human remains be repatriated. I have taken that view and I will not deviate from it.” Meeting 18 transcript, supra, n. 52, at Vol. 1, p. 167. From this expression, it is easy to see how the drafting of regulations on this subject has taken thirteen years and counting and it is also easy to see how the equating of disposition and repatriation was a fait accompli from the beginning.
clearly indicates that ancient remains are not supposed to be covered by this law and that those remains for which no cultural affiliation can be determined should be “kept with care.” 96 Indeed, as to ancient remains, the 1999 statement is in direct contravention of the statement in the 1996 Draft Recommendations that the disposition of ancient remains must be accomplished by statutory amendment.

There is virtually no explanation for this drastic shift in the 1999 Draft Principles. Committee Member, Mr. James Bradley who drafted the Principles, stated that,

my effort here has been to try to draw on all of the information we have been talking about; the statute, the previous attempts at drafting regs, the decisions that we have made on a case-by-case basis as they have come before us… 97

One possible explanation for the vast departure from the 1996 Draft Recommendations that is identifiable from the Review Committee record is the Review Committee’s experiences with instances in which parties had reached mutual agreements among themselves as to the disposition of unidentifiable remains and who came before the Review Committee to seek the Secretary of DOI’s blessing for a repatriation of remains to them. Mr. Bradley did refer to these decisions even though there is no statutory authority for the Secretary to bless such agreements in NAGPRA. 98 The Review Committee’s apparent confusion on this point is evidenced by Mr. Bradley’s statement that the 1999 Draft Principles document, “is not a statement of agreement by the members of this committee.” 99

96 1990 House hearings, supra, n. 49, at 130.
97 Meeting 18 Transcript, supra, n. 52, Vol. 1, p.147.
98 In a discussion of Secretarial authority with respect to authorization the repatriation of culturally unaffiliated remains, DOI solicitor Carla Mattix commented that such authority is “in the regulations. It is not in the statute.” Id. at Vol. 1, p.142.
99 Id. at Vol. 1, p. 148.
E. 2000 Recommendations

The fourth, and so far last, attempt by the Review Committee to develop recommendations on this subject occurred in 2000 with another document entitled Recommendations Regarding the Disposition of Culturally Unidentifiable Native American Human Remains in 2000 (“2000 Recommendations”). These Recommendations largely reiterate the substance of the 1999 Draft Principles, with a few notable differences. The language of the 1999 Draft Principles relating to the meaning of the term “disposition” was changed to:

While the statute does not always specify repatriation, it is implicit that the process be guided by the rights and needs of Indian tribes and Native Hawaiian organizations.

Although it is not expressly stated, the apparent reason for this lexical change from 1999 to 2000 was to give the word “disposition” a meaning more consistent with the Review Committee’s evolving views that all culturally unidentifiable human remains should be removed from federal agency and institutional collections and given to Native peoples for reburial. Such an outcome would be lawful if sanctioned by appropriate congressional amendments to NAGPRA. It does not, however, provide an appropriate basis for unilateral action by federal agencies and institutions. They are bound by the statute as written, and the Review Committee does not possess the authority to modify or waive NAGPRA’s provisions.

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101 Id.
F. 2007 Draft Regulations

After nearly five years of official silence on the issue of culturally unidentifiable human remains, DOI published, in 2007, a series of draft regulations on this topic entitled, Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains (“2007 Draft Regulations”). Although this instrument purports to be published pursuant to authority granted by Congress in NAGPRA, its substance deviates substantially from the clear language of the statute.

An agency’s claim that it has followed congressional language or intent in the drafting of regulations is simply not sufficient to establish its authority for so regulating. Actual authority must exist. This limitation becomes a significant

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103 The last published statement on culturally unidentifiable human remains was the 2000 Recommendations. However, an unpublished set of revisions to that document was circulated in 2002. See Meeting 36 transcript, supra, n. 10 at 18.
105 Id.
106 One such example is the DOI’s rewording the title of NAGPRA in the following statement: The Review Committee recognized that the legislative intent of the Act is expressed by its title: the protection of Native American graves and repatriation [of Native American cultural items].
108 Id.
problem with the 2007 Draft Regulations, as is discussed in Part IV, infra. However, before a critical analysis of the 2007 Draft Regulations can be undertaken, a brief review of their substance is necessary. The 2007 Draft Regulations are preceded by policy statements and an analysis of the rules prepared by the DOI staff. Both the rules and the policy statements/analysis will be reviewed in tandem below, with specific reference to actual draft regulations, where appropriate.

The 2007 Draft Regulations refer to three categories of culturally unidentifiable human remains. These are the same as the three categories proposed by the Review Committee in its 1995 Draft Recommendations. The 2007 Draft Regulations also contain new directives for the documentation of culturally unidentifiable human remains. These state, in essence, that pursuant to consultation with interested Native American groups under 43 CFR 10.9(c) and 43 CFR 10.14, scientific analyses of such remains may be conducted in an effort to advance conclusions regarding the cultural affiliation of the remains. However, any other scientific research beyond mere cultural identification would apparently be prohibited by these regulations.

Under the “Disposition” heading, the 2007 Draft Regulations contain a policy statement regarding the reality that all human remains, whether culturally affiliated or

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111 This reality is clear from the statement that:

The Review Committee confirmed that once inventories have been completed, the Act may not be used to require new scientific studies or other means of acquiring or preserving additional scientific information from human remains and associated funerary objects.

Id. This prohibition raises concerns about the study of remains that, for one reason or another, are not repatriated. Under the proposed regulations, an argument could be made that no scientific research that could lead to the development of better forensic methods, the understanding of pathological pathways, or the understanding of human history as told from the bones would be permissible. Of course, it is possible that permission for such research could be obtained through the consultation process contemplated by the regulations, but the prospects of obtaining such permission, as will be discussed more fully, infra, seem slim. Thus, the remains will sit, unrepatriated and unstudied – a detriment to science and disrespectful to the people whose remains these are.
culturally unaffiliated, are deserving of respect.\textsuperscript{112} Certainly, this policy is one that is shared by all interested parties.\textsuperscript{113} Following the policy statement, the 2007 Draft Regulations state that the disposition of culturally unidentifiable human remains means giving these remains to Native American groups.\textsuperscript{114} With this statement and the proposed regulations that follow, the DOI drafters have taken the liberty of defining the term “disposition” to mean “repatriation,” the same approach taken by the Review Committee in its 2000 Recommendations (see discussion, \emph{supra}).\textsuperscript{115} What this redrafting of the statutory language does is to eliminate the possibility that “disposition” could be interpreted to mean maintaining the status quo of such remains by allowing them to remain in museum and federal agency collections for the purposes of scientific research.\textsuperscript{116} As has been noted above, there is no statutory support for the Review Committee’s or DOI’s restricted interpretation of the term “disposition.”

\textsuperscript{112} 72(199) F.R. 58584.
\textsuperscript{113} “[Dr.] Owsley stated that he felt that all human remains need to be treated with great care and respect.” Native American Graves Protection and Repatriation Review Committee Meeting, Albany, Nov. 17-19, 1994, minutes (“Meeting 8 minutes”), at p.12. Indeed, in my own research experience, I have encountered no one who ever forgot that the subject of their research pursuits were once human beings and accordingly, the remains were always treated with reverence and respect.
\textsuperscript{114} 71(199) Fed. Reg. 58584 and 58588, or draft regulation 43 CFR 10.2(g).
\textsuperscript{116} The common method for interpreting the meaning of terms in statutory interpretation, when no special definition is provided, is to assign those terms their commonsense definition. \textit{See e.g.}, \textit{General Motors Corp. v. United States}, 78 Fed.Cl. 336, 342 (2007); \textit{see also}, \textit{Bass v. County of Butte}, 458 F.3d 978, 982 (C.A. 9 2006). The Concise Oxford English Dictionary provides the following definitions for the term “disposition”:

1 a person’s inherent qualities of mind and character … 2 the way in which something is placed or arranged … 3 the transfer or property or money to someone, in particular by bequest. 4 the power to deal with something as someone pleases.

Catherine Soanes and Angus Stevenson, \textit{CONCISE OXFORD ENGLISH DICTIONARY} (11\textsuperscript{th} ed.), 414 (Oxford 2006). Further, the same source provides the following definition for the term “repatriate”: “send (someone) back to their own country.” \textit{Id.} at 1218 (2006). Obviously, the term “disposition” has multiple meanings, none of which reference repatriation, much less require that repatriation must be accomplished. Indeed, even the more basic term “return” is not a part of the definition of “disposition.” DOI appears to acknowledge that there is a difference in the use of these two terms in NAGPRA in its distinction of the terms on the National NAGPRA’s Web site. \textit{See}, DOI, National NAGPRA Frequently Asked Questions, \url{http://www.nps.gov/history/nagpra/FAQ/INDEX.HTM}, accessed Aug. 22, 2008. The reality that “disposition” may mean something other than “repatriation” has been discussed by the Review Committee on several occasions, with no apparent resolution reached on the issue. \textit{See also}, comments of Dr. Clark.
Also under the “Disposition” heading, the 2007 Draft Regulations contain two recommended approaches to the repatriation of culturally unidentifiable human remains. One would be the return of remains via mutual agreement of the museum or federal agency and the implicated Native American groups and the other would be by repatriation via regional committee meetings on a case-by-case basis. As will be discussed, infra, neither of these approaches are permitted by the statutory language of NAGPRA.

Finally, the 2007 Draft Regulations provide civil penalties for failure to comply with the rules. This portion of the 2007 Draft Regulations is not relevant to this research and will be discussed no further.

IV. Defects in the 2007 DOI Draft Regulations

A. Geographic affiliation is not supported by the law

Section 10.11(c)(1)(iii) of the proposed regulations provides that:

(c) Disposition of culturally unidentifiable human remains and associated funerary objects.

(1) A museum or Federal agency that is unable to prove that it has right of possession, as defined at § 10.10 (a)(2), to culturally unidentifiable human remains must offer to transfer control of the human remains to Indian tribes and Native Hawaiian organizations in the following priority order:

* * *

(iii) The Indian tribe and Native Hawaiian organization with:

(A) A cultural relationship to the region from which the human remains were removed, or

Larsen, who stated that “[t]he regulations should allow for the idea that disposition does not necessarily mean reburial.” Native American Graves Protection and Repatriation Review Committee Meeting, Salt Lake City, Nov. 18-20, 1999, minutes (“Meeting 18 minutes”), at p.17. In this case, DOI simply opted to attempt to avoid the controversy by defining the term as “repatriation,” an approach not supported by the Review Committee as a whole as of the time of the 2007 Draft Regulations.

(B) For human remains lacking geographic affiliation, a cultural relationship to the region in which the museum or Federal agency with control over the human remains is located.

This requirement does not comport with the purposes or text of NAGPRA or scientific realities. Due to the highly mobile nature of Native American groups both before and after European contact, it is without scientific support to claim or assume that human remains excavated from one locale must be culturally or genetically related to the group or groups that are currently occupying that area. As noted by the University of Massachusetts Repatriation Committee,

[the proposed rules presume the ubiquity of one tribe to one discrete area of land (and thus to one discrete set of human remains), and does [sic] not make allowance for the more complex forms of land tenure and cultural relationships present in Native America.]

What DOI failed to recognize with the 2007 Draft Regulations, despite numerous warnings, is that it simply may be impossible to identify cultural affiliation between the culture to which a particular collection of human remains belongs and modern Native American groups.

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119 Comment letter from Nancy Coulam, DOI Document No. DOI-2007-0032-0013.1 (Jan. 4, 2008) at 1 (“Coulam letter”); Comment letter from Gerald R. Singer, Esq., General Counsel, American Museum of Natural History, DOI Document No. DOI-2007-0032-0105 (Jan. 14, 2008) at 1. In this regard, Dr. Holger Schutkowski of the British Association for Biological Anthropology and Osteoarchaeology, noted that “scientific study of archaeological evidence has shown that ... place of burial is often a poor guide to the geographical location an individual inhabited during life.” Comment letter from Dr. Holger Schutkowski, Chair, British Association for Biological Anthropology and Osteoarchaeology, DOI Document No. DOI-2007-0032-0028.1 (Jan. 11, 2008) at 2.

120 Members of the Review Committee warned of the dangers of adopting such an approach early in the recommendation process:

I think that we, from what Mr. Tallbull was saying about his Tribe's history, I think that we need to be careful about imposing geographic -- assuming that these groups will be all from some specific geographical area. What's important is not where a Tribe's living today, but where -- where their ancestors are.

Comments of Dr. Phillip Walker, Meeting 10 transcript, supra, n. 69, at Vol. 1, pp.113-114. Nonetheless, these warnings went unheeded in the 2007 Draft Regulations.

DOI’s Draft Regulations also provide that culturally unidentifiable human remains held in a museum’s collections can be given to the federally recognized tribe that is physically located the closest to the museum.\textsuperscript{122} There is absolutely no basis for this proposed language anywhere in NAGPRA. Indeed, such an approach would seem to turn the entire purpose of NAGPRA – to return remains to the people who share some cultural link to them – on its head. Commenting on this provision, the Field Museum of Natural History notes that,

\begin{quote}
[i]t would be irresponsible and unfair to the proper descendents to require disposition to groups whose only possible link to the human remains is to be located proximate to the institution holding them.\textsuperscript{123}
\end{quote}

Under NAGPRA, as it is currently written, the geographic location of a skeleton’s original provenience can be used as the basis for claiming the skeleton in only two situations: (1) if the skeleton is found on tribal land; or (2) if it is found on land that was judicially determined by a final judgment of either the Indian Claims Commission or the Court of Claims to have been aboriginally occupied by the claiming tribe.\textsuperscript{124} These provisions apply only to remains discovered on federal or tribal land after November 16, 1990, and they authorize repatriations to a single tribe only. They do not apply to agency or institutional collections generally, and they do not permit coalition claims.\textsuperscript{125}

\begin{flushright}
\textsuperscript{122} 72(199) Fed. Reg. 58589, or proposed regulation 43 C.F.R. § 10.11(b)(iii)(B).
\textsuperscript{123} Comment letter from Joe Brennan, Esq., General Counsel, Field Museum of Natural History, DOI Document No. DOI-2007-0032-0017 (Jan. 10, 2008) at 10 (“Brennan letter”). Further, the Society for American Archaeology notes that,
\begin{quote}
[t]he location of a museum or repository might have absolutely nothing to do with cultural affiliation of the remains they curate. Many institutions have collections and human remains from very wide geographic areas. For a variety of reasons, including when and for what reason remains were acquired, documentation of the remains’ geographic origins may be incomplete or non-existent. Remains with no geographic affiliation may have originated in another country.
\end{quote}
\textsuperscript{124} 25 U.S.C. 3002(a).
\textsuperscript{125} Bonnichsen, 217 F.Supp. at 1141-1144.
\end{flushright}
It is probable that Congress did not attempt to apply similar laws to unaffiliated remains that were already in archaeological collections around the country because they recognized that geographic proximity is not tantamount to cultural or biological affiliation. Because NAGPRA is intended to provide a mechanism for reclaiming the remains of individuals whose groups are extant – thus righting the wrongs of the nineteenth and early twentieth century anthropologists and their dubious collection practices – the geographic proximity language that does exist in NAGPRA cannot be applied to unaffiliated remains excavated pre-NAGPRA. Indeed, the problems inherent in using geography as a basis for affiliation have long been a subject of concern even to the Review Committee, with no real resolution ever having been reached on this matter.

DOI does not have the authority to enact its own concepts of what the law should be. Its only authority is to implement the statute as written by Congress. Changes in policy are for Congress to make, if it so chooses. Indeed, Congress might disagree with the choices made by DOI in the Draft Regulations.

B. Property law problems and current archaeological methods

The proposed regulations rely on modern concepts of property ownership and attempt to apply these concepts to human remains. The proposed regulations would permit institutions to retain control over human remains as to which they can prove a

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126 Joe Brennan, General Counsel for the Field Museum, highlights this problem in his comment letter on the 2007 Draft Regulations. See, Brennan letter, supra, n. 124, at 10; see also, Comment letter from Lynn Simonelli, President, Ohio Archaeological Council, DOI Document No. DOI-2007-0032-0015.1 (Jan. 6, 2008) at 3-4 (“Simonelli letter”); Coulam letter, supra, n. 120, at 1; SAA letter, supra, n. 124, at 11.


right of possession.\textsuperscript{129} This provision erroneously implies that the dominion over human remains is a transferable property right.\textsuperscript{130} Such is simply not the case in the absence of a lineal relationship.\textsuperscript{131} Once there is no longer an identifiable cultural or genetic link between human remains and an extant group of people, the remains of these ancient people become wards of the State.\textsuperscript{132} The government thus has a public trust duty to ensure that such remains are kept with care and respect and to ensure that the information that can be learned from these remains is not lost through arbitrary reinterment.

In addition to the mischaracterization of human remains as property, the proposed regulations also fail to consider the dichotomy between the excavation of Native American remains under modern anthropology and the collection gathered under the looser practices of the past.\textsuperscript{133} NAGPRA was enacted to address the acquisition problems created by the latter. Most human remains that were excavated in the last half-century and that fall within the ambit of modern anthropological study were recovered, by and large, according to strict modern ethical and scientific standards.\textsuperscript{134} These remains also were recovered with the full knowledge of the public. NAGPRA was not intended to

\textsuperscript{129} 72 FR 58589, or proposed 43 CFR 10.11(c)(1).
\textsuperscript{130} See, Hugh Y. Bernard, \textit{The Law of Death and the Disposal of the Dead}, 12 (Oceana 1966), who notes that,

\[\text{[f]rom the time of Sir Edward Coke, the great English jurist of the Tudor and Stuart period, it has been held by the courts that dead bodies are not “property,” not having intrinsic value or being articles of commerce.}\]


\textsuperscript{131} \textit{See}, Gilligan and Stueve, \textit{supra}, n. 130, at 6.

\textsuperscript{132} Indeed, as was noted above, that is precisely what some members of Congress had envisioned for ancient remains during the NAGPRA debates. \textit{See}, Testimony of Rep. Bennett, 1990 House hearings, \textit{supra}, n. 49, at 130.

\textsuperscript{133} \textit{See}, Seidemann 2004, \textit{supra}, n.127, for a distinction.

\textsuperscript{134} \textit{See e.g.}, Society for American Archaeology, \textit{Principles of Archaeological Ethics}, \texttt{http://www.saa.org/aboutSAA/committees/ethics/principles.html}, accessed, Sept. 1, 2008 (containing statements regarding respect for Native groups and otherwise outlining the basics of ethical archaeology).
stifle this sort of science. There is no doubt that objections of lineal descendants were not always considered during the nineteenth and early twentieth century when human remains were disinterred and taken to America’s museums in large quantities to fulfill oftentimes superficial objectives. 135 Such is not the case today and it was not the case for many years prior to the passage of NAGPRA. Institutions with meaningful research and teaching collections that were acquired in open view of the public, ethically, and according to the law should not now be penalized by requiring that these collections be given to arbitrarily selected groups to whom lineal or cultural affiliation cannot be determined. NAGPRA was never intended to be applied in this manner.

C. The Continued Need for Study of Ancient and Recent Remains

Human skeletal remains have been studied by anthropologists since the mid-nineteenth century. 136 The uses of these remains can largely be divided into two categories: general human history and medical/forensic applications. 137

Human skeletal remains are used to better understand the lifeways of past peoples. 138 Such remains offer a glimpse into human morphological variation between groups and across time. 139 The general consensus in academia regarding studies of human remains, especially on ancient skeletal material is that, “bones ... offer a picture of

135 See generally, Seidemann 2004, supra, n. 127.
time in our collective history.” Yet another scholar captures the collective history argument thus:

all humans are members of a single species, and ancient skeletons are the remnants of unduplicable evolutionary events which all living and future peoples have the right to know about and understand. 

Data derived from the study of human skeletal remains can provide insights into population movements and migration as well as the specific genetic composition of individual populations. Additionally, skeletal studies provide insights into the impacts of pathological conditions on humans. Such studies allow for the interpretation of the interactions of humankind with various diseases and have applications to both the study of past peoples and the investigation of remains associated with modern crimes. Examinations of dentition and skeletal remains have led to the reconstruction of prehistoric diets and health patterns, a necessity to understanding the complex lifeways of past cultures.

142 All of these tests can be accomplished (with varying degrees of accuracy) through the use of nondestructive means by the examination, recordation, and statistical analysis of metric and nonmetric traits of the human skeleton and dentition. See generally, G. Hauser and G.F. De Stefano, *Epigenetic Variants of the Human Skull* (Schweizerbart 1989). See also, Buikstra and Ubelaker, *supra*, n. 138; Christy G. Turner, II, C. Nichol, and G. Scott, *Scoring Procedures for Key Morphological Traits of the Permanent Dentition: The Arizona State University Dental Anthropology System* in *ADVANCES IN DENTAL ANTHROPOLOGY* 13 (M. Kelley and Clark Spencer Larsen, eds., Wiley-Liss, 1991).
The study of ancient human skeletal remains also contributes to contemporary medical and forensic fields. Many of the techniques used in the identification of war dead, victims of mass disasters, and the victims of crimes were, and continue to be, developed through studies on prehistoric human remains. One example of this is the recent development of a new sexing method for skeletal remains that was initially devised and tested on a six thousand year old Native American archaeological sample and has since been developed into a forensic identification method. It has also been applied to the identification of American war dead from Southeast Asia. Additionally, nondestructive studies of indigenous remains are currently being used to identify relationships between diet and dental anomalies. Finally, the once extensive comparative indigenous skeletal collections around the world are “used in educating medical scientists concerning bone biology and human variation.”

several things: the international scope of skeletal studies and the cross-cultural applicability of research results (see, Elvery et al., Table 1).

145 An example of this was the use of such methods in the recovery and identification efforts following the Branch Davidian compound standoff in Waco, Texas in the early 1990s. See e.g., M.M. Houck, Douglas Ubelaker, Douglas Owsley, E. Craig, W. Grant, R. Fram, T. Woltanski, and K. Sandness, The Role of Forensic Anthropology in the Recovery and Analysis of Branch Davidian Compound Victims: Assessing the Accuracy of Age Estimations, 41 J. FORENSIC SCI. 796 (1996); see also, Jane E. Buikstra, A Specialist in Ancient Cemetery Studies Looks at the Reburial Issue, 3 EARLY MAN 26 (1981).

146 Jane E. Buikstra, Reburial: How We All Lose, 17 SOC. FOR CALIFORNIA ARCHAEOLOGY NEWSLETTER 1 (1983).


150 Franklin Damann, Anthropologist, United States Central Identification Laboratory, HI, personal communication, May 4, 2001.

151 Ericka L. Seidemann, Ryan M. Seidemann, and Glen H. Doran, The Occurrence of the Palatine Torus in the Windover Site Skeletal Sample (presentation at the American Anthropological Association annual meeting, New Orleans, LA, 2002).

The curation of human skeletal remains over long periods of time has several benefits. The primary benefit is the reality that new technologies will be developed in the future that will allow for more information to be obtained from the remains. For example, no one could have imagined a few decades ago that, prior to the advent of PCR amplification of trace DNA material,\textsuperscript{153} genetic data could be gathered on a long extinct population\textsuperscript{154} or species.\textsuperscript{155}

In addition to the use of new technology, the ability to reexamine prior research often leads to a refinement of previous scholars’ interpretations. This was recently demonstrated in a reanalysis of a Florida skeletal sample.\textsuperscript{156} In this case, the original analysis of the individuals from the Calico Hill site in Florida found evidence apparently indicating the presence of malignant tumors in the two crania.\textsuperscript{157} However, a more recent examination determined that the tumors were actually root damage, a fact that drastically changed the paleopathological status of the sample.\textsuperscript{158}

Equally important is the fact that human remains research has actually been used in the past decade to promote the purposes of NAGPRA. There are several examples of such applications. One such example involves a Native American skull that was confiscated in California by law enforcement officials; classic physical anthropological

\textsuperscript{153} “Prior to the invention of PCR, it was not possible to retrieve enough high molecular weight DNA from ancient remains to perform DNA sequencing or restriction fragment length polymorphism (RFLP) analyses.” D. Andrew Merriwether, David M. Reed, and Robert E. Ferrell, Ancient and Contemporary Mitochondrial DNA Variation in the Maya in BONES OF THE MAYA: STUDIES OF ANCIENT SKELETONS at 208 (Stephen L. Whittington and David M. Reed, eds., Smithsonian Institution Press 1997). In short, this recent development revolutionized the field of archaeological DNA analyses.

\textsuperscript{154} See e.g., Glen H. Duran, ed., WINDOVER: MULTIDISCIPLINARY INVESTIGATIONS OF AN EARLY ARCHAIC FLORIDA CEMETERY (Univ. Press of Florida, 2002).

\textsuperscript{155} See e.g., I.V. Ovchinnikov, A. Gotherstrom, G.P. Romanova, V.M. Kharitonov, K. Liden, W. Goodwin, Molecular analysis of Neanderthal DNA from the northern Caucasus. 404 NATURE 490 (2000).


\textsuperscript{157} Dan Morse, R.C. Dailey, and Jennings Bunn, Prehistoric Multiple Myeloma, 50 BULL. N.Y. ACAD. MED. 447 (1974).

\textsuperscript{158} See generally, Smith, supra, n. 156.
analyses were conducted on it (based largely on craniometrics obtained from comparative samples of Native American remains), and positively identified the grave from whence the skull had been stolen.\textsuperscript{159} I have recently also participated in several attempts to identify probable Native American skulls recovered from NAGPRA enforcement cases prompted by eBay sales.\textsuperscript{160} Unfortunately, due to the dearth of comparative craniometrics from the southeastern United States, it is virtually impossible to determine even a regional affiliation for the recovered skulls.\textsuperscript{161} Indeed, the scientific analyses conducted in situations like this have been properly likened to medical autopsies.\textsuperscript{162}

Outcomes such as that in the California case will not be possible if there are no more prehistoric Native American remains available for comparative study, which is the result contemplated by the proposed rules. If future research is stifled, analyses of remains recovered from illicit sales, which appear to be on the rise,\textsuperscript{163} will continue to be difficult, if not impossible, thus frustrating the purposes of the law that the proposed...
regulations purport to support. This unfortunate result was certainly not the intent of Congress when it passed NAGPRA.

D. The 2007 DOI Draft Regulations Would Frustrate Their Own Stated Purpose.

Section 10.9(e)(5) of the proposed regulations imposes conflicting duties on institutions that house culturally unidentifiable human remains. This section requires that institutions provide to potentially interested groups more information on the remains that they hold regarding affiliation and other matters. Conversely, the rule restricts study to gain the further information that the institutions must provide. In this regard, the rule states:

(5) Upon request by an Indian tribe or Native Hawaiian organization that has received or should have received a notice and inventory under paragraphs (e)(1) and (e)(2) of this section, a museum or Federal agency must supply additional available documentation.

* * *

(ii) ... Neither a request for documentation nor any other provisions of this part may be construed as authorizing either:

(A) The initiation of new scientific studies of the human remains and associated funerary objects; or

(B) Other means of acquiring or preserving additional scientific information from such remains and objects.

As a result, the proposed regulations establish an impossible standard for institutions to meet. Institutions cannot provide the increased information required by the regulations when they are deprived of the opportunity to collect that information.

This new restriction on the further study of unaffiliated remains is not consistent with what Congress provided in NAGPRA. The statute permits continued research,


\[165\] Id.
without restriction, on unaffiliated remains. As has been belabored at length above, Congress did not intend, with NAGPRA, to frustrate the scientific study of ancient human remains. Indeed, DOI does not, as has recently been discussed, have any congressionally-granted authority to restrict the scientific study of unaffiliated human remains under any of its organic legislation. As such, to the extent that the 2007 Draft Regulations purport to restrict the scientific study of unaffiliated human remains, the proposed regulations are not in accordance with the authority granted to DOI under NAGPRA or any other law.

E. NAGPRA Review Committee Perspectives on Unaffiliated Remains

The members of the Review Committee, through the discussions of the recommendations outlined in Part III, supra, have had ample opportunity to express their feelings on both the authority of DOI to implement regulations under NAGPRA with respect to the repatriation of culturally unidentifiable human remains as well as on the finer points of the question of what to do with culturally unidentifiable human remains. Although the discussions of the Review Committee at its thirty-sixth meeting – the meeting that immediately postdated the publication of the 2007 Draft Recommendations – are most relevant to the research here, it is also worthwhile to examine how the debate over these remains has evolved since the passage of NAGPRA.

It is also important, while considering the Review Committee’s perspectives, to understand what the functions of the Review Committee are. The Review Committee can serve one of two purposes (but only one of those purposes at a time). Those purposes are: (1) to provide a basis for congressional changes to NAGPRA via recommendations

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166 This permission exists due to the absence of any such restriction in NAGPRA.
167 1987 Senate hearings, supra, n. 49, at 27; 1988 Senate hearings, supra, n. 49, at 66.
168 See generally, Seidemann 2007, supra, n. 108.
for changes to Congress; or (2) to provide a basis for regulatory action by DOI. If the Review Committee had drafted its recommendations as a document to be presented to Congress, it would have been entirely appropriate for the Review Committee to make recommendations that depart from the statutory language (i.e., to make recommendations to Congress for changes). On the other hand, if the Review Committee was drafting its recommendations to serve as a basis for regulatory action by DOI, then it had an obligation to make those recommendations consistent with the law. It is apparent from the scope of the recommendations that the Review Committee did indeed depart from the statutory language and that its recommendations should have been made in the form of suggested changes to Congress. However, it is also apparent that the Review Committee and DOI instead used those recommendations to, at least in some part, form the basis for the 2007 Draft Regulations, a use inconsistent with both the Review Committee’s and DOI’s statutory authority.

Early in the drafting phase for the 1995 Draft Recommendations, members of the Review Committee expressed their concerns regarding what is the proper scope of any recommendations that the Review Committee might make for dealing with culturally unidentifiable human remains. For example, in February of 1995, Dr. Phillip Walker noted that,

what we’re embarking on here is somehow trying to extend the scope of [the right of Native Americans] to determine what happens to the remains of [their] ancestors to groups who -- where that clear connection that everyone can see and everyone can agree upon becomes blurred.169

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169 Meeting 9 transcript, _supra_, n. 11, at Vol. 1, p.47. This problem was highlighted when Dr. Dan Monroe stated that “we’ve heard a lot of testimony that it would be wrong to return remains to the wrong tribe.” _Id._ at 49. Despite recognizing this problem early in the process, this result is precisely what the geographic affiliation portion of the 2007 Draft Regulations would do.
In other words, even before the first set of draft recommendations was published, at least some members of the Review Committee recognized that the “direct cultural link” required by the NAGPRA statute\(^{170}\) did not easily apply to culturally unidentifiable human remains.

Review Committee members also noted, at this early stage, that the authority in NAGPRA for creating such regulations was problematic if it even existed at all. Dr. Jonathan Haas attempted to shoehorn unaffiliated remains into the authority granted in NAGPRA thus:

> To the extent we can draw this out of -- the foundations of this out of the Act, the better off we are, that there are principles in the Act, that there is language in the Act that we can make use of.\(^{171}\)

Statements such as this do not provide much confidence that those charged with advising DOI on NAGPRA’s regulations were even certain that they had the authority to recommend rules that would require the repatriation of culturally unidentifiable human remains.

Following the issuance of the 1995 Draft Recommendations, a lengthy discussion of culturally unaffiliated human remains was had at the Eleventh Meeting of the Review Committee in Billings, Montana, in June 1996.\(^{172}\) Several major themes emerged from this meeting with respect to culturally unidentifiable human remains: (1) how should cultural affiliation be defined and how does this apply to ancient remains; (2) how should the regulations deal with non-federally recognized tribes; and (3) how should the


\(^{171}\) Meeting 9 transcript, supra, n. 11, at 61.

regulations deal with associated funerary objects. The latter two issues, as noted above, are not considered in this research.

With respect to the question of how the regulations should apply to ancient remains, Dr. Phillip Walker raised the point that many of the commentors on the 1995 Draft Recommendations questioned the Review Committee’s and DOI’s statutory authority on this issue. In response to this extremely important question, Dr. Timothy McKeown of the National Park Service stated that DOI’s legal counsel “has looked at [the question of statutory authority] but not in a formal way. He’s not done an analysis of [the issue].” There is no further discussion of the question of whether DOI has the statutory authority to promulgate rules for the disposition of culturally unaffiliated human remains.

It is staggering that this fundamental issue of the Review Committee’s authority had not been addressed in 1995 when it published its Draft Recommendations, especially in light of the reality that numerous comments had been received by DOI questioning this authority. Thus, any review of the 1995 Draft Recommendations and the 1996 Draft Recommendations must be tempered with the reality in mind that legal counsel had not determined whether the Review Committee or DOI had the statutory authority to regulate culturally unidentifiable human remains despite comments requesting an explanation of

\[173\] Id. at Vol. 1, pp.84-85.
\[174\] Dr. Walker stated that,
\[175\] Meeting 11 transcript, supra, n. 11, at Vol. 1, p. 89.
\[176\] Id. at 88.
such authority. This departmental attitude – that it is going to regulate on this issue whether it has the authority to do so or not – was pervasive throughout the ensuing years and explains much of the unilateral drafting of the 2007 Draft Regulations.

There was a very clear recognition by a number of Review Committee members at the Billings meeting that NAGPRA did not grant them or DOI the authority to regulate on the disposition of culturally unidentifiable human remains. One suggestion for stretching NAGPRA to cover such remains was to define “shared group identity” so broadly that this key term, which is the basis for modern groups being culturally affiliated with ancient remains, could reach back into deep archaeological time and allow for such modern groups to claim affiliation with ancient remains. The Review Committee conducted extensive discussions on how this approach could be accomplished. However, concepts about both scientific and legal limitations to expanding the definition of “shared group identity” persisted.

Any such an expansion of this key definition would be contrary to the clear language of NAGPRA itself as well as its legislative history. Furthermore, as has been noted at length above, NAGPRA, by clear language, did not mandate the repatriation of culturally unidentifiable human remains. It simply required that a regulatory process for their “disposition” be recommended to Congress for its consideration on what measures

177 See e.g., Dr. Phillip Walker’s comment that, “I personally think that that [sic] to require actions by museums relative to these unaffiliated collections would require some kind of statutory modification.” Id. at 92. Dr. Dan Monroe also recognized that ancient remains may only be reachable by regulation after statutory amendment. Id. at 95 and 101. Dr. Jonathan Haas also commented that, “I think a number of us went into this legislation or went into this whole process thinking that -- dealing with culturally unaffiliated remains, regardless, was going to take new legislation.” Id. at 121.

178 Id. at 105.

179 Opinions on the Review Committee were not unanimous that it even had the authority to broaden NAGPRA’s concept of shared group identity. See e.g., discussion between Dr. Dan Monroe and Dr. Phillip Walker, Meeting 10 transcript, supra, n. 69, at Vol. 2, p.171.
would be appropriate. This is a far cry from mandating repatriation. However, it is consistent with the legislative history that suggests that such remains should be “kept with care.” In addition, it seems that the practical outcome of permitting such repatriations would conflict with the process for determining cultural affiliation in general. As the Review Committee noted, opening up ancient remains to repatriation claims would put virtually every federally recognized Native American group in the United States in a position to argue cultural affiliation under the idea that all Native Americans share some basic affinity, thus because such remains may be classified as being of Native American affinity (rather than a specific cultural affiliation), any Native American, regardless of cultural affiliation, has a valid claim to repatriate them. If this scenario was Congress’ intent, why then would Congress have specifically identified a mechanism for determining cultural affiliation? If anyone could claim remains based simply on “affinity,” there would be no need for the language in NAGPRA that states that,

[w]here cultural affiliation of Native American human remains and funerary objects has not been established … such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, funerary, and cultural traditions.

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180 25 U.S.C. 3006(c)(5).
181 1990 House Hearings, supra, n. 49, at at 130.
182 See e.g., Meeting 11 transcript, supra, n.11, at Vol. 1, p. 85.
183 The difference between “affinity” and “affiliation” is evident from the plain definitions of these terms. The Concise Oxford English Dictionary defines “affinity” as: “a close relationship based on a common origin or structure.” Soanes & Stevenson, supra, n. 117, at 22. The same source defines “affiliation” as: “officially attach or connect to an organization.” Id. On a very basic level, these two terms are vastly different in their meanings. Affiliation, the term chosen by Congress for inclusion in NAGPRA, suggests a cultural or legal link between two things. Affinity, a word never mentioned in NAGPRA, suggests a looser association of two things that could be less than the cultural aspect of closeness that is so important in NAGPRA. The Review Committee has no authority to substitute its preferred word (affinity) for the word chosen by Congress (affiliation).
Because Congress cannot be assumed to enact vain and useless laws, there must be a presumption that the language of 25 U.S.C. 3005(a)(4), which provides the means to establish cultural affiliation, was purposefully enacted and must be given effect. Giving effect to this provision means that Congress intended for there to be repatriation to a specific, culturally affiliated tribe and not some sort of broad, pan-Indian repatriations to arbitrary coalitions, otherwise such proof would be unnecessary. Under the concept of affinity, the relevant questions upon a request for repatriation of culturally unidentifiable human remains would simply be: (1) is the requesting group a federally-recognized Native American group?; and (2) are the remains Native American? Such an interpretation strains credulity when one considers that Congress could have easily done away with the bulk of NAGPRA by stating that “if remains are Native American, then return everything to anyone.” The expansion of the term “shared group identity” beyond the concepts embodied in 25 U.S.C. 3005(a)(4), as was contemplated by the Review Committee at their Billings meeting, would rewrite NAGPRA to allow for such broad requests.

Comments at the Billings meeting also highlighted the scientific insufficiency of expanding the term “shared group identity.” The issue was whether shared cultural traits

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186 This precise point was raised by Review Committee member Dr. John O’Shea thus,

One is if the intent of NAGPRA was simply to repatriate all Native American remains, it would have been very easy to write that as a very short, sweet and easy law. It could have been very unambiguous. And yet the legislation that we have before us and the regulations that have come from the legislation are not simple. They are very complex, and I think there’s a reason they’re complex.

Meeting 18 transcript, supra, n. 52, at Vol. 1, p. 170. As with other comments regarding the scope of NAGPRA, this one did not generate any further discussion by the Review Committee.
was proof of an ancestral relationships between modern groups and ancient peoples. Dr.
Phillip Walker succinctly framed this problem thus:

[H]omologous … relationships or similarities, you know, and subsistence and so on to me don't say anything about what NAGPRA is all about which is establishing ancestral relationships. … Just because there's a homology or the same types of subsistence strategies in different groups of earlier people doesn't say anything about ancestral relationships.\(^{187}\)

Thus, not only is there the clear problem that redefining the components of cultural affiliation in order to capture culturally unidentifiable human remains stretches the statutory language of NAGPRA, but it is also scientifically inconsistent. Despite these problems, the Review Committee continued to pursue the issue. However, at least some of the Review Committee members recognized that such activities might be beyond their statutory charges.\(^{188}\)

The Review Committee also recognized that problems existed with any attempts to redefine the word “disposition” to mean only “repatriation.” Its comments in this regard are interesting.

[W]ho has the right of disposition for -- for unidentified remains. And if you put it in the simplest possible terms, there are two basic answers to that. One answer is Native American people have the right to that disposition because they're the most closely affiliated. They're the closest relatives to those people. And the other answer is because you can't come up with a way to stay within the Statute then basically those remains should stay where they are and we should have access to be able to study them as we wish. That's the sort of simplest, harshest dividing line between the two kinds of responses. The Committee has clearly come down on the side of saying, for a variety of reasons, that it believes that Native American people should be the ones that have ultimate right of disposition. So that's underlying all of this.\(^{189}\)

\(^{188}\) Dr. Dan Monroe, at one point, commented that, “we’re employing concepts and ideas and terms that really don’t -- can't be linked to the Statute.” \textit{Id}. at 125.
\(^{189}\) \textit{Id}. at 126.
Nonetheless, the Review Committee dismissed these concerns with a vague reference to “for a variety of reasons”\(^{190}\) and proceeded to decide that “disposition” shall mean only “repatriation.” It did so in spite of the fact that the statute is silent on this issue and the legislative history is contradictory to the Review Committee’s position. Whether this rewriting of yet another portion of NAGPRA and the incorporation of these revisions into the 2007 Draft Regulations was the work of the Review Committee itself or was at the behest of DOI is impossible to know. However, the reality is clear that the regulations for culturally unidentifiable human remains have taken on a life independent of the statute the purports to authorize them.

During the course of the Billings meeting, the 1996 Draft Recommendations emerged to replace the 1995 Draft Recommendations.\(^{191}\) In its initial discussion of this draft, the Review Committee recognized the difficulty of staying within the statutory limits of NAGPRA.\(^{192}\) In an effort to remain within those limits, the Review Committee stated that most of the 1995 Draft Recommendations were gutted in favor of the 1996 Draft Recommendations.\(^{193}\) The bulk of the discussion on the 1996 Draft Recommendations, as it relates to the subject matter of this article, was consumed by the question of the definition of “shared group identity.” In the 1996 Draft Recommendations, the Review Committee made an attempt to combine this definition with the statute’s language spelling out how cultural affiliation is to be determined.\(^{194}\) The Review Committee proposed the following definition for “shared group identity”:

\(^{190}\) *Id.*
\(^{192}\) *Id.* at 39.
\(^{193}\) *Id.* at 40.
\(^{194}\) 25 U.S.C. 3001(2).
Shared group identity means a relationship between a present-day Indian tribe or tribes and an earlier group based on direct historical, geographical, temporal, or cultural links. … Geographical, temporal, and/or cultural ties may be established through biological, archaeological, linguistic, folkloric, oral traditional, or other relevant information or expert opinion.\textsuperscript{195}

While it might appear from this language that the Review Committee was trying to remain consistent with the statutory language of NAGPRA, the Review Committee’s discussions of this new proposed definition indicate that its actual intent was to expand the definition of cultural affiliation beyond the statutory scope.\textsuperscript{196}

In \textit{Bonnichsen v. U.S.}, the court discussed the concept of cultural affiliation at length, and concluded that it requires a direct link between the claimant tribe and the remains being claimed.\textsuperscript{197} This was not the objective desired by the Review Committee. It proposed its new definition of shared group identity for the purpose of allowing people or groups to make a valid claim to remains to which they have no direct links.\textsuperscript{198} Indeed, Dr. Dan Monroe stated that the proposed regulatory language “makes an immense difference as to how the law works and what happens to the -- to the disposition of unidentifiable human remains.”\textsuperscript{199} When even the Review Committee believes that its proposed language works substantial changes to the operation of the organic law, those changes certainly cannot be said to be consistent with that law.

Subsequently, in its discussions of the 2000 Draft Recommendations and the 2002 attempt by DOI to create a set of draft regulations, the Review Committee expressed concern about the shotgun-blast effect of permitting repatriations based upon geographic considerations. Dr. Garrick Bailey pointed out that such an approach would have the

\textsuperscript{195} Id. at 43.
\textsuperscript{196} See e.g., comments of Dr. Phillip Walker, \textit{id.} at 47.
\textsuperscript{197} 217 F.Supp. 2d at 1155-1157.
\textsuperscript{198} Meeting 11 transcript, \textit{supra}, n. 11, at 47-48.
\textsuperscript{199} Id.
unintended consequence of returning remains to groups that were definitely not culturally affiliated with those remains, especially in the Eastern United States.\textsuperscript{200}

It was at the Tulsa meeting, the twenty-third meeting of the NAGPRA Review Committee, when the Committee members begin to realize that substantial parts of the work that they has invested in drafting recommendations for the culturally unidentifiable human remains was being disregarded by DOI in its first attempt to draft regulations. Dr. James Bradley remarked, “where’s all that great verbiage that we wrote and talked about in previous meetings? It’s in the preamble [to the draft regulations].”\textsuperscript{201} The problem with much of the work of the Review Committee being relegated to the preamble of the regulations was that this was not an enforceable portion of the law.\textsuperscript{202} In addition, DOI took the liberty of equating disposition and repatriation, despite objections from some members of the Review Committee and unresolved disputes over the use of these words.\textsuperscript{203}

At the next meeting, in Seattle, Committee Chair, Mr. Armand Minthorn, noted even the Native peoples’ displeasure with DOI’s draft regulation attempt:

\begin{quote}
people talk in terms of honoring ancestors, treating people with respect. This is not treating people with respect. This is treating people with let’s get rid of them as cheaply as possible.
\end{quote}

\textsuperscript{200} Native American Graves Protection and Repatriation Review Committee Meeting, Los Angeles, May 31-June 2, 2002, transcript (“Meeting 23 transcript”), Vol. 1, pp. 167-170. Dr. Bailey argued that, using this approach, most of the skeletal remains in museum collections “will go to some group that we know really has no relationship to it.” \textit{Id.} at 169-170. Dr. Timothy McKeown with DOI responded that that scenario is precisely what would happen, but suggested that it did not matter, as long as the remains went to someone. \textit{Id.} This position is, as has been discussed at length above, completely out of step with the congressional intent for NAGPRA. That intent was not to see remains go to just anyone, but rather to see that remains with an affiliation to an existing group actually go to that group. Dr. Bailey went on to address this point thus:

\textsuperscript{201} \textit{Id.} at 171.
\textsuperscript{202} \textit{Id.} at 181.
\textsuperscript{203} \textit{Id.} at 192-193.
I have received several calls throughout the nation from tribes and tribal organizations expressing their displeasure and criticism of the Committee and the existing draft regs as they are.\textsuperscript{204}

Also at this meeting the Review Committee members again expressed their doubts as to their and DOI’s authority to regulate unaffiliated remains. Dr. Garrick Bailey observed:

\begin{quote}
I don’t think National NAGPRA or this Committee can deal with it. I think Congress has to clearly define what or how these things are going to be managed. I think anything we do, as both sides are pointing out clearly, are so questionable from a legal standpoint that all we’re going to do is make – and certain people who are attorneys will not object to this – we are going to make a lot of attorneys very prosperous and impoverish a lot of tribes with the litigation.\textsuperscript{205}
\end{quote}

Dr. John O’Shea further observed,

\begin{quote}
do we really want to rush forward and arbitrarily rebury everything rather than having the patience to take the time to figure out who belongs to who. [sic]\textsuperscript{206}
\end{quote}

This rush to judgment feeling that the Review Committee members were expressing concern over is further supportive of the reality that the care necessary in addressing the issue of culturally unidentifiable human remains had not been taken by DOI. Ms. Rosita Worl further noted that she was concerned about advancing draft regulations that “don’t seem to be acceptable by anyone.”\textsuperscript{207}

It is interesting to note that, at the thirty-sixth NAGPRA Review Committee Meeting, the Chair, perhaps reflecting some of the comments received on the 2007 Draft Regulations, noted that the extent of the Review Committee’s statutory charge with respect to the disposition of culturally unidentifiable human remains was that,

\begin{flushright}
\textsuperscript{205} Id. at 191.  
\textsuperscript{206} Id. at 194.  
\textsuperscript{207} Id. at Vol. 2, p. 104. 
\end{flushright}

53
the Review Committee [was to] recommend specific action for developing a process for disposition of such remains in the NAGPRA statute and that those recommendations would be forwarded to the Secretary of the Interior through the NAGPRA Program and the National Park Service.\textsuperscript{208}

It is important in the above quotation that the Review Committee again recognizes that its authority stops short of drafting or promulgating regulations.

Aside from the general statement by the Chair, each Review Committee member expressed their thoughts on the 2007 Draft Regulations. Although there was support for the spirit of the regulations from some of the members, all members had concerns with certain language.\textsuperscript{209} There was virtual unanimity regarding the need for clarification on the vague terminology such as “cultural relationship” and whether the 2007 Draft Regulations should go forward or be scrapped.\textsuperscript{210}

Several of the members of the Review Committee clearly voiced their opinions that Congress, through NAGPRA, did not intend to authorize the creation of regulations on culturally unidentifiable human remains.\textsuperscript{211} Indeed, Dr. Vincas Steponaitis, stated that, in his opinion, the 2007 Draft Regulations are not “consistent with the statute.”\textsuperscript{212}

He went on to note that,

Congress time and again rejected the idea of a kind of forced universal repatriation, and rather the idea that was that the remains should be returned not just to anybody but to the right people, descendant communities that have some demonstrable affiliation or connection to the remains. And in this respect I think the rules actually overturn NAGPRA.\textsuperscript{213}

\begin{footnotes}
\footnotetext[208]{Meeting 36 transcript, \textit{supra}, n. 10, at p.7-8.}
\footnotetext[209]{\textit{Id.} at 42.}
\footnotetext[210]{\textit{See e.g., id.} at 13.}
\footnotetext[211]{\textit{Id.} at 14.}
\footnotetext[212]{\textit{Id.} at 16.}
\footnotetext[213]{\textit{Id.} at 16-17. Of course, regulations cannot overrule statutes. However, what Dr. Steponaitis is apparently referring to is more the reality that there is no statutory basis for the 2007 Draft Regulations.}
\end{footnotes}
Dr. Steponaitis was the first of all Review Committee members at the thirty-sixth meeting to express his disappointments and surprise to learn that DOI did not follow the Review Committee’s 2000 Draft Recommendations.\(^\text{214}\) Ms. Rosita Worl echoed these concerns when she stated that,

I recommend that the Review Committee and with the Secretary of Interior again reconsider [the 2000 Draft Recommendations]…\(^\text{215}\)

The Review Committee was so disappointed with the 2007 Draft Regulations that even those who did believe that DOI had the authority to promulgate some regulations regarding culturally unidentifiable human remains were confused at the unilateral introduction of unfounded concepts such as repatriation to tribes living near a museum.\(^\text{216}\)

Further, Dr. Dan Monroe, stated that,

I believe the draft regulations as they stand will produce a morass of confusion, will impose very substantial burdens on all parties, museums, federal agencies, tribes and Native Hawaiian organizations, and I believe the draft regulations as they stand materially fall outside of the intent and scope of NAGPRA while at the same times [sic] recognizing that it is imperative that we move forward in expeditiously and intelligently resolving this complex issue.\(^\text{217}\)

Ms. Donna Augustine went so far as to state, with respect to the DOI’s departure from the Review Committee’s earlier recommendations, that, “[t]his is something very different. And I am scared.”\(^\text{218}\)

The dissatisfied Review Committee made the following motion regarding what DOI should do in light of the 2007 Draft Recommendations:

VINCAS STEPONAITIS: I move that we adopt the three points that Dan has made as our recommendations.

\(^{214}\) Id. at 17-19.  
\(^{215}\) Id. at 26.  
\(^{216}\) Id. at 28.  
\(^{217}\) Id. at 31.  
\(^{218}\) Id. at 56.
DAN MONROE: And just to clarify again, those three points would be, one, recommend that the Department extend the input period, two, underscore and emphasize the fact that we believe the 2000 recommendations which were put, I guess, out to the field in 2002 have considerable merit and should be given very serious attention by the Department, and three, that we recommend that the Department consider all of the comments that it’s received, that it amend the current draft regulations as it sees fit, and then issue them for a subsequent period of comment before adopting any final rule. I think that’s a fair statement in detail of what you moved. Is there a second for that motion?

ROSITA WORL: I will second…  

To state that the tenor of all Review Committee members during the thirty-sixth meeting was one of dismay, confusion, and disappointment would be a vast understatement. It is unclear why DOI departed so drastically from the Review Committee’s recommendations – recommendations that had been tweaked in one form or another from 1994 through 2002 – to create a strained-at-best, statutorily-unsupported-at-worst regulatory interpretation of NAGPRA. No rational explanation for this *ultra vires* behavior is available or apparent.

**F. The Kennewick Man case and unaffiliated remains**

In *Bonnichsen v. United States*, a group of scientists sought to study the skeletal remains of an ancient individual, nicknamed Kennewick Man, who was found in Washington state. This case, which bumped around among the district court, the Ninth Circuit, and DOI for nearly eight years, represents the most substantial jurisprudential review of NAGPRA and culturally unidentifiable human remains to date. The well-reasoned decision of Magistrate Judge John Jelderks provides insightful guidance for any regulations purportedly developed under NAGPRA authority.

\[219 \text{Id. at 67-68.} \]
\[220 \text{Bonnichsen v. U.S., supra, n. 85.} \]
With respect to the claims of DOI and the various Native American groups that were parties to the Kennewick Man case that the remains were “Native American” regardless of age and attenuation of culture, Jelderks commented that, “courts do not assume that Congress intends to create odd or absurd results.” Jelderks was referring to the claim that NAGPRA should be read to mean that all individuals present in the United States before A.D. 1492 are subject to that law. Taken to its ends, such an interpretation – as is now urged by the proposed regulations – would mean that if remains of the Vikings, known to have inhabited portions of northeastern North America at least as early as A.D. 1000 are found, they would have to be turned over to Native American control. This “[a]pplication … could yield some odd results” to say the least. Jelderks additionally commented that

> [t]his court cannot presume that Congress intended that a statutory definition of ‘Native American’ requiring a relationship to a ‘tribe, people, or culture that is indigenous to the United States’ yield such far reaching results as to extend to culturally unrelated groups of unknown origin that inhabited the territory now encompassed by the United States at some time in the distant past.

In the determination of “Native American” under NAGPRA, Judge Jelderks held that it was not enough that the remains in question be found in the United States, but that

221 Id. at 1136.
222 This is the generally accepted date of the arrival of Norse Vikings on the North American continent. See generally, Fitzhugh and Ward, supra. There is, as yet, no evidence suggesting earlier forays into North America by these groups, but the possibility must not be ruled out for lack of data. Another example of possible problems of applying this suggested definition of “Native American” could result from the classification of the culturally unrelated inhabitants of the Caribbean as “Native Americans” under NAGPRA, resulting in their “repatriation” to an unaffiliated North American group for reburial if their remains are found in the Southeastern United States. Such a scenario is equally as plausible as the Viking scenario. See generally, Ryan M. Seidemann, The Bahamian Problem in Florida Archaeology: Oceanographic Perspectives on the Issue of Pre-Columbian Contact, 54 FLORIDA ANTHROPOL. 4 (2001).
223 Bonnichsen, supra, n. 85, at 1136.
224 Id. at 1137.
they must be related to a currently existing Native American culture for NAGPRA to even apply to the remains. He based this conclusion on the present tense inherent in the definition of Native American in 25 U.S.C. 3001(9). The judge reasoned that such an interpretation,

requiring a ‘present-day relationship’ is consistent with the goals of NAGPRA: Allowing tribes and individuals to protect and claim remains, graves, and cultural objects to which they have some relationship...

This is an important reality when considering the currently proposed regulations.

Although attempts have been made to redefine the term “Native American” in NAGPRA since the Kennewick Man case was decided, Congress has passed no such legislation to date. Accordingly, unless and until such legislation is passed, the currently proposed regulations, which would direct the return of culturally unidentifiable human remains to current Native American groups, is without support in its organic legislation. The 2007 Draft Regulations are null ab initio for lack of a Congressional delegation of legislative authority to so regulate. NAGPRA does not contain the authority for DOI to direct or mandate the conveyance of such remains to random extant Native American groups.

The Bonnichsen case made clear, through an exhaustive analysis of NAGPRA and its legislative history, that Congress did not intend to encompass ancient, culturally unidentifiable human remains within the coverage of NAGPRA. Subsequent to that ruling, and following an affirmation by the Ninth Circuit Court of Appeals, the federal

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225 Id. at 1136.
226 Where “Native American” is defined as “of, or relating to, a tribe, people, or culture that is indigenous to the United States.” (Emphasis added to the statutory language by Judge Jelderks). Id.
227 Id. at 1136.
228 See e.g., Section 14, S. 2843 (2004).
230 Bonnichsen, supra, n. 2.
government has made attempts to make end-runs around the Kennewick Man ruling – largely by attempting to restrict access to those remains under nonexistent Archaeological Resources Protection Act authority. This end-run did not succeed and it is abundantly obvious that the 2007 Draft Regulations are an attempt to side-step the Bonnichsen rulings and create a new set of regulations for application to culturally unidentifiable human remains that at least two courts have already stated are not supported by the law. Accordingly, the 2007 Draft Regulations have failed to meet the standard for support by their purported organic legislation before they have even been promulgated.

G. Professional societies’ and Native peoples’ perspectives on unaffiliated remains

Much of the information presented in Part IV(C), supra, covers the perspectives of the scientific community regarding the importance of maintaining culturally unidentifiable human remains in museum and federal agency collections. However, a review of the comments of the professional societies and scientists on the specific topic of the 2007 Draft Regulations is warranted. In addition, an examination of the Native peoples’ perspectives on culturally unidentifiable human remains is also in order.

1. Professional societies’ and scientists’ perspectives

In general, the bulk of the comments received by DOI from the professional societies and other scientific interests contained strong statements regarding DOI’s lack of authority to promulgate regulations for the repatriation of culturally unidentified human remains under NAGPRA. These comments, to a large extent, track the analysis

231 See e.g., Letter from David Shuey, Esq., Senior Counsel, Land Acquisition Section, U.S. Department of Justice, to Paula Barran, Esq. and Alan L. Schneider, Esq. (Nov. 22, 2002); Letter from David Shuey, Esq., Senior Counsel, Land Acquisition Section, U.S. Department of Justice, to Paula Barran, Esq. and Alan L. Schneider, Esq. (Dec. 17, 2002).

232 See e.g., Brennan letter, supra, n. 124, at 2, 8; Simonelli letter, supra, n. 126, at 2; White letter, supra, n. 139, at 1; Comment letter from Fred H. Smith, Ph.D., President, American Association of Physical
contained in this article and will not be rehashed here. However, some of the concepts contained in those letters do merit attention.

The general tenor of the comments from the scientific community is that, while they support the moral foundation behind NAGPRA, the 2007 Draft Regulations stray too far from that foundation. Another interesting point made by some of the commentors, and echoing the Review Committee’s comments noted above, is the surprise at the extent to which DOI strayed from the Review Committee’s earlier recommendations with the 2007 Draft Regulations. Virtually every commentor makes the point that, should these regulations become law, the delicate cooperative balance between Native Americans and scientists that was forged by the passage of NAGPRA will be shattered. If the years-long, often contentious, debate over the Kennewick Man remains is any guide in this regard, these warnings are likely accurate. Thus, the adoption of these regulations could rupture Native American/scientific relations, a disappointing prospect.

Many of the commentors also expressed concern regarding the possibility that the 2007 Draft Regulations will require the repatriation of non-Native American human

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235 See e.g., Simonelli letter at 1. Indeed, one commentor observes, probably correctly, that “the proposed rule makes a mockery of Congress’ intended balancing of divergent interests.” Id. at 3. See also, Smith letter, supra, n. 231, at 2; Robinson letter, supra, n. 231, at 1.
remains to Native American groups. 236 Part of this concern is a recognition that, when repatriation is indeed appropriate, respect and dignity require that repatriation be to the proper cultural group. The other component to this concern is that museums and other institutions covered by NAGPRA may be subjected to draconian repatriation requirements, whereby anything not clearly affiliated to a modern group, whether the remains are Native American, European, or African-American, will be required to be repatriated to some Native American group.237 Indeed, Dr. Fred Smith noted that,

[t]he new regulations arguably apply to all culturally unidentifiable collections (Native American or not), including those anatomical collections used by medical schools for the training of physicians, nurses, forensic scientists, and other medical personnel.238

This is clearly not what Congress intended when it passed NAGPRA, but it could be an unintended consequence of these poorly drafted regulations.

The Field Museum raised an interesting point in its comments: it appears that DOI is attempting to undermine the Bonnichsen decisions through the promulgation of these regulations.239 Certainly, it is not unusual for legislation to be used to “overrule” specific court decisions.240 However, as the Bonnichsen cases demonstrated, DOI’s authority in the area of culturally unidentifiable human remains is weak at best.241 Thus, unlike a legislative body enacting new legislation to deal with a matter, here, the agency with the

238 Smith letter, supra, n. 231, at 5; see also, SAA letter, supra, n. 124, at 10; Comment letter from Andrew Kramer, Ph.D., Dept. of Anthropology, Univ. of Tennessee, Knoxville, DOI Document No. DOI-2007-0032-0148.1 (Jan. 8, 2008) at 1.
239 Brennan letter, supra, n. 124, at 14; see also, Smith letter, supra, n. 231, at 4.
delegated authority to carry out the statute that, by its clear language and judicial interpretations has been declared not to apply to such situations, is attempting to legislate (rather than regulate) in an area where is has zero authority. It is also important to note here that several efforts have been introduced in Congress to legislate in this area. They have all failed. Could DOI be attempting by regulation to do what certain members of Congress have failed to accomplish by legislation? It certainly appears so.

Over and over, the commentors pointed out that DOI’s definition of “disposition” is myopic. Congress clearly made provisions in NAGPRA for types of disposition that did not include repatriation. Nonetheless, this reality is never considered or acknowledged in the 2007 Draft Regulations. Another significant problem identified by the commentors is the introduction of vague and undefined terms that have never appeared elsewhere in the history of NAGPRA. Foremost among these new terms is the term “cultural relationship.” Many commentors are concerned that this will open up all remains to claims for repatriation, whether the claimant is a qualified party under the law or not. Professor Fash, from Harvard’s Peabody Museum of Archaeology and Ethnology, raised an even more bizarre, but possible, consequence of these poorly drafted proposed regulations. He muses that,

243 See e.g., Brennan letter, supra, n. 124, at 6; White letter, supra, n. 139, at 2-4; SAA letter, supra, n. 124 at 7.
244 This provision is inherent in Congress’ use of the term “disposition” rather than “repatriation” when dealing with culturally unidentifiable human remains. 25 U.S.C. 3006(c)(5). It is also evident from the various discussions in the congressional hearings suggesting that science was not to be interfered with by NAGPRA. See e.g., 1988 Senate hearings, supra, n. 49, at 66; 1987 Senate hearings, supra, n. 49, at 27.
246 Id. Although this term is present in NAGPRA, 25 USC 3002(a)(2)(C)(2), the Draft Regulations attempt to apply the term in a context not intended by the statute.
the proposed rule leaves open the possibility that even parties outside of the United States may be entitled to consult on culturally unidentifiable human remains because the notion of ancestry in the proposed rule is extremely broad.\textsuperscript{247}

More likely, however, is the probability that culturally unidentifiable human remains will be transferred to groups within the United States with absolutely no cultural link to them at all, thus subjecting the remains to incorrect and improper treatment in the reburial process.\textsuperscript{248} As is discussed more fully, infra, this possibility is a concern of some Native groups. Again, this was not the intention of Congress when it passed NAGPRA.

2. Native peoples’ perspectives on unaffiliated remains

Although I have discussed the Native peoples’ perspectives on human remains research in previous articles,\textsuperscript{249} a more complete picture of these perspectives is apparent from the text of the Review Committee meeting transcripts and minutes. The picture that emerges is that of a topic on which there is little, if any, agreement among the Native peoples of the United States. Nonetheless, a review of some of the more pertinent statements by those who presented comments to the Review Committee over the years is warranted as well as an analysis of the cultural context of many of these comments.

Many of the concerns of the native peoples are illustrated in the following excerpt from the minutes of the first Review Committee meeting in 1992:

Mr. Tallbull stated that one of the most important issues raised by this statute concerns just what constitutes proper treatment and protection. These things are risky. He recounted a reburial he was asked to participate in of a man who lived seven thousand years ago. The man had been buried with his head to the west, facing north. Mr. Tallbull knew this

\textsuperscript{247} Fash letter, supra, n. 233, at 3.
practice, so he was comfortable doing the reburial. But suppose the man had been a “contrary.” He would have done everything backwards, and whatever Mr. Tallbull would have done would have been exactly the opposite of what should have been done.\textsuperscript{250}

The above-quoted language highlights one of the major problems with mass repatriations of culturally unidentifiable human remains. Many native peoples are concerned that the improper reburial of human remains could lead to dire cosmic consequences.\textsuperscript{251} Such improper reburials may result from the wrong ceremonies being performed or from the wrong culture reburying the remains.\textsuperscript{252} Such situations strongly suggest that the portion of the 2007 Draft Regulations that would allow for repatriation by consortia of Native American tribes and the portion that would require museums to repatriate to groups in the location of the museum could create as many or more spiritual problems for certain Native groups as would simply leaving the remains in museum collections. Indeed, the then-chairperson of the Review Committee made this exact point in 1994:

\begin{quote}
[W]e focus more in our area, the Pueblos, of the spiritual part of the being, I would not want to see any Pueblo person be interred up in the North
\end{quote}

\textsuperscript{250} Native American Graves Protection and Repatriation Review Committee Meeting, Washington DC, Apr. 29-May 1, 1992, minutes (“Meeting 1 minutes”), p.6.

\textsuperscript{251} Indeed, Mr. Bobby C. Billie stated, at the fourteenth NAGPRA Review Committee meeting that “if his ancestors get angry, something will happen to the earth.” Meeting 14 minutes, \textit{supra}, n. 80, at p.30. \textit{See also}, the comments of Mr. Dean Barlese, who stated that having his ancestors’ remains removed “from their graves has harmed his people, causing sickness and loss.” Native American Graves Protection and Repatriation Review Committee Meeting, Santa Fe, Dec. 10-12, 1998, minutes (“Meeting 16 minutes”), p.18.

\textsuperscript{252} For example, Mr. Kenneth H. Carleton commented, at the twelfth NAGPRA Review Committee meeting, that, “[h]e believes that the Choctaw should only repatriate Choctaw human remains.” Native American Graves Protection and Repatriation Review Committee Meeting, Myrtle Beach, Nov. 1-3, 1996, minutes (“Meeting 12 minutes”), p. 9. This desire and concern was also supported by the comments of Mr. Phillip Martin at the same meeting. \textit{Id.} It should be noted that not all native peoples share these concerns. Indeed, as Dr. Alan Downer, the Navajo Nation Historic Preservation Officer, when commenting on the possibility that someone’s remains may be reburied by an enemy culture, noted, I think that the Navajo’s position is quite clear that the most important thing is that these remains be re-properly [sic] buried. The mechanics of it, where they’re reburied, is much less important than that they be reinterred quickly. Meeting 2 transcript, \textit{supra}, n. 81, at p.331.
Dakota or South Dakota area. I would rather have it stay where it's at rather than it being moved.\textsuperscript{253}

From a non-Native perspective, it is difficult to fully appreciate the concerns of spiritual danger often raised by the Native community. In a recent analysis of the cultural creation of the concept of a soul, Timothy Taylor provides some insights into the basis for the concerns of Native populations with respect to the retention of human remains in museum collections.\textsuperscript{254} Taylor identifies widespread cultural practices in non-Western societies in which the remains of the dead must travel through a two-part process to reach the afterlife.\textsuperscript{255} The interruption of this process, according to many traditional beliefs, results in wayward souls wandering in a liminal state, wreaking havoc on the living descendants as a result of their frustration for not having made it to the afterlife.\textsuperscript{256} It is precisely this liminal phase of death that Taylor focuses on as one of the major problems for Native groups with respect to unearthed human remains. As part of the two-part process for incorporating the spirit into the afterlife, human remains are often placed in a primary burial, where nature is to take its course and render the remains to a state from which travel to the afterlife is possible.\textsuperscript{257} Following a prescribed amount of time in this primary burial, the remains are collected up and reburied in a secondary burial. Both phases are accompanied by specific rituals to aid the spirit on its journey.\textsuperscript{258}

\textsuperscript{253} Meeting 7 transcript, p.186-187, comments of Chair Tessie Naranjo. Chair Naranjo made the point again in 1997, when she stated that “the pueblos [sic] have a policy of nonreturn of human remains based on their spiritual beliefs.” Meeting 13 Minutes, supra, n. 128, at p.10. Further adding to the spectrum of responses from the Native community are the comments of Mr. Pat Lefthand, who stated that, “[t]he Koontenai have very confidential ceremonies and information. Rather than disclose the information, the Indian tribe would probably choose not to repatriate funerary objects. Meeting 16 Minutes, supra, n. 250, at p.38.

\textsuperscript{254} Timothy Taylor, THE BURIED SOUL: HOW HUMANS INVENTED DEATH, 259-265 (Beacon Press 2002).

\textsuperscript{255} Id.

\textsuperscript{256} Id. at 122, 126-134, 265.

\textsuperscript{257} Id.

\textsuperscript{258} Id.
period of the primary burial, the spirit exists in a liminal state – not really dead, but
certainly not alive. The spirit often remains near the physical remains of the body,
awaiting its final journey to the afterlife. However, if the primary burial is disturbed in
an unritualistic manner, the spirit will not be sent on its final journey and will be destined
to roam the earth in this liminal state for eternity. Taylor argues that,

[a]boriginal tribes paid little heed to bones after the secondary rites
because they knew who they belonged to. But the archaeologically
excavated bones were seen by some tribespeople as supernaturally
dangerous because their identity was a mystery. No one knew if
secondary rites had been properly completed for these ancient people. If
they had not, then their unquiet souls might have been released during the
process of archaeological excavation. The transfer of bones to tribal
keeping houses is not just an expression of a generalized reverence
towards the indigenous dead, but is seen by some as an essential right of
incorporation.

This rite of incorporation is the incorporation of the spirit into the community of
the dead via the secondary burial process. A common non-Western conception is that,

263 There is little doubt that this cultural
dilemma exists with respect to disinterred remains that are not accorded the proper
ceremonies. This is consistent with the comments of Dr. Jonathan Haas in the fourth
meeting of the Review Committee, where,

261 Id.
262 Taylor, supra, n. 253, at 253. See also, Shannon Applegate, LIVING AMONG HEADSTONES, 71 (Avalon
2005) (commenting that, “[m]any Native people…believe that in order for the spirit of a dead person to
enter the next world, his human remains must stay intact.”).
263 Taylor, supra, n. 253, at 122. 126-134, 265.
264 However, Taylor dismisses the application of this perspective to the repatriation debate in the United
States. He states that,
He cited one example in which scientific analysis of the remains helped identify one individual from a larger group who was not culturally affiliated with the particular tribe that had asked for the repatriation of the remains. The tribe concluded repatriation of that one individual would be dangerous because they were not of the proper culture.

Other perspectives from the Native community are also informative of their views on the repatriation debate. In 1993, Ms. Lei Parker, speaking through an interpreter, noted that, with the study of human remains, “[t]his kind of practice of archaeology, it’s like it goes over the edge of what is acceptable.” She further commented that, with the study of human remains of the Hawaiian people, “[y]ou spiritually enslave us and you take us to the edge of insanity.” Similarly, Ms. Rachel Craig stated that, [w]hat I am concerned with is the progress that a person makes in the spirit world. There really is no rest for that spirit whose bones are not interred in the ground.

The reburial issue has become part of a romanticized Western idea of indigenous peoples. Behind the posturing is a rather patronizing projected jealousy of the perceived greater depth of native spirituality as manifested in an apparently passionate concern for the ancient dead. But the underlying issue is disempowerment. Taylor, supra, n. 253, at 263-264. Thus, Taylor’s conclusion means that, with respect to the claims of Native peoples for the reburial of ancient human remains that cannot be culturally affiliated with any current groups, these should be treated carefully. The underlying cultural impetus for such passionate claims may be more related to those groups’ unconscious need to assert control than it is related to a need to actually see the remains reburied. It is impossible to test the veracity or validity of this hypothesis, but it is certainly a perspective that is worth considering.

265 Native American Graves Protection and Repatriation Review Committee Meeting, Oahu, Feb. 26-27, 1993, minutes (“Meeting 4 minutes”), p.12. See also, comments of Cecil Anton, Gila River Indian Community, stating the need for “museums and Federal agencies to work closely with Indian tribes to ensure that human remains and cultural items are repatriated to the correct Indian tribe.” Native American Graves Protection and Repatriation Review Committee Meeting, Phoenix, Jan. 23-25, 1994, minutes (“Meeting 6 minutes”), p.12; see also, comments of Donna Haro, Salinan Nation, stating that “[t]here is a spiritual issue involved in reburying culturally unidentifiable human remains in the wrong tradition.” Meeting 9 minutes, supra, n. 80, at p.18. Cf., William Tallbull’s comment that “he would be happy to have the human remains reinterred by other Indian tribes.” Native American Graves Protection and Repatriation Review Committee Meeting, Anchorage, Oct. 16-18, 1995, minutes (“Meeting 10 minutes”), p.15.


267 Id. at 176.

268 Id. at 195.
However, a contradictory perspective is also prevalent among some Native peoples of the United States. The then chairperson of the Review Committee, Ms. Tessie Naranjo, a Santa Clara Pueblo from New Mexico, stated that,

We’re most interested in the spirit, and almost not interested in what contains a spirit, as evidenced by:

Some of the museums in Sante Fe, for example, a couple of years ago asked my community if they were interested in repatriating the bones that were in their museums.

We paid no attention, because of this philosophy that we have that we’re most interested in spirits. For us, the spirits of the dead are very important. That is for sure. The physical container, meaning the bones, have not as much meaning for us.

* * *

There are 400-plus tribes in the United States. And for every tribe that you go to, you’re going to have a whole different opinion on scientific studies.269

Indeed, the Santa Clara Pueblo peoples are not the only Native Americans who are either indifferent to scientific analyses or are in support of such research. Leigh Jenkins of the Hopi Tribe, stated that

the Hopi Tribe allowed scientific analysis of human remains and cultural items and saw this work as augmenting its own oral histories.270

Rachel Craig, an Alaska Native and a one-time member of the Review Committee, has also stated that “Alaska Natives would not be opposed to minimal physical examinations in order to help determine affiliation.”271 In addition, Ronald Little Owl of the North Dakota Intertribal Reinterment Committee, stated that “each Indian tribe had to make up its own mind regarding the appropriateness of scientific analysis of human remains and

269 Id. at 105-106.
270 Meeting 6 minutes, supra, n. 264, at p.10; see also, Comment letter from Henry John, Vice-Chairman, Puyallup Tribe of Indians, DOI Document No. DOI-2007-0032-0026.1 (Jan. 11, 2008) at 7.
271 Meeting 9 minutes, supra, n. 80, at p.8.
cultural items.\textsuperscript{272} All of these diverse perspectives regarding the appropriateness of human remains research support the conclusion that the charge to museums and federal agencies in the 2007 Draft Regulations to repatriate all culturally unidentifiable human remains, \textit{post haste}, is out of step even with the Native communities perspectives on repatriation.

VI. Conclusion

The very clear picture that emerges from the above analysis is that DOI has no authority to promulgate regulations for culturally unidentifiable human remains. More troubling than this conclusion is the fact that DOI did attempt, with the 2007 Draft Regulations, to do just that despite all the doubts and objections it had heard over the years.

With the 2007 Draft Regulations, DOI has not only exceeded its statutory charge under NAGPRA, but it has also rewritten the organic law that it purports to use as authority to promulgate the proposed regulations. NAGPRA is silent regarding what should be done with culturally unidentifiable human remains. Nonetheless, not only has DOI supplied its own authority to regulate on this issue, but it has also supplied the authority to order the reburial of culturally unidentifiable human remains. This is quite a

\textsuperscript{272} Meeting 6 minutes, \textit{supra}, n. 264, at p. 13. The dilemma presented by the need to conduct scientific testing to aid in affiliating remains is highlighted by the numerous groups who noted their cultures' idiosyncratic approach to reburial and the necessity of following those practices should any reburial occur. See \textit{e.g.}, comments of Ms. Carmen Christy, who stated that, [a]s long as the U.S. government, universities, and museums hold their cultural items, Indians in Pomo county will live in constant turmoil and unrest… any Pomo items that cannot be returned need to be burned in the Pomo tradition. Native American Graves Protection and Repatriation Review Committee Meeting, Kelseyville, May 31-June 2, 2001, minutes, p.29. In order to honor such wishes, with respect to culturally unidentifiable remains, more scientific testing, perhaps even destructive analyses, are necessary to narrow down questions of affiliation.
feat for a law that says nothing about such remains aside from the charge to the Review Committee to make recommendations regarding their disposition.

It is clear from the above review that, in addition to being inconsistent with the letter of NAGPRA, the 2007 Draft Regulations are also inconsistent with the legislative history of NAGPRA. Congress did not intend for NAGPRA to interfere with science. In addition, several members of Congress noted that culturally unidentifiable human remains were to be “kept with care.” This is definitely not a mandate to DOI to order the repatriation of such remains. NAGPRA is about righting past wrongs and doing the right thing. It can hardly be said that DOI is doing the right thing by promulgating rules that would have remains returned to virtually anyone who claims Native American heritage, with no consideration to the cultural affiliation the remains being requested. Indeed, it does not appear that such a method for repatriation even comports with the wishes of many in the Native community.

Although there have not been many reported cases under NAGPRA, it is clear from the *Bonnichsen* case that jurisprudential interpretations of NAGPRA also find that law not to provide for repatriation of human remains to tenuously linked groups on the basis of some shared Native affinity. Thus, in addition to rejecting the clear language of NAGPRA and its legislative history in drafting the 2007 Draft Regulations, DOI has also rejected the jurisprudence on this matter.