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Repatriation and the Smithsonian: An examination of repatriation at the National Museum of the American Indian and the National Museum of Natural History

A thesis submitted in partial satisfaction
of the requirements for the degree Master of Arts
in American Indian Studies

by

Meredith Laura Duarte

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ABSTRACT OF THE THESIS

Repatriation and the Smithsonian: An examination of repatriation at the National Museum of the American Indian and the National Museum of Natural History

by

Meredith Laura Duarte

Master of Arts in American Indian Studies

University of California, Los Angeles, 2012

Professor Angela R. Riley, Chair

As a research based institution, the Smithsonian's involvement in the debate over the control of indigenous history between indigenous and scientific communities has largely been at the defense of free access to all knowledge despite the destruction of indigenous people's cultural heritage. However, the passage of the National Museum of the American Indian Act in 1989, which established a new Smithsonian museum devoted to indigenous cultures and created a federally mandated repatriation statute for all Smithsonian museums, has caused the Smithsonian to evaluate the ethical and moral issues surrounding its involvement in this debate.

This thesis seeks to examine the differing perceptions of cultural property being utilized at the Smithsonian through its two repatriating bodies, the National Museum of Natural History and the National Museum of the American Indian. This study provides an example of the

current larger debate as well as emphasizes the Smithsonian's influence on this controversy. Through this study I will provide possible mediations between the two opposing sides of the contest for control of indigenous history and propose the need for a collaborative partnership towards a shared authority over indigenous history.

The thesis of Meredith Laura Duarte is approved.

Duane W. Champagne

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Wendy G. Teeter

Angela R. Riley, Committee Chair

University of California, Los Angeles

2012

DEDICATION

In loving memory of my Uksod.

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INTRODUCTION

Controversy over the study and curation of indigenous¹ remains and cultural property has historically been filled with cases and legislation pitting the interests of scientists and indigenous people against each other. Throughout this legacy there have been specific instances where researchers and indigenous people have come head to head over the right to lay claims to indigenous remains and cultural property. Both sides of the debate maintain their claims supersede those of the other and both are unwilling to concede. In his seminal work, *Skull Wars*, archaeologist David Hurst Thomas examines these growing tensions between scientific and indigenous communities and asserts they are deeper than merely philosophical differences.²

¹ The term “indigenous” is controversial and continues to be contested today; however, for the purposes of this thesis the term will defer to the working definition of “indigenous peoples” in the U.N. system. See, Erica-Irene A. Daes, “An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations,” 21 CAMBRIDGE REV. INT’L AFF. 7, 9 (2008) (“[T]here is not an international consensus on who indigenous peoples are: the term cannot be defined precisely or applied all-inclusively.”). Nevertheless, a working definition of “indigenous peoples” exists in the U.N. system:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non dominant [sic] sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Id. (quoting ECOSOC, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, ¶ 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1987) (prepared by José R. Martínez Cobo).

² Thomas, David Hurst. *Skull Wars: Kennewick Man, Archaeology, and the Battle for Native American Identity*. New York, NY: Basic, 2000.

Thomas suggests this struggle is the result of a much larger political war over the authority to own and control the past.³

Thomas's theory identifies specific repatriation disputes, such as the renowned case of Kennewick Man,⁴ within a legal framework in which differing conceptions of property are utilized to determine if human remains and cultural property ever cease to be part of any one group and become the property of mankind. In the case of the Kennewick Man, American Indian tribes and scientists both laid claim to one of the oldest and most complete sets of skeletal remains in the United States.⁵ In the landmark decision of *Bonnichsen et al. v. U.S.* (Bonnichsen), the ninth circuit court of appeals concluded that the Kennewick Man could not be defined as American Indian due to the age of the remains.⁶ This decision not only questioned the definition of "indigenous people," but also affirmed a claim of science over indigenous epistemology causing a devastating blow to indigenous claims to their ancestors and cultural property being held and studied in museums and federal agencies all over the nation.⁷ As Native activist Suzan Harjo has characterized it, the decision and Congress's subsequent support, "paves the way for regulations that the scientists want to protect their 'studies' on the myriad of dead Indians they view as their property."⁸

³ *Id.*

⁴ *Id.*, at Prologue (discussion on the discovery of an approximately 9,000 year old skeleton on the banks of the Columbia River in Kennewick, Washington and the ensuing controversy between archaeologist Jim Chatter, and other prominent scientists, and five indigenous groups of the Northwest headed by the Umatilla tribe of northeastern Oregon.)

⁵ *Id.*, at Prologue xxi (discussion of initial carbon dating of the Kennewick bones.)

⁶ *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1143-44 (D. Or. 2002), *aff'd*, 367 F.3d 864 (9th Cir. 2004)

⁷ *Id.* See *discussion* which examines whether a 9000-year-old human skeleton was properly described as "Native American" in origin.

⁸ Suzan Shown Harjo, "How Many Dead Indians Will Satisfy Feds and Scientists?" *Indian Country Today*, AUG. 4, 2005.

Of the eight prominent scientists who sued to obtain access to the Kennewick bones in the Bonnicksen case, two were, and currently are, employees of the Smithsonian Institution in the Department of Anthropology at the National Museum of Natural History.⁹ As the world's largest museum and research complex, the Smithsonian Institution is involved in many of the disputes over indigenous human remains and cultural property. Historically, the Smithsonian has been on the side of researches in most of these cases; however, with the passage of the National Museum of the American Indian Act (NMAI Act) in 1989 and the creation of a new museum devoted to indigenous cultures, the Smithsonian has been forced to confront the ethical and moral issues raised by their active role in the debate over the control of indigenous history.

The NMAI Act exposed two distinct positions in the contest for control of the past within the Smithsonian Institution. This thesis will examine the debate over the control of indigenous history as exemplified by the Smithsonian through the individual perceptions of property being implemented at the repatriation programs of the National Museum of Natural History and the National Museum of the American Indian. A study of this debate within the Smithsonian provides a microcosm of the larger debate in modern society and emphasizes the influence each museum's position has on this larger controversy. Through this study I will discuss possible mediations between indigenous people and those who wish to study them both in and out of the Smithsonian Institution.

In 1836 President Andrew Jackson announced the bequest of British scientist James Smithson's estate to Congress and the United States formally pledged to follow Smithson's

⁹ As of May 17, 2012, Archaeologist Dennis J. Stanford is currently the Director of the Paleo-Indian/Paleocology Program and Curator of the North American Archaeology in the division of Archaeology. Physical Anthropologist Douglas Owsley is currently the Division Head and Curator of Native American Forensics in the division of Physical Anthropology. *available at* http://anthropology.si.edu/anthro_staff.htm.

wishes to create,¹⁰ “at Washington, under the name of the Smithsonian Institution, an establishment for the *increase and diffusion of knowledge.*”¹¹ Today, the Smithsonian Institution now includes nineteen museums, the National Zoo and nine research facilities.¹² Each of the nineteen museums in the Smithsonian Institution is an autonomous entity directed by its own governing systems due to their different collections and areas of interest as well as their different dates of inception. This fact is not common knowledge. Many view the Smithsonian as the single institution it started out as¹³ when in fact it now acts as an umbrella organization for its many different museums and facilities. It is the separation of administrative power that has allowed each of the Smithsonian museums to develop individual philosophies toward current debates, such as the contest for control of indigenous history.

One year prior to the passage of a national repatriation policy in the Native American Graves Protection and Repatriation Act (NAGPRA), the passage of the NMAI Act in 1989 made all of the Smithsonian Institution’s museums subject to repatriation regulations fought for in a long and tenuous battle between indigenous people, United States policy makers and the Smithsonian Institution. The Smithsonian is only subject to the NMAI Act and is specifically excluded from those repatriation regulations outlined in NAGPRA,¹⁴ although the regulations in

¹⁰ “General History.” Smithsonian Institution Archives. *available at* <http://siarchives.si.edu/history/general-history>.

¹¹ Smithson, James, Last Will and Testament, October 23, 1826. Smithsonian Archives. *available at* <http://siarchives.si.edu/history/exhibits/documents/smithsonwill.htm>.

¹² Smithsonian History. Smithsonian Institution Archives. *available at* <http://siarchives.si.edu/history>.

¹³ See “The History of the National Museum of Natural History.” Smithsonian Institution Archives. *available at* <http://siarchives.si.edu/history/national-museum-natural-history>.(discussion of the emergence of differing Smithsonian museums out of the initial single collecting body).

¹⁴ See Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013(“Federal agency.” “Federal Agency means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution.”) See also (“museum.” “Museum means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.”)

both statutes are very similar. Of the extensive collections held by the nineteen Smithsonian museums, only those collections held in the National Museum of the American Indian and the National Museum of Natural History are affected by the NMAI Act. In compliance with the NMAI Act both museums are required to identify and return any American Indian, Alaskan Native and Native Hawaiian human remains and/or associated funerary objects, unassociated funerary objects, sacred objects and objects of cultural patrimony in their possession to the culturally affiliated group.¹⁵

To expose the deeply rooted perceptions of property each museum exhibits throughout the debate over the control of indigenous history, the first chapter titled, “I. The Last Smithsonian Museum,” explores the legacy of the NMAI Act in order to understand the creation of an entirely new Smithsonian museum and discern the true regard the National Museum of Natural History and the National Museum of the American Indian maintain toward a federally mandated repatriation policy that limits the research directive codified in the Smithsonian’s mission. Through this historical discussion, the foundations for two distinct repatriation programs emerge and in the second chapter titled, “II. The National Museum of the American Indian,” I will examine the creation of the repatriation program at this museum, discuss its philosophies toward repatriation and highlight the execution of its repatriation practices. Comparatively, in the third chapter titled, “III. The National Museum of Natural History,” I will examine the creation of the repatriation program at this museum, discuss its philosophies toward repatriation and highlight the execution of its repatriation practices. I intend to illustrate the contrasting perceptions of property within the larger debate over the control of indigenous

¹⁵ See National Museum of the American Indian Act. 20 U.S.C. 80q et seq. § 11 (discussion of inventory, identification and return of human remains and funerary objects in the possession of the Smithsonian Institution.) See also National Museum of the American Indian Act Amendments of 1996. 20 U.S.C 80q note. §§ 11A (discussion of repatriation of unassociated funerary objects, sacred objects and cultural patrimony.)

history through a comparison of both museum's policies and practices. In the fourth chapter titled, "IV. Moving Forward," I will propose the need for a collaborative partnership towards a shared authority over indigenous history in the Smithsonian Institution.

I. THE LAST SMITHSONIAN MUSEUM

In 1985 a group of Cheyenne religious and tribal leaders were invited to the Smithsonian's National Museum of Natural History in Washington DC to review the museum's Cheyenne inventory. By a chance inquiry, the Smithsonian's curator opened a drawer revealing the remains of a human being marked as "Kiowa."¹⁶ The group later discovered the National Museum of Natural History was housing the remains of at least 18,500 indigenous individuals and they were unceremoniously being stored in drawers and boxes such as the "Kiowa."¹⁷ This chance discovery was just one of many instances that sparked a battle for federal legislation to resolve the ethical and moral issues raised over the study and curation of indigenous human remains and objects of cultural significance.¹⁸

The majority of indigenous collections in American museums are the result of nefarious dealings and questionable ethics legitimized by theories of American Indians becoming a "vanishing race."¹⁹ From all accounts, George Gustav Heye, the founder and collector of what

¹⁶ C. Spotted Elk. "Skeletons in the Attic," in *New York Times*, March 8, 1989; *See also* Kara Swisher. "Smithsonian to Surrender Indian Bones: Accord Sets Stage for New Museum," in *Washington Post*, September 12, 1989.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Brian William Dippie. *The Vanishing American: White attitudes and U.S. Indian policy* (1982). (discussing the origins of this assumption and its insidious effects on U.S. policy toward Indians from the beginning of the nation's history through the Indian New Deal of the 1930s. Dippie describes its role in early attempts at civilization and education, segregation of Indians west of the Mississippi, post-Civil War reform, the Dawes Act and allotment, the gradualism of early twentieth-century policy, the reform movement of the 1920s, John Collier's Indian

would become the National Museum of the American Indian's collections, remained ambivalent toward indigenous communities and indigenous issues of the time. He, like many of his peers, had little interest in contemporary indigenous people; it was the past that motivated his desire for collecting. On a number of occasions his actions were called into question. In 1914 he and his team were arrested for grave robbing in New Jersey. However, they were later acquitted. These actions were not uncommon practices as public perception of indigenous people at the time considered American Indians to soon be extinct. Even those who became sympathetic toward contemporary indigenous issues through their work with indigenous subjects, such as renowned anthropologist Franz Boas,²⁰ uncovered burials in an effort to preserve this knowledge.²¹ An account of researchers uprooting living indigenous people from their homes and housing them in a museum basement for display and further study was also justified in the name of preservation.²²

While these transgressions simultaneously destroyed and preserved indigenous cultures, indigenous people have endured. However, indigenous knowledge has been marginalized relative to scientific versions of knowledge for generations. Indigenous people have long sought

Reorganization Act, and into the 1970s.) *See also* Thomas *supra* note 2 at Chapter 5 Darwin and the Disappearing American Indian 44-51.

²⁰ Thomas *supra* note 2 at Chapter 5 Darwin and the Disappearing American Indian 44-51.

²¹ Ira Jacknis, "A New Thing?: The National Museum of the American Indian in Historical and Institutional Context," in *The National Museum of the American Indian: Critical Conversations* at 3-42 (Amy Lonetree and Amanda J. Cobb, eds., 2008)

²² *See* Kenn Harper, *Give Me My Father's Body: The Life of Minik, the New York Eskimo* at 24-25 (2000); *See also* Jo Carrillo, "The Repatriation of Cultural Property," in *Readings in American Indian Law: Recalling the Rhythm of Survival* at 153, 155-56 (Jo Carrillo ed., 1998) (discussing the story of Minik Wallace an Inuit boy brought to live in the basement of the American History Museum in New York by researcher Robert Peary in 1897 along with five other Inuit individuals including his father, Qisuk. After disease killed four of the group members including Minik's father, the young man asked the museum to relinquish Qisuk's body to him so that he may perform the proper burial rituals. To appease the boy the museum staged a mock funeral then de-fleshed, preserved and prepared the skeleton for display. In his teenage years Minik discovered the horrifying truth that his father's body was being displayed as a nameless "Eskimo" in the museum and engaged in a struggle with the museum to return the remains. Unfortunately, Minik died before his father's remains would ever be laid to rest. It was not until the passage of NAGPRA that the museum quietly negotiated the repatriation of Qisuk's remains to the tribe).

to collaborate with the Smithsonian in hopes of creating a forum where indigenous epistemologies would be included in the curation and display of culturally significant objects. In 1981, the chairman of the North American Indian Museum Association, Richard Hill (Tuscarora), approached the National Museum of Natural History stating an interest in establishing a cooperative relationship to assist in the renovation of their Northern American Indian exhibits in order to ensure a more accurate and sensitive portrayal of American Indian cultures at the museum.²³ Hill envisioned the creation of a national advisory committee on American Indian cultures.²⁴ However, the Department of Anthropology in National Museum of Natural History formally declined the offer stating they would, “contact them in the future as the need arises,” but, “a formal advisory committee is not called for at this point and may in fact prove difficult.”²⁵ This denial of an opportunity to include an indigenous voice, and many others like it, created a pattern that eventually led indigenous groups, like the Cheyenne, to circumvent working with the Smithsonian and seek federal legislation that would not only allow an indigenous voice at the table but create a separate museum devoted to this collaboration.

The year 1986 proved to be pivotal in the history of museums, particularly in their representation of indigenous cultures. That year, as a result of many indigenous complaints, the Senate Select Committee on Indian Affairs began to explore the status of museum collections of American Indian human remains and the issue of repatriation. Soon thereafter, Smithsonian Secretary Robert McCormick Adams testified to the Senate that the Smithsonian Institution had curated thousands of American Indian skeletal remains, which constituted 42.5 percent, or

²³ Richard Hill, chairman of the North American Indian Museum Association, to Gene Bahlen [sic], curator of exhibits, National Museum of Natural History, March 11, 1981, Box 17, SIA ACC 90-077, Office of Museum Program (OMP) Records.

²⁴ *Id.*

²⁵ Douglas H. Ubelaker to Richard S. Fiske, March 25, 1981, Box 17, SIA ACC 90-077, OMP Records.

14,523 objects of the institutions physical anthropology collection.²⁶ In addition, he also testified another 11.9 percent, or 4,061 objects were Alaskan Native and Native Hawaiian.²⁷ By comparison, 20 percent were identified as White, 5.1 percent as Black, and 20.6 percent as all others.²⁸ Indigenous communities across the western hemisphere continued to voice their outrage over these numbers and began to push even harder for federally legislated repatriation.²⁹

In October 1986, Senator John Melcher, a Democrat from Montana, introduced the Native American Cultural Preservation Act.³⁰ While not enacted, this was the first of many bills considered by Congress that included repatriation or grave protection provisions and called for a Native American Claims Commission.³¹ In its final form, the Commission was intended to resolve disputes between tribal communities and museums over the repatriation of human remains and culturally significant objects.³² However, the Commission and numerous other bills were vigorously opposed by, *inter alia*, the American Association of Museums, the Society for American Archeology and the Smithsonian Institution.³³

In an effort to come up with a fresh solution, the newly appointed chair of the Senate Select Committee on Indian Affairs, Senator Daniel Inouye, approached the National Capitol Planning Commission with the idea of creating a national memorial on the National Mall for all

²⁶ Smithsonian Secretary Robert McCormick Adams, Joint Hearing before the Select Committee on Indian Affairs and Committee on Rules and Administration, United States Senate, National American Indian Act (Part I) (Washington DC: U.S. Government Printing Office, 1987), 73.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See for example Jake Henshaw, "Burial Remains: Indians Urge Smithsonian to Turn over Collections," *Argus Leader* (Sioux Falls SD), February 2, 1986, 7D.

³⁰ United States Senate, 1986: NATIVE AMERICAN CULTURAL PRESERVATION ACT. S. 2952, October 18, 1986.

³¹ S. 2952, 99th Cong., 2d. Sess. (1986); S. 187 100th Cong., 1st Sess. (1987).

³² Tamara L Bray, American Archaeologists and Native Americans: A Relationship Under Construction," in *The Future of the Past: Archaeologists, Native Americans, and Repatriation.* (ed Tamara L. Bray, 2001).

³³ *Id.*

remains curated by the Smithsonian.³⁴ However, the last space reserved on the National Mall was for the creation of a Smithsonian museum and the Commission suggested the idea of an indigenous memorial be combined with the museum format in light of the vast holdings.³⁵ Tensions quickly surfaced from the National Museum of Natural History's Department of Anthropology over the type of new museum. Talks of a National Museum of Mankind had been underway for some time, which would have allowed the Department of Anthropology to be an autonomous entity outside of the National Museum of Natural History.³⁶ Any other type of museum was not a welcome concept at the time.

Simultaneously, Senator Inouye was approached with a proposal by the board of the financially troubled Museum of the American Indian, a private museum in New York City. The Museum of the American Indian had been facing severe financial problems at least since the 1970's and was seeking possible resolutions.³⁷ It had been approached by others about the sale of the collection and numerous solutions to save the collection were formulated, but none were accepted.³⁸ In April of 1987, Barber Conable, then chair of the Heye Foundation, invited Senator Inouye and Smithsonian Secretary Adams to New York City to tour and meet with the Heye board.³⁹ The meeting formally launched what would become two years of sensitive negotiations between the Heye Foundation, Congress and the Smithsonian Institution.⁴⁰

³⁴ Senator Daniel Inouye, *Joint Hearing before the Select Committee on Indian Affairs and Committee on Rules and Administration, United States, National American Indian Museum Act (Part I)* (Washington DC: U.S. Government Printing Office, 1987), 2.

³⁵ Patricia Pierce Erikson, "Decolonizing the Nation's Attic: The National Museum of the American Indian and the Politics of Knowledge-Making in a National Space," in *The National Museum of the American Indian: Critical Conversations* at 43-83 (Amy Lonetree and Amanda J. Cobb, eds., 2008)

³⁶ Jacknis *supra* note 21.

³⁷ Erikson *supra* note 35, at 55-56.

³⁸ *Id.*

³⁹ *Id.* at 58-59

⁴⁰ *Id.*

The Museum of the American Indian in New York City was home to the extensive American Indian collection largely assembled by the private collector, George Gustav Heye. Heye was a wealthy New York banker who had personally collected indigenous material culture throughout the Western hemisphere and as a result of this passion founded the Museum of the American Indian in 1916.⁴¹ The Heye collection amassed nearly one million ethnographic and archeological pieces as well as 86,000 prints and negatives.⁴² The overwhelming majority was from indigenous people of North America (70 percent) with the rest from Central and South America.⁴³ This colossal opportunity attracted the attention of the Smithsonian regents and with their influence Secretary Adams continued discussions with the Heye Foundation and Congress over the founding of a Native American museum at the Smithsonian.

Throughout the process Secretary Adams defended the established Smithsonian repatriation policy of the time, which only returned human remains that were identifiable as “named individuals” and continued negotiations asserting that no legislative mandate of repatriation was warranted.⁴⁴ However, at the time, the Senate Select Committee on Committee Rules and Administration, which has congressional jurisdiction over the Smithsonian, collaborated with the Senate Select Committee on Indian Affairs and this significant body of influence provided a crucial platform for indigenous lobbying to be much more effective.

In 1987 Senator Inouye introduced a bill to establish the National Museum of the American Indian.⁴⁵ The bill required the Smithsonian to determine the geographical and tribal

⁴¹ *Id.* at 55-56

⁴² *Id.* at 58

⁴³ *Id.*

⁴⁴ *Id.* at 59

⁴⁵ United States Senate, 1987: NATIVE AMERICAN MUSEUM ACT. S. 1772, September 25, 1987.

origin of all human remains and inter those that remained unidentifiable in a national memorial.⁴⁶ This drew quick opposition from the National Museum of Natural History. The National Museum of Natural History did not condone the reinterment of indigenous remains, the erection of a memorial nor the prospect of a repatriation mandate.⁴⁷ Also, negative responses from indigenous communities over a collective interment in a national monument began to surface.⁴⁸

At the November 1987 hearing Secretary Adams formally presented the Smithsonian's position stating they found the bill's repatriation provisions to be, "inconsistent with the Smithsonian's historic mandate for the increase and diffusion of knowledge and with the precepts of modern scientific inquiry."⁴⁹ Secretary Adam's statements largely coincided with those coming from anthropologists at the National Museum of Natural History. They later proposed an alternative to the American Indian Museum: a "Gallery of the Americas" in their long-desired Museum of Mankind, which would display the newly acquired Heye collection as well as the extensive indigenous collections already possessed by the National Museum of Natural History.⁵⁰ This alternative, along with opposition to repatriation measures, found no sympathy on Capitol Hill. The majority of Congress viewed repatriation measures as the least the government could do to correct a legacy of cultural genocide.

While there had been little advancement and little agreement over federal legislation, the many Congressional hearings on repatriation issues stimulated conversations between the

⁴⁶ *Id.*

⁴⁷ Erikson *supra* note 35, at 59.

⁴⁸ United States Senate 1988b: JOINT HEARING BEFORE THE SELECT COMMITTEE ON INDIAN AFFAIRS AND THE COMMITTEE ON RULES AND ADMINISTRATION. S. 1722 and S. 1723. Senate Hearing 100-547 at Part 2. November 18, 1987.

⁴⁹ Secretary Robert McCormick Adams, Joint Hearing before the Select Committee on Indian Affairs and Committee Rules and Administration, U.S. Senate, National Museum of the American Indian Act, at Part II 15-29 (1987).

⁵⁰ Erikson *supra* note 35, at 61

museum, scientific and indigenous communities.⁵¹ Throughout the discussions, indigenous people remained steadfast in their efforts to include repatriation provisions in any legislation that would establish a new American Indian museum. Indigenous groups and activists such as, Walter Echo-Hawk (Pawnee) of the Native American Rights Fund and Suzan Harjo (Cheyenne/Creek) of the Morningstar Foundation, were instrumental in political lobbying as well as gaining media and public appeal. Essentially, indigenous actors were asking the public to accept limits on scientific justification for research on indigenous human remains.

After two years of intense negotiations between the Heye Foundation, the Smithsonian and Congress and decades of indigenous protest, a repatriation policy was included in the NMAI Act and it was put into law on November 28, 1989.⁵² The primary purpose of the NMAI Act was to establish a museum devoted to the histories and cultures of indigenous people on the last remaining space on the National Mall. However, the Act also required, “the Secretary of the Smithsonian Institution, in consultation with tribes and tribal religious leaders, to identify and create an inventory of all human remains and associated funerary objects in the Smithsonian’s possession or control and expeditiously return them to their lineal descendants upon request.”⁵³ This meant that an inventory was to be completed of all indigenous objects and remains in order to determine the origin of such items. Based on the best scientific and historical documentation available, “if the tribal origin of [the] remains or objects is able to be identified by a preponderance of evidence then the tribe is to be promptly notified and the item or items are to

⁵¹ Mille Gabriel and Jens Dahl. *Utimut: past Heritage -- Future Partnerships, Discussions on Repatriation in the 21st Century*. Copenhagen: International Work Group for Indigenous Affairs, at 135, (2008).

⁵² F. Barringer. “Major Accord Likely on American Indian Remains,” in *New York Times*, August 20, 1989.

⁵³ National Museum of the American Indian Act *supra* note 15, §§ 11(a)

be expeditiously returned.”⁵⁴ The Act’s stipulations also required all associated funerary objects be repatriated as well as established a special committee to, “monitor and review the inventory, identification and disposition of remains and funerary objects and assist in any dispute resolution over the repatriation process.”⁵⁵ A 1996 amendment, Public Law 104-278, also allowed the repatriation of unassociated funerary objects, sacred objects and objects of cultural patrimony to indigenous people.⁵⁶

The passage of the NMAI Act, of course, did not come without vehement opposition from the scientific community both in the Smithsonian and outside as well. However, this groundbreaking legislation was only the beginning of what would shock the entire museological discipline and further the contest for control of indigenous history.

⁵⁴ *Id.*

⁵⁵ *Id.*, §§ 10(a).

⁵⁶ The National Museum of the American Indian Act Amendments of 1996. 20 U.S.C § 80q-11(a)

II. THE NATIONAL MUSEUM OF THE AMERICAN INDIAN

In her article, *The Paradoxes of Cultural Property*, Naomi Mezey contends that culture should remain fluid and available to all because “[i]t is the circulation of cultural products and practices that keeps them meaningful and allows them to acquire new meaning, even when that circulation is the result of chance and inequality.”⁵⁷ According to Mezey and other critics of cultural property law,⁵⁸ propertizing culture with cultural property laws, like the NMAI Act and NAGPRA, gives one specific group ownership and the ability to exclude the rest of the world from knowledge.⁵⁹ Thus in the views of these critics, cultural property laws will have a negative effect on the free dissemination of culture, because “[a]s groups become strategically and emotionally committed to their ‘cultural identities,’ cultural property tends to increase intragroup conformity and intergroup intransigence in the face of cultural conflict.”⁶⁰ This understanding of property perceives cultural property laws, such as the NMAI Act and NAGPRA, as limiting the access of research and creating exceptions through the allowance of indigenous claims to repatriation, which negatively affects the natural growth of knowledge and culture. These same

⁵⁷ Naomi Mezey, “The Paradoxes of Cultural Property,” 107 Colum. L. Rev., at 2007 (2007).

⁵⁸ *Id.* See also Michael F. Brown, *Who Owns Native Culture?* at xi, 6 (quoting member of Klamath Tribe) (2003). (discussion of “the difficulty—the near-impossibility . . . of recapturing information that has entered the public domain,” noting Native peoples’ resistance to the unfettered dissemination and commodification of Native culture, particularly through the Internet, by quoting a member of Oregon’s Klamath Tribe: “All this information gets shared, gets into people’s private lives. It’s upsetting that the songs of my relatives can be on the Internet. These spiritual songs live in my heart and shouldn’t be available to just anyone. It disturbs me very much.”)

⁵⁹ Mezey, *supra* note 57, at 2005.

⁶⁰ *Id.* at 2007.

critiques and concerns were evinced as the National Museum of the American Indian was established and began to assert its position on issues of property and ownership.

When the National Museum of the American Indian Policy Statement on Native American Human Remains and Cultural Materials emerged, it drew vehement criticisms alleging the erosion of academic freedom and the weakening of the perception of science as an altruistic endeavor. The statement that the collections “must be treated as the sole property of the affected Native American culturally affiliated group,” immediately triggered opposition from across the National Mall.⁶¹ In response to this policy, the National Museum of Natural History’s physical anthropology curator, Donald Ortner, wrote to Secretary Adams stating:

The issues raised by the Americanists substantially transcend their individual or collective concerns. This is much more than a matter of curatorial or scholarly self interest. Western science and scholarship flourished in the past because of free access to sources of information that were carefully preserved by various institutions. Any departure from this tradition needs to be evaluated with great care.⁶²

The Smithsonian’s Senate of Scientists Council joined these sentiments by lobbying to Secretary Adams about the potential threat that the National Museum of the American Indian’s policies posed stating:

Restriction of access unless permission is granted by the Native American group...will undoubtedly lead to censorship in cases in which research is found unacceptable by the Native American

⁶¹ Erickson *supra* note 34, at 64.

⁶² Donald Ortner to Robert Adams, April 18, 1991, letter regarding concerns of departmental Americanists, William Fitzhugh personal archives.

group owning the collection, if research is allowed at all. The Smithsonian should not be party to the over cultural or political restriction and restructuring of knowledge. It is in no one's best interest to stifle differing points of view.⁶³

These concerns voiced by researchers and administrators alike have long been used in the debate over the control of indigenous history. However, the criticisms posed by cultural property critics such as Mezey and those in opposition of indigenous ownership of their cultural material are founded on a false premise. They believe property fundamentally creates the right of owners to exclude others, thus any protection of cultural property would automatically stifle the natural, participatory and free movement of culture and knowledge.⁶⁴ This perception of cultural property over generalizes the wants and needs of indigenous communities.

Destruction, preservation, public display or secrecy can only be determined on a case by case basis. Cultural property laws can foster a forum where culture is shared and disseminated to the public, yet remain inclusive of indigenous ownership. This all depends on whether the curation or repatriation of an item is consistent with its cultural integrity.⁶⁵ For example, the Zuni people of New Mexico viewed the repatriation of their War Gods from the National Museum of Natural History and other museums across the country as essential to the tribe's religion and way of life, yet the Zuni refused an offer from the Museum of New Mexico for the return of human remains.⁶⁶ Other tribes have requested the continued curation of human remains that would be repatriated from the National Museum of the American Indian due to a number of

⁶³ See Frank Talbot to Secretary Adams, April 29, 1991, letter regarding Indianists memo to secretary, William Fitzhugh personal archives.

⁶⁴ Mezey, *supra* note 57, at 2005.

⁶⁵ Sarah Harding, "Justifying Repatriation of Native American Cultural Property," 72 IND. L.J. 771 (1997).

⁶⁶ Thomas A. Livesay, "The Impact of the Federal Repatriation Act on State-Operated Museums," 24 ARIZ. ST. L.J. 293, at 297-301 (1992).

reasons, including but not limited to: religious beliefs, lack of funding and lack of land.⁶⁷ The views of critics place indigenous cultural property in a fixed, stagnate position where the only tool to reveal an item's importance is through access, yet there are lessons to be learned from the acknowledgement of indigenous epistemologies and beliefs that call for repatriation. The seven years that the National Museum of the American Indian has been open has proven this acknowledgement of indigenous people's authority over their cultural property can lead to a mutually beneficial relationship between scientific and indigenous communities.

On September 21, 2004 The National Museum of the American Indian, located on the National Mall in Washington D.C., opened with a ceremony consecrating the building as a sacred place and a celebration amassing the largest known American Indian gathering in history.⁶⁸ Ever since this founding, the door between the museum and indigenous people has remained wide open. The National Museum of the American Indian's mission statement asserts a goal to promote the "continuance of culture, traditional values and transitions into contemporary native life."⁶⁹ The museum strives to be transparent and community oriented, intentionally deviating from the traditional Smithsonian model.⁷⁰ This approach has allowed the National Museum of the American Indian to create a collaborative system promoting the curation and preservation of indigenous material culture and recognizing indigenous rights to cultural property as a basic human right.⁷¹

⁶⁷ National Museum of the American Indian Employee #1: Interviewed by Meredith Duarte. Hand-written notes, September 9, 2011 at 1:00 PM. National Museum of the American Indian.

⁶⁸ See Champagne, Duane. *Notes from the Center of Turtle Island*, at 38-39 (2010). (discussing the creation of the National Museum of the American Indian.)

⁶⁹ National Museum of the American Indian History. Smithsonian Institution Archives. *available at* <http://siarchives.si.edu/history/national-museum-american-indian>.

⁷⁰ *Id.*

⁷¹ National Museum of the American Indian Employee #1: Interviewed by Meredith Duarte. Audio recording, February 14, 2012 at 11:00 AM. National Museum of the American Indian.

The National Museum of the American Indian has sought to promote indigenous authority over their cultural property throughout its curation,⁷² exhibits⁷³ and, significantly, its repatriation efforts. The National Museum of the American Indian's Repatriation Office acts as the liaison between indigenous communities and the museum. The relationship cultivated throughout the repatriation process is vital to the museum's effectiveness in counteracting the legacy of distrust the scientific community has created with indigenous people. The result of this partnership is not so much of a limitation of scientific knowledge as it is an inclusion of indigenous knowledge as exemplified through the extensive consultation process being implemented at this museum's Repatriation Office.

Indigenous groups going through the repatriation process with the National Museum of the American Indian can expect a mutually participatory relationship in drafting a report on the item in question's place of origin. The National Museum of the American Indian's Repatriation Office stresses its commitment to including indigenous communities in every aspect of the process, especially when determining cultural affiliation. The Repatriation Office strives to include indigenous knowledge with the scientific record to complete a more accurate history.⁷⁴ Case reports are returned to case officers if there is a lack of a strong community voice when determining cultural affiliation, causing caseworkers to return to the community and guarantee this perspective's inclusion in all final determinations.⁷⁵ This practice gives credence to indigenous knowledge while remaining inclusive of the NMAI Act's requirement of, "using the

⁷² *Id.* (Discussion of Traditional Care Program within the National Museum of the American Indian's Cultural Resource Center. Indigenous people are able to make requests determining the curation of an item or human remains. Suggestions have included but are not limited to: Specific positions of items (i.e. facing an object to the east or placing an object in a higher position than another object), specifications on the handling and care of certain objects (i.e. some requests have asked that only male curators handle certain objects).

⁷³ *Id.* (Discussion of the creation of opening exhibition *Our Universes: Traditional Knowledge Shapes Our World, Our Peoples: Giving Voice to Our Histories*, and *Our Lives: Contemporary Life and Identities*)

⁷⁴ National Museum of the American Indian Employee #1: Interviewed by Meredith Duarte. Hand-written notes, February 14, 2012 at 1:00 PM. National Museum of the American Indian.

⁷⁵ *Id.*

best available scientific knowledge and historical documentation [to] identify the origins of...remains and objects.”⁷⁶

While subject to the same federal statute as the National Museum of Natural History, the repatriation policies and procedures at the National Museum of the American Indian have always been vastly different due to their inclusion of indigenous people. A difference in constituency may be a factor in this step away from the traditional Smithsonian model; however, it is not the driving force of the unique philosophy being enacted through National Museum of the American Indian’s Repatriation Office. Playing a much greater role is the National Museum of the American Indian’s pluralistic perception of property. Influencing this perception of property is Sarah Harding’s expansion of Margaret Jane Radin’s theory linking property to personhood.⁷⁷ Harding’s asserts that certain properties are entitled to legal protection as cultural property because they are integral to the group identity and cultural survival of indigenous peoples.⁷⁸ Harding’s theory is seen in the National Museum of the American Indian’s policy towards repatriation of human remains and objects to all indigenous people, including those indigenous people outside of the United States and those American Indian tribes not recognized by the federal government.

The National Museum of the American Indian repatriates internationally and takes repatriation claims of non-federally recognized tribes into consideration under the principle that every human being in their collection deserves the same basic human rights.⁷⁹ The National

⁷⁶ National Museum of the American Indian Act *supra* note 15 §§ 11(a)(2).

⁷⁷ Margaret Jane Radin, “Property and Personhood,” 34 STAN. L. REV. 957, 1013-15 (1982).

⁷⁸ Harding, *supra* note 65 at 723, 725, 749-53.

⁷⁹ National Museum of the American Indian Repatriation Policy. Smithsonian National Museum of the American Indian, Part III(F) (dated March 2012, currently under revision). *See also* The National NAGPRA Committees discussion of the Museum of the American Indian repatriating human remains and cultural items to indigenous groups in the Americas. To date, it has undertaken repatriations to indigenous groups in Peru, Cuba, and Canada. *available at* <http://www.nps.gov/nagpra/SPECIAL/International.htm>.

Museum of the American Indian has had to manage the legacy of government led policies that stripped indigenous people of their land, livelihood and identities. Its decision to repatriate regardless of the indigenous group's status with the nation-state demonstrates its adherence to its mission and a concept of property centered on the inalienable linkage of some property to a group identity and cultural survival.⁸⁰

In May 2011, the Government Accountability Office (GAO) released a report on the progress of the NMAI Act and NAGPRA including its recommendations. In regards to the NMAI Act, the report suggested that “much work [is] still needed to identify and repatriate Indian [sic] human remains and objects.”⁸¹ Arguably the most controversial recommendation in the GAO's report was for the Smithsonian to implement a concrete policy under which the National Museum of Natural History and the National Museum of the American Indian can repatriate culturally unidentifiable items.⁸² This recommendation goes to the very core of the two institution's differences in perception of property as the National Museum of the American Indian will repatriate culturally unidentifiable items and the National Museum of Natural History will not.

In Kristen A. Carpenter, Sonia K. Katyal, and Angela R. Riley's recent article, *In Defense of Property*, they propose a stewardship model allowing the fiduciary or custodial duties belonging to indigenous people in the absence of title or ownership.⁸³ This stewardship model departs from the traditional individual rights paradigm, and situates indigenous cultural property

⁸⁰ National Museum of the American Indian Repatriation Policy. Smithsonian National Museum of the American Indian, Part III(F). (dated March 2012, currently under revision).

⁸¹ “Report to Congressional Requesters.” United States. Government Accountability Office. Washington, D.C.: Government Accountability Office, at Summary (2011).

⁸² *Id.* at 37-39. (discussing the need for a written policy by both museums on the repatriation of culturally unidentifiable remains.)

⁸³ Kristen A. Carpenter, Sonia K. Katyal, and Angela R. Riley, “In Defense of Property,” 118 Yale L.J. 1022 (2009).

claims in the interests of “peoples” rather than “persons.”⁸⁴ The authors’ conception of collective indigenous custodial rights to their cultural property has been exemplified by the National Museum of the American Indian’s response to the GAO’s call for a policy on the repatriation of culturally unidentifiable remains.

The National Museum of the American Indian has stated, “NMAI does and has been respectfully repatriating the remains of individuals that cannot definitively be culturally affiliated,” despite the absence of any language in the NMAI Act about culturally unidentifiable remains or objects.⁸⁵ This type of repatriation is made possible through the extensive consultation process in place at the National Museum of the American Indian. The Repatriation Office has resolved many of these cases by tribes stepping forward and serving a custodial role in the respectful treatment and disposition of these items.⁸⁶ Also, The National Museum of the American Indian has implemented a policy of repatriating items given there is sufficient evidence to establish a “reasonable belief” of cultural affiliation.⁸⁷ This threshold of proof is lower than the NMAI Act’s basic requirement to repatriate given a preponderance of evidence.

A reasonable belief threshold allows repatriation if a reasonable third party with no vested interest in any particular outcome would agree with the conclusion reached.⁸⁸ Whereas a preponderance of evidence standard only allows repatriation if the item in question is more likely to be culturally affiliated with a group than not. The legal differences between reasonable basis and preponderance of evidence are significant when indigenous people are making claims for

⁸⁴ *Id.*

⁸⁵ National Museum of the American Indian Employee #1 Interviewed by Meredith Duarte. Audio recording, February 14, 2012 at 11:00 AM. National Museum of the American Indian.

⁸⁶ *Id.*

⁸⁷ *Id.* See also 2012 National Museum of the American Indian Repatriation Policy Part III(B), (C)(1-4). (dated March 2012, currently under revision).

⁸⁸ National Museum of the American Indian Employee #2: Interviewed by Meredith Duarte. Handwritten notes, February 14, 2012 at 1:00 PM. National Museum of the American Indian. See also 2012 National Museum of the American Indian Repatriation Policy Part III(B), (C)(1-4). (dated March 2012, currently under revision).

repatriation. In the absence of title or sufficient evidence to satisfy the law's basic standard of proof, the National Museum of the American Indian has determined the best approach is to appeal to the custodial rights of indigenous people as authorities of their cultural property.

The inclusion of indigenous people in the planning, curation, representation and repatriation process at the National Museum of the American Indian not only disrupts conventional notions of what a scholar is and who gets to constitute the consciousness of the visitor but also questions the role of the Smithsonian museum. While the National Museum of the American Indian is not the first or only museum to maintain this philosophy⁸⁹ it is the first museum of its magnitude and level of influence to do so.⁹⁰ As of December 31, 2010 the National Museum of the American Indian has offered to repatriate about 40% (approximately 250) of its 630 catalog numbers containing human remains⁹¹ and has openly proclaimed its endeavor to repatriate all items subject to the NMAI Act. Although it has received much criticism and tensions within the Smithsonian over its policies still exist, the National Museum of the American Indian's dedication to advancing a collaborative approach to property remains invaluable to the indigenous constituency it serves.

⁸⁹ Amy Lonetree, "Acknowledging the Truth of History: Missed Opportunities at the National Museum of the American Indian," in *The National Museum of the American Indian: Critical Conversations* at 309 (Amy Lonetree and Amanda J. Cobb, eds., 2008) (discussing Richard West's comments on smaller community museums inclusion of native voices in interpretation and representation.)

⁹⁰ Judy Stoffman, "Natives Tell Their Own Story at Smithsonian: Controversy in Calgary Led to Collaboration; Native Groups Consulted on Every Aspect of Museum," *Vancouver Sun*, August 21, 2004.

⁹¹ Report to Congressional Requesters, *supra* note 81, at 19-20.

III. THE NATIONAL MUSEUM OF NATURAL HISTORY

The National Museum of Natural History's collections date their origins to the 1838–1842 United States Exploring Expedition, which circumnavigated the globe amassing cultural and natural history collections.⁹² In 1858, the U.S. Congress began to provide appropriations for the United States National Museum and all the government's collections were transferred to the Smithsonian Institution.⁹³ Also, during the 1850s and 1860s several expeditions, which explored the American West, sent additional items and remains to the Smithsonian. The collections were initially housed in the Smithsonian's first building, most commonly referred to as Castle, which was completed in 1855.⁹⁴ The National Collections were again moved to the newly constructed National Museum Building, now the Arts and Industries Building, in 1881.⁹⁵ Within two years, the new building was overflowing with collections and Smithsonian management requested another building from the US Congress. Legislation for the new building finally passed in 1902, providing for a granite structure across the National Mall from the Smithsonian Castle.⁹⁶

On March 17, 1910 the U.S. National Museum, now the National Museum of Natural History, opened to the public. Initially, the National Museum housed art, culture, history,

⁹² "The History of the National Museum of Natural History." Smithsonian Institution Archives. *available at* <http://siarchives.si.edu/history/national-museum-natural-history>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

geology, and natural history collections, totaling over ten million objects.⁹⁷ In 1967, the U.S. National Museum was eliminated as an administrative entity, and the National Museum of Natural History became its own administrative unit.⁹⁸ By 1969, the art and history collections had moved to new museums, and the building was renamed the National Museum of Natural History. Research, collections, and exhibits now focus on anthropology, botany, geology, paleontology, and zoology.

By the late 1970s, collections were again overflowing and a Museum Support Center was planned in Suitland, Maryland.⁹⁹ When it opened in 1983, it housed collections, specialized laboratories, and conservation facilities.¹⁰⁰ After the passage of the NMAI Act, the Support Center underwent renovations to include better equipped and more accessible areas suitable for tribal consultations. The National Museum of Natural History's Repatriation Office is currently located on the National Mall as part of the National Museum of Natural History's Department of Anthropology.

Today, the National Museum of Natural History's mission is to "increase knowledge and inspire learning about nature and culture, through outstanding research, collections, exhibitions, and education, in support of a sustainable future."¹⁰¹ This mission is largely generalized and is not meant to further the interests of any one specific community because the National Museum of Natural History is a research based institution focused on including a global perspective in pursuit of science and intellectual freedom. Its core values include the "use [of] the scientific

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ "National Museum of Natural History Mission, Vision, Values and Strengths." Smithsonian National Museum of Natural History. *available at* <http://www.mnh.si.edu/about/mission.htm>.

method to propose and test hypotheses and generate new knowledge” as well as an endeavor to “recruit and train the best minds and give them independence to pursue important questions.”¹⁰² These admirable values have had to adapt to a federally mandated statute that is focused solely on indigenous people and has called for the limitation of access to some knowledge.

Researchers in contest for control of indigenous history consider the limitation of access to knowledge due to cultural property protection as an infringement on their First Amendment rights to freedom of expression, maintaining this constitutional right safeguards the right to gather and receive information.¹⁰³ This ability to freely study is vital to the National Museum of Natural History’s mission. The long-standing philosophy of the National Museum of Natural History is to appease the curiosity that exists in all human beings regardless of cultural affiliation. The National Museum of Natural History shares a cosmopolitanist philosophy on property presented by theorist Kwame Anthony Appiah, among others.¹⁰⁴ Appiah advocates the protection and repatriation of cultural property yet qualifies this by contending that protection and repatriation should only be motivated for the benefit of “all mankind” not just one specific group.¹⁰⁵ This view of property presents those same arguments raised in the case of the Kennewick Man, does cultural property ever cease to be part of one specific group and become the property of all mankind?

¹⁰² See National Museum of Natural History discussion of core values. Available at <<http://www.mnh.si.edu/about/mission.htm>>.

¹⁰³ Thomas *supra* note 2, at Prologue xxiii. (Discussion of researcher’s accusations in the Bonichsen case.)

¹⁰⁴ Kwame Anthony Appiah, *Cosmopolitanism: Ethics in the World of Strangers*, (2006).

¹⁰⁵ *Id.*, at 121.

In the case of the Kennewick Man and as Appiah argues in the case of the Elgin Marbles,¹⁰⁶ such removals are for the greater good of universal knowledge.¹⁰⁷ In the National Museum of Natural History's case it allows the museum to maintain possession of its collections in order to cater to its mission and core values. The National Museum of Natural History's Department of Anthropology has been one of the NMAI Act's greatest critics yet has become subject to its regulations and requirements just as the National Museum of the American Indian. As of December 31, 2010, the National Museum of Natural History has offered to repatriate about 25% (approximately 5,040) of its 19,150 catalog numbers containing human remains¹⁰⁸ and approximately 340 human remains and 310 funerary objects have been deemed culturally unidentifiable.¹⁰⁹ According to the National Museum of Natural History's repatriation practices those items deemed culturally unidentifiable will not be repatriated.

The National Museum of Natural History only considers repatriation claims from those American Indian tribes and Alaskan Native Corporations that are within the U.S. borders and are federally recognized by the U.S. government.¹¹⁰ This limits the scope of indigenous people who may lay claims to the museum's collections significantly, however as a federal agency the National Museum of Natural History does not wish to be perceived as attempting to make any sort of political statement with the inclusion of non-federally recognized tribes.¹¹¹ Yet, in its

¹⁰⁶ John Henry Merryman, "Thinking About The Elgin Marbles." 83 Michigan L. Rev. 1881 (1985) (History of the removal of the Elgin Marbles by 7th Earl of Elgin and British Ambassador to the Sublime Porte, Thomas Bruce. Bruce removed many of the surviving sculptures on the Parthenon and shipped them to England where he then sold them to the British Museum in 1816. These sculptures, now commonly referred to as "The Elgin Marbles," have been on display for hundreds of years despite requests for their repatriation by the Greek Government.)

¹⁰⁷ Appiah *supra* note 104. See also Kwame Anthony Appiah, *Whose Culture Is It, Anyway?* in COSMOPOLITANISM (W.W. Norton & Company 2006)

¹⁰⁸ Report to Congressional Requesters, *supra* note 81, at 19-20.

¹⁰⁹ *Id.* at 38 (2011).

¹¹⁰ National Museum of Natural History Employee #1: Interviewed by Meredith Duarte. Audio recording, September 6, 2011 at 10:00 AM. National Museum of Natural History.

¹¹¹ *Id.*

effort to not make a political statement it has drawn a clear line for those indigenous communities that are not federally recognized. It will consider joint repatriations where cultural affiliation can be made to a federally recognized tribe or a tribe residing within the U.S. borders, in the case of an international claimant, yet the Repatriation Office must be able to affiliate the eligible tribe to the item through a preponderance of evidence standard.

The recommendations by the May 2011 GAO report have also largely been answered with the National Museum of Natural History's clear stance on cultural affiliation. The museum operates with a preponderance of evidence standard of proof, which determines cultural affiliation by asking if the item in question is more likely than not culturally affiliated with the requesting tribe. If the item in question can be proven by a preponderance of evidence to be culturally affiliated to a federally recognized tribe then the museum will repatriate to that tribe. In the case of competing claims of cultural affiliation the National Museum of Natural History encourages the two tribes to consult with each other and determine who is most likely to be culturally affiliated.¹¹² In the case that the item in question is more likely to not be culturally affiliated with any eligible tribe then the item will not be repatriated as the National Museum of Natural History requires a finding of cultural affiliation using a preponderance of evidence standard to repatriate any indigenous items or remains from its collections, outside of named individuals.¹¹³ The museum hopes to be able to culturally affiliate these items in the future with new information and advancing research technologies but in their opinion the most conducive place for these items is in this research facility where this new information may be attained.¹¹⁴

¹¹² *Id.*

¹¹³ National Museum of Natural History Employee #1: Interviewed by Meredith Duarte. Audio recording, February 12, 2012 at 10:00 AM. National Museum of Natural History.

¹¹⁴ *Id.*

The National Museum of Natural History's philosophy on cultural affiliation is the result of a tumultuous past between the museum and a federally mandated repatriation statute. Those same concerns voiced by members of the Department of Anthropology when National Museum of the American Indian Policy Statement on Native American Human Remains and Cultural Materials was released are still influencing the practices being enacted at this research based institution.

IV. MOVING FORWARD

The Smithsonian Institution's involvement in the fight for control of indigenous history can be traced to many cases of disagreement between researchers and indigenous people throughout history, yet no other instance of its involvement has been more indicative of this larger debate than the Smithsonian's internal debate currently being enacted through the repatriation philosophies and practices of the National Museum of Natural History and the National Museum of the American Indian. While each museum has vastly different histories that have influenced their relationships with indigenous people, both choose to advance contrasting conceptions of property that purport either the political stance of science or that of indigenous peoplehood. What is emerging from these two museums are theoretical views of property being put into practice and examples of either maintaining the historical relationship between researchers and indigenous people or striving to become a more collaborative and cooperative model.

In the case of these two Smithsonian museums, the approach each has taken is consistent with their mission, goals and core values. The National Museum of Natural History is a fundamentally research based institution with a deeply seeded mission of providing access to knowledge to all mankind. The National Museum of the American Indian is the self proclaimed,

“Museum Different,”¹¹⁵ and as such has intentionally deviated away from the traditional role of the museum seeking to serve indigenous communities and the greater public as an honest and thoughtful conduit to indigenous culture, present and past. The current political debate is demonstrated by the philosophies and practices of these two institutions, but the question then becomes how do we move forward?

Perhaps the single most important aspect of the National Museum of the American Indian’s philosophies and practices regarding the disposition of indigenous remains and cultural property is its focus on collaboration between indigenous people and researchers at every step of the process. This valuable aspect should be applied to the greater political debate over the control of indigenous history. The application of a sense of shared authority would be most conducive in restructuring the relationship between the two parties of the debate in an effort to build an inclusive partnership, which would provide a more accurate portrayal of indigenous history acknowledging the historical wrongs and their continuing effects.¹¹⁶

This partnership is already being fostered at the National Museum of the American Indian and in other instances around the nation. Such was the case in the Tongass Forest Project in Alaska where archaeologists uncovered a mandible, three vertebrae and a pelvis fragment with an average radiocarbon date of 9,600 years old.¹¹⁷ The archaeologists immediately contacted the leaders and elders of local tribal communities and consulted to determine a course of action that all groups involved would feel comfortable with.¹¹⁸ One archaeologist noted later of the discussions with local tribal authorities, “We said, ‘We want your ideas. We’ll put Native interns

¹¹⁵ Lonetree *supra* note 89.

¹¹⁶ Tsosie, Rebecca, “The BIA’s Apology to Native Americans,” in *Taking Wrongs Seriously: Apologies and Reconciliation*, at 201 (Elazar Barkan and Alexander Karn, eds., 2006).

¹¹⁷ Thomas *supra* note 2, at 271-275.

¹¹⁸ *Id.*

in field. We'll put your questions in the research design. What do you want to know?"¹¹⁹

Through these discussions, the tribes agreed to allow research on the skeletal remains, seeing an opportunity to increase knowledge about their oldest ancestors. The Tongass Forest project benefited from the researchers willingness to work with local indigenous groups. The inclusion of indigenous people early on secured their approval over the study and created a participatory relationship where indigenous groups were provided with all information and included in the research model as authorities rather than merely subjects.

The examples of cooperation, sharing and learning together in the Tongass Forest project, and evinced in the National Museum of the American Indian's repatriation practices, are evidence that this partnership can work for the betterment of science as well as indigenous people. In most cases the repatriation of an item to an indigenous group may mean its removal from the public domain entirely; however, the repatriation of the item to the indigenous community may foster an advancement of knowledge rather than a limitation. To think of repatriation of cultural property through the lens of traditional conceptions of property rights limits the possibilities. The National Museum of the American Indian's inclusion of indigenous people as authorities of their cultural property in the repatriation process has provided a more clear and accurate portrayal of indigenous history, which should be the goal for researchers.

While the National Museum of Natural History's implicit hold to the free access of knowledge for all mankind advances their museum's mission, as a Smithsonian museum with the influence of being part of the world's largest museum complex and research center the repercussions for their stance on the control of indigenous history are much more complex. President Clinton once asserted that, "individuals could write or say whatever they want, but

¹¹⁹ *Id.*

when the Smithsonian speaks it, the implication is that it is being done officially, of, and for, the nation as a whole.”¹²⁰ This perception of the Smithsonian’s reputation is shared by many and as such the policies and practices its museums choose to implement have significant impacts on the current contest for control of indigenous history.

A single framework for the mediation of this debate is somewhat impossible given every argument over the cultural property of indigenous people is different. However, unified policies regarding the disposition of indigenous remains and cultural property could be adopted at the Smithsonian Institution through an understanding of shared authority over indigenous history. The current request from the GAO for a policy on the repatriation of culturally unidentifiable remains and objects offers a unique opportunity where the two museums could create continuity within the Smithsonian regarding repatriation and have a profound impact on the larger debate.

The NMAI Act’s lack of language about the disposition of culturally unidentifiable remains and objects allows the museums to set a precedent on an area of repatriation that has been largely debated in its successor, NAGPRA. Currently, the National Museum of the American Indian’s use of a reasonable basis standard of proof for cultural affiliation allows the museum to maintain its pluralistic view of property and its mission to repatriate all human remains in its collection. The National Museum of Natural History’s preponderance of evidence standard of proof allows the museum to maintain globalistic concept of property and retain its research based mission. Through these distinct views of cultural property, each museum has developed philosophies toward the disposition of culturally unidentifiable remains and objects,

¹²⁰ See Richard Kurin, director, Center for Folklife Programs and Cultural Studies, Smithsonian, “Closing Remarks,” Presenting History: Museums in a Democratic Society” conference, sponsored by the Smithsonian Institution and the University of Michigan, April 19, 1995, Ann Arbor, Michigan, p. 30 Summary, Museum Reference Center Archives of the Center for Museum Studies, Smithsonian Institution.

yet their lack of a delineated policy regarding this aspect of repatriation allows them to be unaccountable for their actions regarding these remains and objects. What hangs in the balance is the care of indigenous human remains and culturally significant objects. At the National Museum of Natural History, those remains and/or objects that cannot be culturally affiliated with a federally recognized tribe are retained by the museum and remain open to all scientific study.¹²¹

The May 2010 amendment to NAGPRA developed a framework of prioritization for the disposition of culturally unidentifiable remains and objects.¹²² The amendment prioritizes the repatriation of remains and objects to the American Indian tribe whose tribal lands the item was removed from, then to the tribe whose aboriginal lands the item were removed from and if no tribes agree to accept control of these items then they may go to any federally recognized tribe.¹²³ Interestingly, if no federally recognized tribe agrees to take control of these items the amendment allows for repatriation to a non-federally recognized tribe.¹²⁴ While not subject to NAGPRA's regulations, the repatriation policies at the National Museum of Natural History and the National Museum of the American Indian have generally looked to NAGPRA as a guide where appropriate.¹²⁵ However, this new amendment has largely been criticized by both museums. Each museum cites overall discontent with NAGPRA's new regulations noting that reaching out to tribes to offer remains that were located on their current or historical land is not

¹²¹ National Museum of Natural History Employee #2: Interviewed by Meredith Duarte. Audio recording, February 15, 2012 at 10:00 AM. National Museum of Natural History. *See also* National Museum of Natural History Employee #1: Interviewed by Meredith Duarte. Audio recording, February 12, 2012 at 10:00 AM. National Museum of Natural History

¹²² Native American Graves Protection and Repatriation Act, *supra* note 14.

¹²³ *Id.*, at § 10.11(c)(i-ii) and (c)(2)(i).

¹²⁴ *Id.*, at § 10.11(c)(2)(ii)(A).

¹²⁵ United States Government Accountability Office *supra* note 87, at 38.

an ideal approach because tribes only submit repatriation requests when they are ready to engage in repatriation activities.

This concern over the implementation of a NAGPRA-like regulation presents a valid challenge for the Smithsonian museums. Pushing for repatriation by the National Museum of the American Indian could adversely affect the participatory relationship its Repatriation Office has cultivated with indigenous groups. Also, the adoption of this policy by the National Museum of Natural History would be problematic for collections of its size. However, at the core of these disputes are the two museum's distinct conceptions of property. The adherence to a policy resembling the construction of the NAGPRA amendment at the National Museum of Natural History would open the door for the repatriation of many cases that have been deemed culturally unidentifiable. Comparatively, NAGPRA's historic exception to repatriation allowing scientific study¹²⁶ is inconsistent with the National Museum of the American Indian's mission and philosophy regarding the repatriation of all indigenous remains and objects subject to the NMAI Act.

Currently, both Smithsonian museums are addressing the GAO's request for policy regarding the disposition of culturally unidentifiable remains and objects. The historically exemplified philosophies toward the repatriation of indigenous remains and objects create a foundation for two differing policies. However, Congress's original intent with the passage of the NMAI Act was to foster the cultural survival and protect the cultural identity of indigenous people through a framework of repatriation allowing them to lay claim to their cultural heritage. A response to the GAO's request for a policy regarding the disposition of culturally

¹²⁶Nell Jessup Newton, et al., *Cohen's Handbook Of Federal Indian Law*, LexisNexis, 2005. §§ 22.01-.07, at § 20.02[1][c], at 1239-40 (2005) (discussing four limitations to repatriation).

unidentifiable remains and objects must reflect this original intent. In order to maintain the spirit of this legislation, any policy conceived must take a collaborative approach to the disposition of culturally unidentifiable remains and objects.

An adherence to Congress's original intent would produce a policy that establishes a reasonable basis standard of proof when attempting to identify the cultural affiliation of those remains and objects previously deemed culturally unidentifiable. A preponderance of evidence standard of proof disallows for the repatriation of culturally unidentifiable remains and objects entirely and provides an avenue for continued scientific study, which is arguably inconsistent with the NMAI Act's mandate for the protection of cultural identity and survival of indigenous people. Moving forward both Smithsonian museums should keep in mind their largely influential role in the contest for control of indigenous history and consider the original intent behind this groundbreaking legislation when developing new policy and implementing existing policy.

CONCLUSION

The passage of the National Museum of the American Indian Act was instrumental in creating a cooperative relationship between indigenous communities and western institutions. The federally mandated repatriation policy requires the Smithsonian's National Museum of Natural History and the National Museum of the American Indian to repatriate culturally affiliated human remains, associated and unassociated funerary objects, objects of cultural patrimony and sacred objects to American Indian tribes, Alaskan Native villages and Native Hawaiian organizations. The passage of this landmark piece of legislation was not easily won and took years of negotiations between indigenous people, U.S. policy makers and the Smithsonian to implement.

Today, the National Museum of the American Indian and the National Museum of Natural History's Repatriation Offices have been given the responsibility of consulting with indigenous actors in an effort to be more inclusive of indigenous epistemologies in the museum's structure. The National Museum of Natural History's tenuous history toward a federal repatriation statute has influenced its role in this task. Its cosmopolitan perception of cultural property has led to repatriation policies that promote the adherence to the traditional roles of the museum as the authoritative purveyor of knowledge and a perception of property advocating the access of all knowledge by all mankind, regardless of the cost. Comparatively, the National

Museum of the American Indian has established a collaborative approach toward its role with indigenous communities and their inherent rights to their cultural property. Acting as a conduit for the indigenous people the National Museum of the American Indian has broken the traditional model of what a museum is thought to be and maintained a conception of property as linked to peoplehood. This has allowed for a partnership that has long been called for in the debate over who owns the past.

While each approach is conducive to each museum's mission and core values, the National Museum of the American Indian's philosophies advance the rights of indigenous people in an unprecedented way. As a federal institution with the level of influence that the Smithsonian has attained, its views of cultural property are significant. The adoption of the National Museum of the American Indian's collaborative approach toward indigenous cultural property has had large implications for the Smithsonian Institution, the museum, indigenous people and the larger current debate.

The National Museum of the American Indian's philosophies toward cultural property have not completely disregarded traditional models of ownership in property, on the contrary they have created a model in which individual claims to title can exist along with collective claims that reflect indigenous conceptions of property. To the critics of this system the National Museum of the American Indian responds by stating "these are the communities and people we have to go home and answer to, our allegiances lie with them."¹²⁷ Researchers in the greater debate may view free access to knowledge as serving all mankind; however, it primarily serves only the majority. The scientific inquiry that researchers abide by can be fulfilled through a

¹²⁷ National Museum of the American Indian Employee #1: Interviewed by Meredith Duarte. Handwritten notes, September 9, 2011 at 1:00 PM. National Museum of the American Indian.

respectful participatory relationship with indigenous people. Claims to the contrary seem to advance the idea that history is solely told by researchers when in fact history is best told by those who experienced it.

The American Anthropological Association Code of Ethics poses an interesting requirement for those researchers under its guise:

Anthropological researchers have primary ethical obligations to the people, species, and materials they study and to the people with whom they work. These obligations can supersede the goal of seeking new knowledge.¹²⁸

Genuine collaboration is vital to a relationship between the scientific community and indigenous people that seeks to strike a balance of moral obligations and the pursuit of new knowledge.

¹²⁸ Code of Ethics of the American Anthropological Association. American Anthropological Association, Part III(A)(1). (approved June 1998). *available at* <http://www.aaanet.org/committees/ethics/ethicscode.pdf>.

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