



News from Conner & Winters, LLP

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Thorpe Appeal Draws Broad Support in Indian Country

The removal of Jim Thorpe's body from a tribal burial ceremony in 1953 for later use for commercial purposes long has been viewed as a serious injustice, not only among Sac and Fox people but also across Indian country. Likewise, the legal effort to repatriate his remains has drawn broad support in Indian country.

The National Congress of American Indians adopted a resolution last fall supporting the litigation, and the Tribal Supreme Court Project of the Native American Rights Fund has assisted throughout the appeals with briefing as amicus curiae. Recently, the Stanford Law School Supreme Court Litigation Clinic joined the legal team as co-counsel on the petition for a writ of

Sac and Fox Nation and Sons of Jim Thorpe Continue Legal Effort to Repatriate His Remains

The Sac and Fox Nation of Oklahoma and the sons of Jim Thorpe have taken their longstanding fight to repatriate the legendary athlete's remains to the United States Supreme Court.

On Tuesday, the tribe and Jim Thorpe's two surviving sons, Richard Thorpe and William Thorpe, filed a petition for a writ of certiorari asking the Supreme Court to uphold a United States district judge's ruling that the Native American Graves Protection and Repatriation Act-known as "NAGPRA"-required a small town in Pennsylvania to participate in a repatriation proceeding. The United States Court of Appeals for the Third Circuit reversed the federal district court's ruling in October 2014 on the basis of a legal doctrine not recognized by the Supreme Court for decades.

The appeal to the Supreme Court is the latest step in the litigation begun in 2010 by another son of Jim Thorpe, John or "Jack" Thorpe, who died two years later. The Sac and Fox Nation and the two surviving Thorpe brothers continued the case represented by Stephen Ward and Daniel Gomez, both attorneys in the Conner & Winters, LLP, Indian law practice. Brian Wolfman and Jeffrey L. Fisher of the Stanford Law School Supreme Court Litigation Clinic serve as co-counsel in the Supreme Court appeal.

Jim Thorpe died in California in 1953, and his family later gathered in Shawnee, Oklahoma, for the traditional Sac and Fox two-day funeral rites. However, before the rites were completed, Thorpe's estranged third wife, Patsy,

certiorari to the Third Circuit. A copy of the petition may be found [here](#).

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who was not Indian, arrived with local law enforcement and had the casket removed. Patsy Thorpe then began a macabre odyssey of shopping the athlete's remains around the country to the city that would meet her demands. Turned down by several localities, she eventually chose as a burial location two small, distressed former coal mining towns in Pennsylvania, which agreed to consolidate and change their name to "Jim Thorpe." The towns hoped to use the athlete's grave for a grandiose economic scheme that was never realized. In fact, over the years the burial site has been the target of vandalism and local derision.

NAGPRA was enacted by Congress in 1990 as important civil rights legislation to remedy, in part, a longstanding legacy in the United States of a lack of respect for American Indian peoples' and tribes' religious and cultural traditions, as well as of the misuse of Indian remains for commercial and other purposes. Thorpe's Indian family opposed the burial in Pennsylvania, and requested repatriation over the years. However, until the enactment of NAGPRA, American Indians and tribes lacked adequate legal tools to enforce their basic human right to bury their own in accordance with their beliefs and traditions.

The Third Circuit acknowledged that the plain language of NAGPRA required the Borough of Jim Thorpe to participate in repatriation proceedings, which ultimately would result in a determination of whether a return of his remains to the tribe would be appropriate. However, the appeals court invoked the seldom-used "absurdity doctrine" to avoid the result mandated by the plain language of the law. The tribe and the Thorpe sons unsuccessfully sought a rehearing of the case, which was supported by one of the drafters of NAGPRA, former United States Senator Ben Nighthorse Campbell, who filed an amicus brief confirming that NAGPRA was intended to apply to situations such as the Thorpe burial.

The appeal presents a number of important legal issues, including the Third Circuit's revival of a judge-made doctrine that can be used to override congressional intent in enacting a law, as expressed through clear and unambiguous language in a statute. The petition argues, among other issues, that the circuit's use of the doctrine raises concerns about the separation of powers between the legislative and judicial branches.

The decision also creates an exception to NAGPRA not envisioned by Congress, and raises concerns about new limitations on its future application.



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