



File Code: 5300

Date:

United States Sentencing Commission
Attention: Public Information
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Dear Commissioners:

As Directors of Law Enforcement and Investigations, and Recreation, Heritage and Wilderness Resources for the USDA Forest Service, one of our primary responsibilities is the protection and management of heritage and cultural resources on all National Forest System Lands in the United States. As such, we are responding to the United States Sentencing Commission's call for comment on issues involving sentencing for crimes affecting cultural heritage (66 Fed. Reg. 7962, 7991, 92 (2001)). We believe the U.S. Sentencing Guidelines are deficient as applied to crimes affecting the archeological resources, historic properties, and other cultural items that are part of our heritage. We urge the Commission to incorporate Guidelines provisions in the Economic Crimes Package that will redress those deficiencies.

Heritage resources crime is serious because it deprives people of things that satisfy their emotional and spiritual needs, and intellectual curiosities, but it also is serious in terms of economics and the Government's ability to exercise its legal responsibilities. In terms of economic impact, according to INTERPOL, "the annual dollar value of art and cultural property theft is exceeded only by trafficking in illicit narcotics, money laundering, and arms trafficking." In terms of legal responsibilities, heritage resources crime adversely affects property and other items for which the United States has a perpetual duty to act whether as a trustee for the public, generally, or as a fiduciary on behalf of American Indians, Alaska Natives, and Native Hawaiian Organizations. However, we believe that the U.S. Sentencing Guidelines, as currently applied, inadequately fulfill the basic purposes of criminal punishment for these crimes.

We offer five suggestions for remediation of the inadequacies. As part of the Economic Crime Package, we respectfully urge the Commission to address them. This could be done either through a new guideline or through amendments to existing guidelines, specific offense characteristics, and application notes.

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First, the Commission should remedy the disparity over Guidelines that apply to crimes committed in violation of the Native American Graves Protection and Repatriation Act (NAGPRA; 18 U.S.C. 1170), and the Archeological Resources Protection Act (ARPA 16 USC 470aa-mm). The Commission should address the issue that when the same offenses are committed against the same resource the sentences can be different dependent upon what the defendants are charged with. The principal example of this is offenses charged under ARPA where the cultural resources are archeological resources by definition (and sentenced under the Guidelines), while in other similar offenses; the cultural resources are treated as fungible property and are charged under NAGPRA (and thus, sentenced under 19 U.S.C. 3553(b)). Because of this discrepancy we believe that the Guidelines should also be made to apply to violations of NAGPRA as well as ARPA.

Second, the Commission should remedy the Guidelines' disparate treatment of dead bodies. An enhancement exists for crimes committed in a national cemetery, but no enhancement exists for crimes committed against other human remains, funerary objects, or funerary architecture that comes within the scope of Federal law. We believe that the same sentencing enhancements used for crimes involving national cemeteries should be used for offenses against all interments and funerary property, wherever federal law applies.

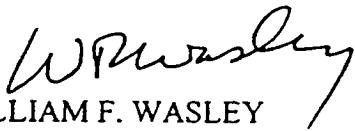
Third, the Commission should remedy the equal treatment, by the Guidelines, of commercial and noncommercial looters, which risks providing the same sentence for criminal conduct of differing severity. As a result the purposes of criminal punishment are thwarted. We believe the Guidelines should provide an enhancement for crimes involving heritage resources committed for pecuniary gain or commercial purpose, just as they do for other offenses.

Fourth, because heritage resource crimes affect important interests such as social identity, spiritual and emotional well-being, academic pursuit, economics, and the fiduciary responsibilities of the government to the public in general, and native peoples in particular, the Commission should correct the policy engendered by the Guidelines: namely, that crimes against heritage resources are among the least repugnant for our nation. We believe the base offense level should be raised for crimes involving defined "archaeological resources" (16 USC 470bb(1)), "historic properties or resources" (16 U.S.C. 470w(5)), "sacred objects" (25 U.S.C. 3001(3)(C)), and "cultural patrimony" (25 U.S.C. 3001(3)(D)), regardless of the statute used to convict, or, alternatively, that there be an enhancement.

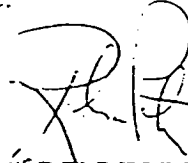
Fifth, the Commission should include "archaeological value", as defined by the ARPA uniform regulations, in the application notes. Doing so will accomplish three things. First, it will remedy the refusal of some courts to apply this statutory measure to determine loss for purposes of sentencing. Second, it will prevent the use of arbitrary loss determinations that risk-creating disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, it will eliminate the use of archeological value to determine whether an offense is a felony, only to ignore it at sentencing. We believe that archeological value is the proper measure of loss in an offense involving an archeological resource, regardless of the statute used to convict, where the Government proves archeological value to a jury.

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The looting of, and injury to, heritage resources, robs our citizens of part of their cultural identity. It drives significant illegal markets and undermines important fiduciary responsibilities. The Department of Agriculture is the steward responsible for an enormous number of archeological sites and historic areas on public lands. Because the issues concerning sentencing for crimes involving heritage resources are fundamental to effective protection of our nations archeological heritage, we respectfully urge the United States Sentencing Commission to address them within the framework of the Economic Crime Package. I invite you to call on either of our staffs for any assistance you might require.



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