



United States Department of the Interior

NATIONAL PARK SERVICE

1849 C Street, N.W.
Washington, D.C. 20240

IN REPLY REFER TO:

MAR - 9 2001

W4819(2275)

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

Dear Commissioners:

As the official delegated the responsibility of carrying out the Secretary of the Interior's leadership responsibilities for the Federal archeology and historic preservation program, I am responding to the United States Sentencing Commission's call for comment on issues involving sentencing for crimes affecting cultural heritage, as part of the Economic Crime Package (66 Fed. Reg. 7962, 7991-92 (2001)). I believe that, as applied, the Guidelines are deficient concerning crimes affecting the archeological resources, historic properties, and other cultural items that are an irreplaceable part of our heritage. I urge the Commission to incorporate Guidelines provisions to redress those problems in the Economic Crime Package.

Archeological resources, historic properties, and cultural items

"...are important to us on many different levels: providing our scientists with information which is both fascinating and important to us all; and giving ordinary modern peoples a sense of respect and kinship with ancient peoples. . . Our heritage resources serve as the ultimate model of what we are capable of accomplishing. . . The universal fascination with traces of our past is evident in every community in the nation. Americans from all walks of contemporary life agree that we must defend our heritage resources as fiercely as we defend our natural resources. The law is one of our most powerful tools." [Former Attorney General Janet Reno, Foreword to *Heritage Resources Law* (John Wiley and Sons Publishers, 1999)]

Crimes against these cultural resources are serious because they deprive people of commemorative associations that provide for reflection, remembrance, and stability in our modern world. Such crimes also prevent us from learning about the past through education programs, scientific research, and traditional stories. Cultural resource crime also has serious economic aspects and inhibits the Government's ability to carry out its legal responsibilities. Interpol has estimated that "the annual dollar value of art and cultural property theft is exceeded only by trafficking in illicit narcotics, money laundering, and arms" (see *About the Cultural Property Program*, < www.usdoj.gov/usncb/cultprop/about/cultureabout.htm > (accessed January 25, 2001)). I believe that the U.S. Sentencing Guidelines, as currently applied, inadequately fulfill the basic purposes of criminal punishment for these crimes.

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There are a number of specific topics that should be addressed to improve the Sentencing Guidelines. The Departmental Consulting Archeologist in a letter to the Commission, dated March 7, 2001, has described these in some detail. I add my endorsement of the recommendations in his letter (Enclosure).

In particular, it is important that cultural resource crimes be considered as serious offenses against all Americans. In order to reflect this general perspective, the base offense level should be raised for crimes involving "archaeological resources" (Archaeological Resources Protection Act (ARPA); 16 U. S. C. 470bb(1)), "historic properties or resources" (16 U. S. C. 470w(5)), and "cultural items" (Native American Graves Protection and Repatriation Act (NAGPRA); 25 U. S. C. 3001(3)), regardless of the statute used to convict, or, alternatively, there should be an enhancement.

The Commission should include "archaeological value", as defined by the Archaeological Resources Protection Act uniform regulations (43 C.F.R. Part 7), in the application notes in order to remedy the problem experienced in some courts of applying this statutory measure to determine loss for purposes of sentencing. This also would prevent the use of arbitrary loss determinations that risk creating disparity in sentences imposed for similar criminal offenses committed by similar offenders. 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.

The Commission should provide for variation in the Guidelines for sentencing of commercial and non-commercial looters and/or traffickers. I believe that 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.

The looting of cultural resources robs all citizens of part of their national identity. It drives significant illegal markets and undermines important public responsibilities. The Department of the Interior is the steward responsible for the greatest number of archeological sites and historic properties on public lands. Congress has charged the Secretary of the Interior with leadership and coordination responsibilities in our national archeology and historic preservation program. The National Park Service acts for the Secretary in this important national leadership role.

I urge you to consider these matters seriously and to take full account of the suggestions made here and in the Departmental Consulting Archeologist's letter to you of March 7, 2001. I invite you to call on the Departmental Consulting Archeologist for any assistance you might require. You can contact Dr. McManamon and his staff at 202/343-4101.

Sincerely,



Denis P. Galvin
Acting Director

Enclosure

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Dear Commissioners:

I am responding to the United States Sentencing Commission's call for comment on issues involving sentencing for crimes affecting cultural heritage, as part of the Economic Crime Package (66 Fed. Reg. 7962, 7991-92 (2001)). I believe that the Guidelines are deficient concerning crimes affecting the archeological resources, historic properties, and other cultural items that are an irreplaceable part of the cultural heritage of all Americans. I respectfully urge the Commission to incorporate Guidelines provisions to redress those problems in the Economic Crime Package.

I am submitting the following comments and suggestions as the National Park Service and Department of the Interior official delegated to carry out the Secretary of the Interior's responsibilities for the Federal archeology program, including implementation of the Archaeological Resources Protection Act (ARPA, 16 U.S.C. 470aa-mm), archeological aspects of the Native American Graves Protection and Repatriation Act (NAGPRA, 25 U.S.C. 3001), and other laws related to archeological matters.

Crimes affecting cultural resources deprive the American public of access to places, objects, and information of commemorative, educational, and scientific value. Such crimes also are serious in terms of economics and the Government's ability to exercise its legal responsibilities. In terms of economic impact, according to INTERPOL, "[t]he annual dollar value of art and cultural property theft is exceeded only by trafficking in illicit narcotics, money laundering, and arms trafficking" (INTERPOL-USNCB, Cultural Property Program, About the Cultural Property Program, <www.usdoj.gov/usncb/cultprop/about/cultureabout.htm> (accessed Jan. 25, 2001)).

In terms of legal responsibilities, cultural resource crime adversely affects property and other items for which the United States government acts on behalf of the American public. However, the U.S. Sentencing Guidelines, as currently applied, inadequately fulfill the basic purposes of criminal punishment for these crimes. My staff and I have prepared the following analysis and suggestions for improvements to the Sentencing Guidelines. There are five areas that should be addressed.

First, courts currently use the Guidelines to constructively treat defined archeological resources (16 U.S.C. 470bb(1)) and historic properties (16 U.S.C. 470w(5)) as mere fungible property. In the absence of a specific guideline addressing crimes that affect archeological resources and historic properties, they have chosen to use the theft of property guideline as the most analogous. However, with no specific enhancement for archeological resources and historic properties in the theft guideline, the resulting base offense level for heritage resources crimes is the lowest in the entire Guidelines. Thus, as applied, the

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Guidelines stand for the proposition that offenses involving odometers and contraband cigarettes are more repugnant than crimes affecting our non-renewable, irreplaceable cultural heritage.

Second, the Sentencing Guideline application notes omit the statutorily prescribed measure of "archaeological value" to determine loss for offenses committed in violation of the Archaeological Resources Protection Act (ARPA; 16 U.S.C. 470ee). This omission has resulted in at least one court refusing to follow the will of Congress. In 1979, Congress enacted the Archaeological Resources Protection Act, believing that "archeological resources . . . are an accessible and irreplaceable part of the Nation's heritage" which are "increasingly endangered because of their commercial attractiveness", and that "existing Federal laws did not provide adequate protection to prevent their loss and destruction" (16 U.S.C. 470aa). Congress realized that any disturbance of an archeological site always results in archeological destruction because removing an archeological resource from its original location always destroys the context of the artifact. Recognizing that fair market value and the costs of repair and restoration, or both, to gauge loss would be inadequate to measure this irreparable harm, Congress provided a means to determine the value of the loss to humanistic science caused by an ARPA offense. That measure of loss, called "archaeological value" (16 U.S.C. 470ee(d) & ff(2)(A)), is defined in the ARPA uniform regulations. Archaeological value is

"the value of the information associated with the archaeological resource. This value shall be appraised in terms of the costs of the retrieval of the scientific information which would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential."
(43 C.F.R. 7.14(a); 36 C.F.R. 296.14(a); 18 C.F.R. 1312.14(a); 32 C.F.R. 229.14(a)).

The definition of archeological value in the ARPA uniform regulations is a reasonable interpretation of the Act. It is consistent with the purpose of the statute and the authority given by Congress to the Secretaries of the Interior, Agriculture, and Defense, and the Chairman of the Tennessee Valley Authority to promulgate regulations. Moreover, archeological value (combined with costs of restoration and repair) has been held to be an appropriate method of determining loss for an offense involving an archeological resource (see U.S. v. Shumway, 112 F.3d 1413, 1425-26 (10th Cir. 1997)). Nevertheless, at least one court constructively rejected the use of archeological value to measure loss. In U.S. v. Hunter (48 F. Supp.2d 1283 (D. Utah 1998)), the court accepted the Government's valuation of damage to archeological sites managed by the Bureau of Land Management and the Forest Service, based on the cost of repair and restoration. However, the court rejected the archeological value offered by the United States for the destroyed resources at all the sites as a "speculative assessment", "fictional scholarship", and "absurd." Instead, the court assigned an admittedly subjective and arbitrary measure of loss to the destroyed resources that it called "aesthetic diminishment."

The sentencing basis, termed "aesthetic diminishment" used in U.S. v. Hunter, is broadly subjective and relies heavily upon personal inference. Its use has a potentially chilling effect on the deterrent value of ARPA which archaeological value provides. Also, it raises further legal issues about the use of archeological value. For example, courts might rely on Hunter to hold that they have discretion to use commercial value or archeological value for purposes of determining whether a violation is a misdemeanor or a felony. Similarly, administrative law judges might rely on Hunter to find that they have discretion to use archeological value or commercial value to determine the amount of a civil penalty.

Contrary to the court in Hunter, in enacting ARPA, Congress mandated that the value of the destroyed archeological resources is either the commercial value or the archeological value of the resources for purposes of sentencing defendants convicted of violating the Act, and that Congress gave the Executive Branch the authority to choose which value to use to determine loss. There is no justification for using

archeological value when determining whether an ARPA offense is a felony (or the actual damages recoverable in a civil penalty), and yet ignore this value when assessing loss for purposes of sentencing. Nevertheless, Hunter stands for the proposition that the Sentencing Guidelines can be used to deny the Executive Branch the authority it derives from Congress through ARPA, to decide how archeological resources are to be valued when they are destroyed in violation of the Act.

Third, the Guidelines as applied do not distinguish between cultural resources crimes committed for non-pecuniary gain and offenses committed for pecuniary gain or commercial purpose, as they do for other crimes. Commercial looters and dealers who traffic in looted objects, earn all or part of their income from looting and the subsequent sales of these objects. They might make substantial sums of money from their activities. Non-commercial looters engage in these activities because of their interest in the past and their desire to possess archeological, historic, and other cultural items. When the courts apply the Guidelines uniformly to commercial and non-commercial looters, they risk imposing the same sentence for criminal conduct of different severity. Consequently, as applied to cultural resources crimes, the Guidelines could be undermining some of the basic purposes of criminal punishment, namely just punishment and rehabilitation.

Fourth, the courts are split regarding use of the Guidelines for sentencing criminal violations of the Native American Graves Protection and Repatriation Act (NAGPRA; 18 U.S.C. 1170). NAGPRA protects defined Native American cultural items (25 U.S.C. 3001(3)). In U.S. v. Corrow (941 F. Supp. 1553, 1566-67 (D.N.M. 1996), *aff'd*, 119 F.3d 796 (10th Cir. 1997), *cert. denied*, 522 U.S. 1133 (1998)), the sentencing court found that, beside there being no specific guideline addressing NAGPRA crimes, no analogous offense guideline existed for use to determine the base offense level. Consequently, the court was guided by the general sentencing provisions of 18 U.S.C. 3553(b). Other courts, however, have applied the Guidelines by analogy to NAGPRA crimes (see U.S. v. Garcia, No. 92-515-LFG (D.N.M. 1993); U.S. v. Stephenson, No. CR 95-82-LH (D.N.M. 1995); U.S. v. Kramer, No. CR-96-337-BB (D.N.M. 1997); U.S. v. Tidwell, No. CR-97-00093-02-EAC (D. Ariz. 1998), *aff'd*, 191 F.3d 976 (9th Cir. 1999); U.S. v. Fragua, No. 1:97 CR 00482-001 (D.N.M. 1998); U.S. v. Tosa, No. 1:97 CR 00482-002 (D.N.M. 1998)). To compound the issue of the split of authority as to whether the Guidelines are applicable to NAGPRA crimes, some cultural items subject to NAGPRA also are archeological resources subject to the Archaeological Resources Protection Act (ARPA; 16 U.S.C. 470aa-mm). The Guidelines are used by analogy to sentence defendants convicted of violating ARPA. Thus, the same item(s) might fall inside or outside the Guidelines, depending on the court and the statute used to convict. This confusion regarding the applicability of the Guidelines for crimes involving Native American cultural items that also are archeological resources appears to frustrate the underlying rationale of the Guidelines, namely reasonable uniformity in sentencing.

Finally, the Guidelines, as applied, give disparate treatment to national cemeteries, on the one hand, and other human remains, burials, and cemeteries on "public lands" (16 U.S.C. 470bb(3)), "Federal lands" (25 U.S.C. 3001(5)), "Indian lands" (16 U.S.C. 470bb(4)), "tribal lands" (25 U.S.C. 3001(15)), and wherever else Federal law applies (see 16 U.S.C. 470ee(c)). The Guidelines provide an enhancement for crimes affecting national cemeteries, but not other interments. Consequently, to the extent that the Guideline enhancement applies to human interments in national cemeteries, they do not stand for the equal protection of other human burials that are within the scope of Federal law. Here again, they do not satisfy the objective of reasonably uniform sentences for similar criminal offenses.

Below, I suggest five ways in which the Sentencing Guidelines can be improved to address these issues as part of the Economic Crime Package. Improvements might be made through a new guideline, or through amendments to existing guidelines, specific offense characteristics, and application notes.

First, cultural resources crimes diminish important social interests, such as the direct connections, through commemoration, education, scientific understanding, or personal spiritual and emotional well-being, that every American can make to our ancient and historic past. The base offense level should be raised for crimes involving "archaeological resources" (16 U. S. C. 470bb(1)), "historic properties or resources" (16 U. S. C. 470w(5)), and "cultural items" (25 U. S. C. 3001(3)), regardless of the statute used to convict, or, alternatively, there should be an enhancement. Unfortunately, as they currently exist, the relatively low sentences for cultural resource crimes engendered by the Guidelines suggest that crimes against these kinds of resources are among the least repugnant for our nation.

Second, 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 absurdity of the use of archeological value to determine whether an offense is a felony, but to ignore it at sentencing. 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.

Third, the Commission should remedy the equal treatment by the Guidelines of commercial and non-commercial looters which risks providing the same sentence for criminal conduct of differing severity. As a result, the purposes of criminal punishment are thwarted. I 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, the Commission should remedy the split of authority over whether the Guidelines apply to crimes committed in violation of the Native American Graves Protection and Repatriation Act (NAGPRA; 18 U.S.C. 1170). The Commission should address the inconsistent outcomes, where the same offenses committed against the same resources result in different sentences. A principal example of this is offenses charged under ARPA (and sentenced under the Guidelines), while other offenses are charged under NAGPRA (and thus, sentenced under 18 U.S.C. 3553(b)). The Guidelines should be made to apply to violations of 18 U.S.C. 1170.

Finally, the Commission should remedy the Guidelines' disparate treatment of human burials. 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 come within the scope of Federal law. 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.

The looting of cultural resources robs our citizens of part of their cultural identity. It drives significant illegal markets and undermines important fiduciary responsibilities. The Department of the Interior is the steward responsible for the greatest number of archeological sites and historic properties on public lands. Further, Congress has charged the Secretary of the Interior with leadership and coordination responsibilities throughout Federal archeology and historic preservation. These responsibilities include providing advice, technical information, and regulations, standards, and formal guidelines for programs throughout the nation. To accomplish this important charge, each Secretary of the Interior since 1991 has declared and contributed to implementation of the "National Strategy for Federal Archeology". This is a policy that emphasizes, among other things, education; efforts to fight looting and preserve the archeological record; and interagency cooperation in information exchange at the Federal, State, and local levels. Because the issues concerning sentencing for crimes involving heritage resources are fundamental

to effective protection of our nation's archeological heritage, I respectfully urge the United States Sentencing Commission to address them within the framework of the Economic Crime Package. I invite you to call on the office of the Departmental Consulting Archeologist for any assistance you might require.

Sincerely,

A handwritten signature in black ink, appearing to read 'F. P. McManamon', followed by a long horizontal line.

Francis P. McManamon, Ph.D.
Chief Archeologist, National Park Service
Departmental Consulting Archeologist, Department of the Interior

