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March 24, 2006

The Honorable Ricardo H. Hinojosa
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Dear Judge Hinojosa,

I am submitting this letter on behalf of the Lawyers' Committee for Cultural Heritage Preservation commenting on the proposed amendments to Section 2B1.5 of the United States Sentencing Guidelines. The Lawyers' Committee for Cultural Heritage Preservation (<http://www.culturalheritagelaw.org>) is an association of lawyers who have joined together to promote the preservation and protection of cultural heritage resources in the United States and internationally through education and advocacy.

The proposed amendment would refer a new offense, created under the Veterans' Memorial Recognition and Preservation Act of 2003, 18 U.S.C. § 1369, to § 2B1.5 (Theft of, Damage to, or Destruction of Cultural Heritage Resources) of the Sentencing Guidelines. The Lawyers' Committee supports the addition of Veterans' Memorials to the list of culturally significant places. The current guideline provides as one of its specific offense characteristics that if the offense involves property damage to one of the protected places, the base offense level will be enhanced by two levels.

The proposed amendment also raises the question of whether the enhancement for damage or destruction to a Veterans' Memorial should be raised to four or six levels. The Lawyers' Committee supports this increase in the enhancement but only if the increase applies to all the special offense characteristics listed in § 2B1.5(b)(2) (offenses involving specially protected places) and § 2B1.5(b)(3) (offenses involving specially protected cultural items). Particularly with respect to the characteristics listed in § 2B1.5(b)(2), there seems to be no policy justification for treating one type of protected location differently from other types of protected locations. For example, § 2B1.5(b)(2) currently lists national monuments, national memorials and national cemeteries, as well as the national park system, National Historic Landmarks, national marine sanctuaries, museums, and sites listed on the World Heritage List. There is no apparent reason to subject an offense involving any of these different locations to different levels of punishment. By the same reasoning, offenses involving human remains (listed in § 2B1.5(b)(3)) should be subject to the same punishment as offenses involving cemeteries and memorials.

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What unites all of the special offense characteristics listed in § 2B1.5(b)(2) and § 2B1.5(b)(3) is that Congress has singled out all of these culturally significant places and types of cultural resources for special treatment. This is reiterated in the Reason for Amendment given by the Sentencing Commission at the time that § 2B1.5 was adopted:

The first two of these enhancements, at subsections (b)(2) and (b)(3), relate to whether the offense involves a place or resource that Congress has designated for special protection. A two level enhancement attaches if the offense involves a resource from one of eight locations specifically designated by Congress for historic commemoration, resource preservation, or public education. ... An additional two level enhancement attaches to offense conduct that involves any of a number of specified resources, including human remains and other resources that have been designated by Congress for special treatment and heightened protection under federal law.

The Lawyers' Committee strongly believes therefore that all of the offense characteristics listed in § 2B1.5(b)(2) and § 2B1.5(b)(3) should be treated in a uniform and consistent manner. Only uniform treatment is justified under the Sentencing Commission's own original rationale for the enactment of these sections of the Sentencing Guideline. Establishing an unfortunate precedent for non-uniform treatment may create misunderstanding of the purpose and application of the Guideline. One of the central accomplishments of the Cultural Heritage Resource Crimes Sentencing Guideline is its capacity to achieve uniformity in sentencing because the sentencing provisions are based primarily on the cultural significance of the resource involved without regard for extraneous factors such as whether the resource was found within the United States or in another country and whether the resource has a relatively high or low commercial value.

At the same time, the Lawyers' Committee strongly supports an increase in the amount of enhancement to four or, even preferably, six levels for all the offense characteristics listed in § 2B1.5(b)(2) and § 2B1.5(b)(3). This type of uniform increase in the enhancement will send an even clearer message to those who loot, deface or destroy cultural sites and monuments that the United States government is serious about protecting our cultural heritage for future generations of Americans.

Any increase in the offense level enhancements will make even more urgent a point made in the Sentencing Commission's statement on Reason for Amendment and in a letter from the former Chair of the Sentencing Commission, Judge Diana Murphy, to Congress—that the statutory maxima established under three of the relevant statutes, the Archaeological Resources Protection Act, the Native American Graves Protection and Repatriation Act, and the Theft from Indian Tribal Organizations Act, prevent full implementation of the Cultural Heritage Resource Crimes Sentencing Guideline. The Sentencing Commission previously pointed out that "full implementation of this new guideline for the most serious offenders often will be limited in its application because of the extremely low statutory maxima of some of the potentially applicable statutes, such as the criminal provisions of ARPA, NAGPRA, and 18 U.S.C. § 1163 (covering theft of tribal property)." These statutes have either a one or two year statutory maximum term of imprisonment for the first offense and a statutory maximum term of five years for second and subsequent offenses. At the time the Commission submitted the Guideline to Congress it recommended that Congress raise the statutory maximum terms of imprisonment for these offenses.

In her letter to Senators Leahy and Hatch, Judge Murphy gave several examples where an individual who violates one or more of these statutes would not receive the sentence allowable under the Guidelines because of the statutory maxima. In order to achieve uniformity in sentencing and to accomplish the goal of greater enforcement of these statutes that protect our cultural heritage, Judge Murphy urged Congress to change these statutory maxima to ten years, consistent with other general property crimes and the Theft of Major Artwork statute, 18 U.S.C. § 668. The Lawyers' Committee strongly urges you to send a similar letter to Senators Specter and Leahy this year suggesting that the Judiciary Committee consider increasing the statutory maxima for ARPA, NAGPRA and the Theft from Tribal Organizations Act so that judges can give the sentences provided for under the Sentencing Guideline.

I thank you for this opportunity to provide comments on the proposed changes in the Sentencing Guideline for Cultural Heritage Resource Crimes. If any additional explanation or comments are requested, please feel free to contact me.

Sincerely,

Patty Gerstenblith
Professor
President, Lawyers' Committee for
Cultural Heritage Preservation