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ENHANCED PROTECTION OF OUR CULTURAL HERITAGE ACT OF 2002

SEPTEMBER 9, 2002.—Ordered to be printed

Mr. BINGAMAN, from the Committee on Energy and Natural Resources, submitted the following

R E P O R T

[To accompany S. 2598]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 2598) to enhance the criminal penalties for illegal trafficking of archaeological resources, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Enhanced Protection of Our Cultural Heritage Act of 2002".

SEC. 2. ENHANCED PENALTIES FOR CULTURAL HERITAGE CRIMES.

(a) ENHANCED PENALTY FOR ARCHAEOLOGICAL RESOURCES.—Section 6(d) of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470ee(d)) is amended by striking "not more than 10,000" and all that follows through the end of the subsection and inserting "in accordance with title 18, United Codes, or imprisoned not more than ten years or both; but if the sum of the commercial and archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources does not exceed $500, such person shall be fined in accordance with title 18, United States Code, or imprisoned not more than one year, or both."

(b) ENHANCED PENALTY FOR EMBEZZLEMENT AND THEFT FROM INDIAN TRIBAL ORGANIZATIONS.—Section 1163 of title 18, United States Code, is amended by striking "five years" and inserting "10 years".

(c) ENHANCED PENALTY FOR ILLEGAL TRAFFICKING IN NATIVE AMERICAN HUMAN REMAINS AND CULTURAL ITEMS.—Section 1170 of title 18, United States Code is amended—

(1) in subsection (a), by striking "or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years" and inserting "imprisoned not more than 10 years"; and

(2) in subsection (b), by striking "imprisoned not more than one year" and all that follows through the end of the subsection and inserting "imprisoned not more than 10 years, or both; but if the sum of the commercial archaeological value of the cultural items involved and the cost of restoration and repair of such items does not exceed $500, such person shall be fined in accordance with this title, imprisoned not more than one year, or both."

PURPOSE

The purpose of S. 2598 is to enhance the penalties for illegal trafficking of archaeological resources.

BACKGROUND AND NEED

S. 2598 will increase the maximum penalties for violations of three statutes that protect the cultural and archaeological history of the American people, particularly Native Americans. The statutes amended are the Archaeological Resources Protection Act ("ARPA"), 16 U.S.C. 470ee; the Native American Graves Protection and Repatriation Act ("NAGPRA"), 18 U.S.C. 1170; and the statute prohibiting theft from Indian Tribal Organizations, 18 U.S.C. 1163.

The United States Sentencing Commission ("Commission") has unanimously recommended amendment of these statutes to strengthen their maximum sentences. Following a two-year review of cultural heritage resource crimes, the Commission recently approved a separate sentencing guideline. This guideline recognizes that offenses against cultural heritage resources are more serious due to the essentially irreplaceable nature of the resources involved. Because individuals, communities, and nations identify themselves through emotional and spiritual connections to places and objects, the effect of cultural heritage resource crimes transcends mere monetary considerations. In addition to the serious nature of the offenses, the conduct of many of the offenders, professional looters who are dangerous to law enforcement and innocent passers-by, requires increased proportional punishment.

While the serious nature of cultural heritage crimes merits correspondingly severe punishment, the purpose of this legislation is not to increase sentences for these crimes across the board. Instead, the legislation seeks to eliminate three significant disparities among the statutory maximum sentences for various crimes against property and cultural heritage resources. The Commission concluded that the three sentencing disparities frustrate Congress's objectives of proportionality and the elimination of unwarranted disparity, as set forth in the Sentencing Reform Act of 1984.

First, NAGPRA and ARPA limit sentences for the first offense to one or two years, respectively, regardless of the amount of harm caused by the offender's conduct. In contrast, general property crime statutes, such as Theft and Destruction of Government Property at 18 U.S.C. 641 and 1361, do not limit sentences for the first offense.

The second disparity is that both ARPA and NAGPRA, together with the Federal statute concerning theft from tribal organizations, have five-year maximum sentences, whereas the theft and destruction of government property statutes have ten-year limits. The third disparity is that even statutes specifically protecting cultural resources have different maximum sentences. While the ARPA and NAGPRA maximum sentences are five years, the 1994 Federal law

proscribing museum theft has a ten-year maximum sentence, similar to general property crimes.

In order to address these disparities, the Commission has recommended two changes: (1) eliminating the sentencing limits in ARPA and NAGPRA for first violations, and (2) raising the maximum sentences for ARPA, NAGPRA, and theft from tribal organizations to ten years, consistent with other statutes for crimes against property and cultural resources. By making these changes, S. 2598 would authorize punishment for serious cultural resources crimes in proportion to the severity of the crimes involved.

LEGISLATIVE HISTORY

At the business meeting on July 31, 2002, the Committee on Energy and Natural Resources ordered S. 2598, as amended, favorably reported.

COMMITTEE RECOMMENDATION

The Committee on Energy and Natural Resources, in open business session on July 31, 2002, by a unanimous vote of a quorum present, recommends that the Senate pass S. 2598, if amended as described herein.

COMMITTEE AMENDMENT

During the consideration of S. 2598, the Committee adopted an amendment in the nature of a substitute. The substitute amendment ensures that maximum penalties are increased under the Archaeological Resources Protection Act (ARPA), 16 U.S.C. 470ee(d), and for cultural items under the Native American Graves Protection and Repatriation Act (NAGPRA), 18 U.S.C. 1170, but that misdemeanor offenses are retained, so that relatively minor offenses will continue to be prosecuted while more significant crimes will receive more appropriate felony penalties.

The substitute amendment is explained in detail in the section-by-section analysis, below.

SECTION-BY-SECTION ANALYSIS

Section 1 entitles the Act the "Enhanced Protection of Our Cultural Heritage Act of 2002."

Section 2(a) amends section 6(d) of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470ee(d)) by increasing maximum criminal penalties to a $100,000 fine and 10 years imprisonment. The existing maximum criminal penalties are a $100,000 fine and five years imprisonment, with a lower maximum fine and sentence for the first offense. The amendment also provides that if the sum of the commerical and archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources does not exceed $500, maximum sentences shall be fines in accordance with title 18, United States Code, imprisonment not more than one year, or both.

Subsection (b) amends the statute governing embezzlement and theft from tribal organizations, 18 U.S.C. 1163, by increasing the maximum sentence from five to ten years.

Subsection (c) amends 18 U.S.C. 1170, the Native American Graves and Repatriation Act. This subsection increases the maximum sentence for trafficking in the human remains of Native Americans in violation of NAGPRA to 10 years imprisonment. The existing maximum is just one year for a first offense, and five years for subsequent convictions. This subsection likewise increases the maximum sentence for trafficking in Native American cultural items in violation of NAGPRA to 10 years imprisonment. For these crimes as well, the existing maximum is just one year for a first offense, and five years for subsequent convictions. Finally, for violations involving Native American cultural items, this subsection provides that if the sum of the commerical and archaeological value of the cultural items involved and the cost of restoration and repair of such items does not exceed $500, maximum sentences shall be fines in accordance with title 18, imprisonment not more than one year, or both.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of the cost of this measure has been provided by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 15, 2002.

Hon. JEFF BINGAMAN,
Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2598, the Enhanced Protection of Our Cultural Heritage Act of 2002.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Megan Carroll.

Sincerely,

ROBERT A. SUNSHINE
(For Dan L. Crippen, Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 2598—Enhanced Protection of Our Cultural Heritage Act of 2002

CBO estimates that implementing S.2598 would not significantly affect the federal budget. The bill could affect direct spending and receipts; therefore, pay-as-you-go procedures would apply, but we estimate that any such effects would total less than $500,000 a year. S. 2598 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

S. 2598 would increase maximum fines and imprisonment terms for certain crimes against Indian tribes and for illegal trafficking under the Archaeological Resources Protection Act and the Native American Graves Protection and Repatriation Act. Based on information from the U.S. Sentencing Commission, CBO estimates that the bill's provisions probably would affect fewer than 50 cases each year. Because the new penalties would apply to a small number of offenders, we estimate that any increase in costs for prison oper-

ations would not be significant and would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under S. 2598 might be subject to increased criminal fines, the federal government might collect additional finds under the bill. Collections of such fines are recorded in the budget as governmental receipts (revenues), which are deposited in the Crime Victims Fund and later spent. CBO expects that any increased receipts and direct spending would be negligible because of the small number of cases involved.

The CBO staff contact for this estimate is Megan Carroll. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 2598. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant responsibilities or private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 2598.

EXECUTIVE COMMUNICATIONS

The pertinent legislative report received by the Committee from the Department of the Interior setting forth Executive agency recommendations relating to S. 2598 is set forth below. Also set forth below is a May 20, 2002 letter from the United States Sentencing Commission to the Chairman and Ranking Member of the Committee, setting forth the Commission's views on the subject matter of S. 2598.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, July 25, 2002.

Hon. JEFF BINGAMAN,
Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter sets forth the views of the Department of the Interior on S. 2598, Enhanced Protection of Our Cultural Heritage Act of 2002.

The Department generally supports the enhancement of statutory penalties for cultural resource crimes, however, it is unclear whether this bill will, in all instances, strengthen cultural heritage protection.

S. 2598 would propose to change the statutory penalties for illegal trafficking under the Archaeological Resources Protection Act (ARPA; 16 U.S.C. 470ee), for embezzlement and theft from Indian tribal organizations (18 U.S.C. 1163), and for illegal trafficking in Native American human remains and cultural items under the Native American Graves Protection and Repatriation Act (NAGPRA; 18 U.S.C. 1170).

It is unclear whether S. 2598 would strengthen ARPA. Currently, ARPA, as read in conjunction with 18 U.S.C. 3571, provides for a graduated system that allows for citation of a Class A misdemeanor as well as a Class D or E felony, depending on the value of the resource and whether or not the offense is a first or subsequent offense. As currently drafted, S. 2598 would eliminate such a graduated system, and instead provided only the option to charge an ARPA offense as a Class C felony. Although increasing maximum fines and imprisonment terms would seem to strengthen ARPA eliminating the option to charge a crime as a misdemeanor, in fact, may result in fewer prosecutions. U.S. Attorneys Offices may be reluctant to prosecute a case if the defendant's conduct was not so egregious as to normally warrant felony prosecution. Similarly, juries may be reluctant to hold a defendant responsible if a felony conviction appears overly harsh in a particular case. Thus, the Department supports strengthening, the maximum penalties, while retaining a graduated system that will provide the U.S. Attorneys Office with the discretion to charge a defendant with an offense that more appropriately fits the conduct involved. In addition, it is unclear what type of violations the ARPA provision in S. 2598 intends to address. Although the heading appears to apply only to illegal trafficking under ARPA, the subsection amended would actually cover other crimes under ARPA as well. We would like an opportunity to further review the bill and to work with the Committee and the U.S. Department of Justice to craft appropriate language that would more clearly accomplish our mutual goals.

Earlier this year, the Department expressed its support for the establishment of a sentencing guideline for the protection of cultural heritage resources. After a two-year review, the United States Sentencing Commission had found that existing sentencing guidelines inadequately covered a variety of offenses involving the theft of, damage to, destruction of, or illicit trafficking in cultural resources, including national memorials, archeological resources, national parks, and national historic landmarks. Because individuals, communities, and nations identify themselves through intellectual, emotional, and spiritual connections to places and objects, the effect of cultural resources crimes sometimes transcends mere monetary considerations. Consequently, the Commission transmitted to Congress on May 1, 2002 a proposed guideline amendment that takes into account the transcendent value of these irreplaceable resources, and punishes in a proportionate way the particular offense characteristics associated with the range of cultural resources crimes. These amendments will take effect on November 1, 2002, unless Congress passes legislation disapproving them.

Though most Americans may think of looting as a crime that takes place during times of civil unrest, the Department has come to know better. Surprisingly, cultural resource crimes occur frequently and have been occurring with increased frequency on our federal lands. One Bureau of Land Management archeologist in Utah estimates that 80 percent of the surface artifacts at one site have disappeared within the last two to three years. We have seen a shift in the type of looter who commits these crimes. Countless magazine and newspaper articles and television shows discussing cultural resources has led to a dramatic drop in offenses committed by "the casual looter," a recreationist who picks up an artifact

while hiking or damages an archeological site. Although this type of theft and damage still occurs, these incidents are uncommon. A more recent trend is the theft and damage of cultural resources by "professional looters," hard-core looters who sell the resources for monetary gain and often have criminal histories, usually drug-related or violence related. Professional looters educate themselves about the locations of archeological sites and the kinds of artifacts and grave goods that may be found at those sites. Many of them are technologically savvy, using Global Positioning Systems (GPS) and conducting extensive computer research to locate specific sites.

In order to maximize the impact of our law enforcement efforts, we have joined forces with other federal agencies to educate law enforcement officers regarding the pervasive criminal activity. Until we are able to completely deter such criminal conduct, we must work hard to use the criminal and civil enforcement tools at our disposal to diminish the looting of our national and Indian treasures. In working closely with the Department of Justice, United States Attorneys, and federal law enforcement officials, we have found that effective prosecutions under ARPA and NAGPRA receive positive publicity and raise the public awareness of the seriousness of these crimes. We believe that such prosecutions can have a positive deterrent effect.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

PATRICIA LYNN SCARLETT,
Assistant Secretary for Policy, Management and Budget.

U.S. SENTENCING COMMISSION,
Washington, DC, May 20, 2002.

Re: Penalties for Cultural Heritage Resource Crimes

Hon. JEFF BINGAMAN,
Chairman, Senate Committee on Energy and Natural Resources, Dirksen Senate Office Building, Washington, DC.

Hon. FRANK MURKOWSKI,
Ranking Member, Senate Committee on Energy and Natural Resources, Dirksen Senate Office Building, Washington, DC.

DEAR SENATORS BINGAMAN AND MURKOWSKI: On behalf of the Sentencing Commission, and pursuant to the Commission's statutory charge under 28 U.S.C. §§ 994(r) and 995(a)(20), I am writing to recommend that Congress consider enacting legislation to increase the maximum statutory penalties for three federal crimes involving cultural heritage resources. These changes are warranted because the offenses are serious and the proposed increases would correspond to the punishment levels in the Commission's new guideline for cultural heritage resource offenses.

These three statutes—the Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470ee; the Native American Graves Protection and Repatriation Act (NAGPRA), 18 U.S.C. § 1170; and Theft from Indian Tribal Organizations, 18 U.S.C. § 1163, are basic tools of federal prosecution for offenses involving cultural heritage re-

sources.[4] Increased statutory maxima for these offenses will give full effect to the operation of the new sentencing guideline for cultural heritage resource offenses that the Commission will send to Congress on May 1, 2002. We therefore recommend elimination of the 12- and 24-month ceiling for first offenses under NAGPRA and ARPA, respectively, and adoption of a ten year statutory maximum for all three statutes (currently five years).

The Commission recently completed a two year examination of cultural heritage resource crimes and found that existing sentencing guidelines are inadequate for the wide variety of federal crimes involving the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources. Cultural heritage resources include national memorials, landmarks and parks, together with archaeological and other historic resources specifically dedicated to the preservation of the nation's heritage. Because individuals, communities, and nations identify themselves through intellectual, emotional, and spiritual connections to places and objects, the effect of cultural heritage resource crimes transcends mere monetary considerations. The Commission has determined that a separate guideline is needed that specifically recognizes both the federal government's longstanding obligation and unique role in preserving these resources and the harm caused to the nation and its inhabitants when its history is degraded through the destruction of cultural heritage resources.

As a result, the Commission has approved a separate sentencing guideline which reflects the fact that offense involving cultural heritage resources are more serious because they involve essentially irreplaceable resources and cause intangible harm to society. The actual and potential cases which the Commission considered in its review range from vandalism and terrorism at historic landmarks and cemeteries to looting and theft of archaeological resources and human remains from federal and Indian lands.

Upon close scrutiny the Commission recognized that treatment of these offenses against unique and irreplaceable resources under traditional property offense guidelines would not be adequate to reflect the significance of the resources and the concomitant harm to the identity of the nation and its communities. Not only are the offenses themselves very serious and deserving of substantially more punishment, but the conduct of many of the offenders, professional looters who are well armed and dangerous to law enforcement and innocent passers-by, requires increased proportional punishment.

For example, currently under the general guideline for theft and property damage at § 2B1.1, a sentence for vandalism to the Vietnam Memorial would be determined primarily by the amount of intended or actual pecuniary harm. If a federal administration building sustains the same amount of harm caused by vandals, the same

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The criminal provisions of ARPA, enacted in 1979, prohibit: (1) the unlawful excavation, removal, damage or defacement of archaeological resources located on public or Indian lands; (2) the sale, receipt, exchange, or purchase of archaeological resources unlawfully obtained from public or Indian lands; and, (3) the interstate or foreign sale, receipt, purchase, exchange, or transportation of archaeological resources removed or obtained in violation of State or local law.

The criminal provisions of NAGPRA, enacted in 1990, prohibit the sale, purchase, use or transportation for sale or profit of Native American Human Remains and Native American cultural items obtained from public or Indian lands. The crime of Theft from Tribal Organizations, 18 U.S.C. § 1163, prohibits, among other things, the theft or conversion of goods, assets, or other property belonging or entrusted to the custody or care of an Indian tribal organization or its officers, employees, or agents.

punishment would result under current law. The Commission has determined that the magnitude of the harm caused to a national memorial and landmark is greater precisely because of the symbolic and historic nature of the object of the offense conduct, together with the fact that such resources are unique, nonfungible, and irreplaceable.

Accordingly, the Commission has taken steps to ensure that the punishment for such cultural heritage resource crimes takes such factors into consideration by promulgating a new guideline at § 2B1.5 for this unique category of offenses. (See enclosure.) This new guideline will account for the fact that the offense involves items and locations specially designated by Congress over the years for preservation and education about the nation's heritage. The Commission has also been mindful of the potential for terrorist attacks against symbols of our nation and has provided for proportionate increases in punishment in the event that such violence occurs in connection with cultural heritage resources.

Surprisingly, when the Commission scrutinized the panoply of federal statutes that are used to prosecute offenses involving both property and cultural heritage resources, it found three significant disparities among the various statutory maxima for these offenses. These disparities impede Congress's ultimate objectives of proportionality and the elimination of unwarranted disparity, as enunciated in the Sentencing Reform Act of 1984. The examples below illustrate these disparities.

First, two cultural heritage resource statutes subordinate the amount of harm caused by the offender to the number of the offender's convictions under the statute. ARPA has one year and two year statutory maxima (based on a $500 threshold) for the first offense, and NAGPRA has a one year maximum for the first violation, irrespective of the amount of harm caused by the offender's conduct. In contrast, general property crime statutes, such as Theft and Destruction of Government Property at 18 U.S.C. §§ 641 and 1361, do not have a statutory cap based on whether the offense was the defendant's first violation of the particular statute.

The second disparity is that both ARPA and NAGPRA, together with the federal law prohibiting theft from tribal organizations, have five year statutory ceiling, whereas the theft and destruction of government property statutes have ten year limits. The third disparity is that even statutes specifically protecting cultural heritage resources have different statutory maxima. Thus while the ARPA and NAGPRA statutory maxima are both five years, the 1994 federal law proscribing museum theft at 18 U.S.C. § 668 has a ten year statutory maximum, similar to the general property crimes.

The Commission suggests eliminating these caps in ARPA and NAGPRA for first violations and raising the statutory maximum for ARPA, NAGPRA, and Theft from Tribal Organizations to ten years. This change will not only achieve consistency with other federal property crimes but will also eliminate potential obstacles to the proportional punishment of cultural heritage resource crimes and allow for the full implementation of the sentencing guideline structure that the Commission has determined is appropriate for such crimes.

A few illustrations may suffice to underscore the problem. A looter in the Civil War Battlefield at Manassas has violated the Archaeological Resources Protection Act (ARPA) by disturbing human remains while collecting $10,000 worth of buttons, belt buckles, and rifle shells to sell at an antique show, causing $30,000 in damage to the battlefield's terrain. Under the Commission's new guideline, this defendant qualifies for a sentence of between 27 and 33 months (without chapter three adjustments) based on the magnitude of the harm as measured by the aggravating factors that the Commission has delineated. This offender's possible sentence would be twenty-four months under the statutory maximum if it were his first ARPA conviction.

Similarly, a defendant who violates NAGPRA by stealing and attempting to sell Native American ceremonial masks and skulls unearthed from a burial site on tribal lands that have a commercial value on the black market of $150,000, and who threatens the use of a firearm when apprehended by law enforcement agents, qualifies for a sentence under the new guideline of 51 to 63 months. Nonetheless, if it is the defendant's first NAGPRA conviction, his sentence is capped at 12 months. Even if prosecuted and convicted under 18 U.S.C. § 1163 (Theft from Tribal Organizations), its five year statutory maximum comes into play and prevents the sentencing judge both from applying the high end of the guideline range, if appropriate, and from adjusting upwards to account for the defendant's prior criminal history.

In the actual case of a sophisticated and notorious professional looter of ancient Anasazi archaeological sites who operated for over a decade in remote federal lands, both in national parks and national forests, the seventy-eight month sentence calculated in 1997 under § 2B1.1 *United States* v. *Shumway,* 112 F.3d 1413 (10th Cir. 1997), could double to between 135 and 168 months under the new guideline at § 2B1.5. Such a defendant, if convicted only of an ARPA violation, will not serve this appropriately severe penalty reflecting the magnitude of harm because of ARPA's five-year statutory maximum. Such an egregious violator would not even serve his full guideline sentence under the ten year statutory maximum for a single count of damage to government property (18 U.S.C. § 641). Raising ARPA's statutory maximum to correspond to other federal crime statutes would not constrain the operation of the new sentencing guideline which the Commission has promulgated.

The Commission has taken an important step to ensure that damage to our nation's cultural heritage resources is appropriately punished, for example, by requiring that the use of a destructive device to accomplish such a crime receive more severe punishment and providing enhanced punishment for other aggravating factors in the offender's conduct. This goal cannot be completely achieved, however, if the statutory ceiling for these offenses is too low to permit a full application of the guideline criteria for fair and proportionate punishment. For other general property crimes, such as interstate computer or car theft, the statutory maximum does not generally restrict the application of the sentencing guidelines.

I respectfully urge the Congress to consider the changes we have recommended and will be pleased to provide you or your staff with additional information that may assist you in your consideration.

Sincerely,

Judge DIANA E. MURPHY,
Chair.

Enclosure.

2. CULTURAL HERITAGE

Synopsis of Amendment: This amendment provides a new guideline at § 2B1.5 (Theft of, Damage to, Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources) for offenses involving cultural heritage resources. This amendment reflects the Commission's conclusion that the existing sentencing guidelines for economic and property destruction crimes are inadequate to punish in an appropriate and proportional way the variety of federal crimes involving the theft of, damage to, destruction of, or illicit trafficking in, cultural heritage resources. The Commission has determined that a separate guideline, which specifically recognizes both the federal government's long-standing obligation and role in preserving such resources, and the harm caused to both the nation and its inhabitants when its history is degraded through the destruction of cultural heritage resources, is needed.

Cultural heritage resources include national memorials, landmarks, parks, archaeological and other historic and cultural resources, specifically designated by Congress and the President for the preservation of the cultural heritage of this nation and its ancestors. The federal government acts either as a trustee of the public generally, or as a fiduciary on behalf of American Indians, Alaska Natives and Native Hawaiian Organizations, to protect these cultural heritage resources. Because individuals, communities, and nations identify themselves through intellectual, emotional, and spiritual connections to places and objects, the effects of cultural heritage resource crimes transcend mere monetary considerations. Accordingly, this new guideline takes into account the transcendent and irreplaceable value of cultural heritage resources and punishes in a proportionate way the aggravating conduct associated with cultural heritage resource crimes.

This guideline incorporates into the definition of "cultural heritage resource" a broad range of existing federal statutory definitions for various historical, cultural, and archaeological items. If a defendant is convicted of an offense that charges illegal conduct involving a cultural heritage resource, this guideline will apply, irrespective of whether the conviction is obtained under general property theft or damage statutes, such as laws concerning the theft and destruction of government property, 18 U.S.C. § 641, interstate sale or receipt of stolen property, 18 U.S.C. §§ 2314–15, and smuggling, 18 U.S.C. §§ 541 et seq., or under specific cultural heritage statutes, such as the Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470ee (ARPA), the criminal provisions of the Native American Graves Protection and Repatriation Act (NAGPRA) at 18 U.S.C. § 1170, and 18 U.S.C. § 668, which concerns theft from museums. In addition, if a more general offense is charged that is referenced in Appendix A to § 2B1.1, this guideline will apply by

cross reference if the offense conduct involves a cultural heritage resource and results in a higher offense level.

This new guideline has a base offense level of level 8, which is two levels higher than the base offense level for general economic and property destruction crimes. The higher base offense level represents the Commission's determination that offenses involving cultural heritage resources are more serious because they involve essentially irreplaceable resources and cause intangible harm to society.

The new guideline also provides that the monetary value of the cultural heritage resource is an important, although not the sole, factor in determining the appropriate punishment. The Commission has elected not to use the concept of "loss", which is an integral part of the theft, fraud, and property destruction guideline at § 2B1.1 (Theft, Property Destruction, and Fraud), because cultural heritage offenses do not involve the same fungible and compensatory values embodied in "loss." Instead, under this new guideline, value is to be based on commercial value, archaeological value, and the cost of restoration and repair. These methods of valuation are derived from existing federal law. See 16 U.S.C. § 470ee(d); 43 C.F.R. § 7.14.

The Commission has recognized that archaeological value shall be used in calculating the value of archaeological resources but has provided flexibility for the sentencing court to determine whether either commercial value or the cost of restoration and repair, or both, should be added to archaeological value in determining the appropriate value of archaeological resources. For all other types of cultural heritage resources covered by this guideline, the Commission has provided flexibility for the sentencing court regarding whether and when to use all or some of the methods of valuation, as appropriate, for calculating the total value associated with the harm to the particular resource caused by the defendant's offense conduct. The value of the cultural heritage resource is then referenced to the monetary table provided at § 2B1.1(b)(1) in order to determine appropriate and proportionate offense levels in a manner consistent with the overall guidelines structure.

The new guideline provides five additional specific offense characteristics to provide proportionate enhancements for aggravating conduct that may occur in connection with cultural heritage resource offenses. In providing enhancements for these nonpecuniary aggravating factors, the Commission seeks to ensure that the nonquantifiable harm caused by the offense to affected cultural groups, and society as a whole, is adequately reflected in the penalty structure.

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. These are the national park system, national historic landmarks, national monuments, national memorials, national marine sanctuaries national cemeteries, sites contained on the World Heritage List, and museums.

Consistent with the definition in 18 U.S.C. § 668(a)(1), museums are defined broadly to include all organized and permanent institutions, with an essentially educational or aesthetic purpose, which exhibit tangible objects to the public on a regular schedule. Adoption of this definition reflects the Commission's recognition that cultural heritage resource crimes affecting institutions dedicated to the preservation of resources and associated knowledge, irrespective of the institution's size, ownership, or funding, deprive the public and future generations of the opportunity to learn and appreciate the richness of the nation's heritage. Similarly, this enhancement reflects the Commission's assessment that damage to the other listed places degrades not only the resource itself but also the historical and cultural aspects which the resource commemorates.

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. Funerary objects, items of cultural patrimony, and sacred objects are included because they are domestic cultural heritage resources protected under NAGPRA. See 25 U.S.C. § 3001. Cultural property, designated archaeological and ethnological material, and pre-Columbian monumental and architectural sculpture and murals are included in the enhancement because these are cultural heritage resources of foreign provenance for which Congress has chosen, in the implementation of international treaties and bilateral agreements, to impose import restrictions. See 19 U.S.C. §§ 2092, 2606, and 2607.

This guideline also provides a two level enhancement at subsection (b)(4) if the offense was committed for pecuniary gain or otherwise involved a commercial purpose. This increase is based on a determination that offenders who are motivated by financial gain or other commercial incentive are guideline at § 2B1.5 if the resulting offense level under it would be greater than under § 2B1.1. When a case involving a cultural heritage resource is sentenced under § 2B1.1, loss attributable to that cultural heritage resource is to be determined using the definition of "value of the cultural heritage resource" from § 2B1.5.

The Commission recognizes that the 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 the theft of tribal property). Currently ARPA has either a one year or two year statutory maximum term of imprisonment for the first offense, depending on whether the value exceeds $500, and NAGPRA has a statutory maximum term of imprisonment of one year for the first offense irrespective of value. These statutes all have five year statutory maximum terms of imprisonment for second and subsequent offenses. Consequently, the statutory ceiling may limit the full range of proportionate guideline sentencing, but the Commission has promulgated this new guideline to cover the wide variety of potential offense conduct that can occur in connection with cultural heritage resources. The Commission has recommended to

Congress that the statutory maximum terms of imprisonment for these offenses be raised appropriately.

§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

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(c) Cross References

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(4) If the offense involved a cultural heritage resource, apply § 2B1.5 (Theft of Damage to, or Destruction of Cultural Heritage Resources, Unlawful Sale, Purchase, Exchange, Transportation or Receipt of Cultural Heritage Resources), if the resulting offense level is greater than that determined above.

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Commentary

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Application Notes:

1. *Definitions.*—For purposes of this guideline:

"Cultural heritage resource" has the meaning given that term in Application Note 1 of the Commentary to § 2B1.5 (Theft of Damage to, or Destruction of Cultural Heritage Resources, Unlawful Sale, Purchase, Exchange, Transportation or Receipt of Cultural Heritage Resources).

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2. *Loss Under Subsection (b)(1).*—This application note applies to the determination of loss under subsection (b)(1).

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(F) *Special Rules.*—Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:

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(vii) *Value of Cultural Heritage Resources.*—In a case involving a cultural heritage resource, loss attributable to that cultural heritage resource shall be determined in accordance with the rules for determining the "value of the cultural heritage resource" set forth in Application Note 2 of the Commentary to § 2B1.5.

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§ 2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) If the value of cultural heritage resource (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(2) If the offense involved a cultural heritage resource from, or that, prior to the offense, was on, in, or in the custody of (A) the national park system; (B) a National Historic Landmark; (C) a national monument or national memorial; (D) a national marine sanctuary; (E) a national cemetery; (F) a museum; or (G) the World Heritage List, increase by 2 levels.

(3) If the offense involved a cultural heritage resource constituting (A) human remains; (B) a funerary object; (C) cultural patrimony; (D) a sacred object; (E) cultural property; (F) designated archaeological or ethnological material; or (G) a pre-Columbian monumental or architectural sculpture or mural, increase by 2 levels.

(4) If the offense was committed for pecuniary gain or otherwise involved a commercial purpose increase by 2 levels.

(5) If the defendant engaged in a pattern of misconduct involving cultural heritage resources, increase by 2 levels.

(6) If a dangerous weapon was brandished or its use was threatened increase by 2 levels. If the resulting offense level is less than level 14; increase to level 14.

(c) Cross Reference

(F) "National park system" has the meaning given that term in 16 U.S.C. § 1c(a).

(G) "World Heritage List" means the World Heritage List maintained by the World Heritage Committee of the United Nations Educational, Scientific, and Cultural Organization in accordance with the Convention Concerning the Protection of the World Cultural and Natural Heritage.

(4) *Enhancement in Subsection (b)(3).*—For purpose of subsection (b)(3):

(A) "Cultural patrimony" has the meaning given that term in 25 U.S.C. § 3001(3)(D) *see also* 43 C.F.R. 10.2(d)(4).

(B) "Cultural property" has the meaning given the term in 19 U.S.C. § 2601(6).

(C) "Designate archaeological or ethnological material" means archaeological or ethnological material described in 19 U.S.C. § 2601(7) (*see also* 19 U.S.C. §§ 2601(2) and 2604).

(D) "Funerary object means an object that, as a part of the death rite or ceremony or a culture, was placed intentionally, at the time of death or later, with or near human remains.

(E) "Human remains" (i) means the physical remains of the body of a human; and (ii) does not include remains that reasonably may be determined to have been freely disposed of or naturally shed by the human from whose body the remains were obtained, such as hair made into ropes or nets.

(F) "Pre-Columbian monumental or architectural sculpture or mural" has the meaning given the term in 19 U.S.C. § 2095(3).

(G) "Sacred object" has the meaning given that term in 25 U.S.C. § 3001(3)(C) (*see also* 43 C.F.R. § 10.2(d)(3).

(5) *Pecuniary Gain and Commercial Purpose Enhancement Under Subsection (b)(4)*

(A) "*For Precuniary Gain.*—For purposes of subsection (b)(4) "for pecuniary gain" means for receipt of, or in anticipation of receipt of anything of value, whether monetary or in goods or services. Therefore, offense committed for precuniary gain include both mon-

etary and barter transactions, as well as activities designed to increase gross revenue.

(B) *Commercial Purpose.*—The acquisition of cultural heritage resources for display to the public, whether for a fee or donation and whether by an individual or an organization, including a governmental entity, a private non-profit or organization, or a private non-profit organization, shall be considered to involve a "commercial purpose" for purposes of subsection (b)(4).

6. *Pattern of Misconduct Enhancement Under Subsection (b)(5).*—

(A) *Definition.*—For purposes of subsection (b)(5), "pattern of misconduct involving cultural heritage resources"; means two or more separate instances of offense conduct involving a cultural heritage resource that did not occur during the course of the offense (*i.e.*, that did not occur during the course of the instant offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct). Offense conduct involving a cultural heritage resource may be considered for purposes of subsection (b)(5) regardless of whether the defendant was convicted of that conduct.

(B) *Computation of Criminal History Points.*—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

7. *Dangerous Weapons Enhancement Under Subsection (b)(6).*—For purposes of subsection (b)(6), "brandished" and "dangerous weapon" have the meaning given those terms in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

8. *Multiple Counts.*—For purposes of Chapter Three Part D (Multiple Counts), multiples counts involving cultural heritage offense covered by this guideline are grouped together under subsection (d) of § 3D1.2 (Groups of Closely Related Counts). Multiple counts involving cultural heritage offenses covered by this guideline and offenses covered by other guidelines are not to be grouped under § 3D1.2(d).

9. *Upward Departure Provision.*—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases an upward departure may be warranted. For example, an upward departure may be warranted if (A) in addition to cultural heritage resources, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources); or (B) the offense involved cultural heritage resource that has profound significance to cultural identity (e.g., the Statue of Liberty, or the Liberty Bell).

§ 2Q2.1. Offenses Involving Fish, Wildlife, and Plants

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(c) Cross Reference

(1) If the offense involved a cultural heritage resource, apply § 2B.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resource; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), if the resulting offense level is greater than that determined above.

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Commentary

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Application Notes:

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6. For purposes of subsection (c)(1), "cultural" heritage resource has the meaning given that term in Application Note 1. of the Commentary to § 2BI:5 (Theft of, Damage to, or Destruction of Cultural Heritage Resources; Unlawful Sale; Purchase, Exchange, Transportation or Receipt of Cultural Heritage Resources).

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§ D1.2 Groups of Closely Related Counts

(d) * * *

Offenses covered by the following guidelines are to be grouped under this subsection:

§§ 2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B6.1;

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APPENDIX A—STATUTORY INDEX

16 U.S.C. § 433 2B1.1
16 U.S.C. § 470ee § 2B1.5
16 U.S.C. § 668(a) 2B1.5, 2Q2.1
16 U.S.C. § 707(b) 2B1.5, 2Q2.1

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18 U.S.C. § 541 2B1.5, 2T3.1
18 U.S.C. § 542 2B1.5, 2T3.1
18 U.S.C. § 543 2B1.5, 2T3.1
18 U.S.C. § 544 2B1.5, 2T3.1
18 U.S.C. § 545 2B1.5, 2Q2.1. 2T3.1
18 U.S.C. § 546 2B1.5

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18 U.S.C. § 641 2B1.1, 2B1.5

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18 U.S.C. § 661 2B1.1, 2B1.5

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18 U.S.C. § 662 2B1.1,2B1.5

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18 U.S.C. § 666(a)(1)(A) 2B1.1, 2B1.5

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18 U.S.C. § 668 2B1.12B1.5

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18 U.S.C. § 1152 2B1.5
18 U.S.C. § 1153 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.1, 2B1.1, 2B1.5, 2B2.1, 2B3.1, 2K1.4

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18 U.S.C. § 1163 2B1.1, 2B1.5

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18 U.S.C. § 1170	2B1.5					
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18 U.S.C. § 1361	2B1.1, 2B1.5					
*	*	*	*	*	*	*
18 U.S.C. § 2232	2B1.5, 2J1.2					
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18 U.S.C. § 2314	2B1.1, 2B1.5					
*	*	*	*	*	*	*
18 U.S.C. § 2315	2B1.1, 2B1.5					
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CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill S. 2598, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

PUBLIC LAW 96–95

SECTION 1. This Act may be cited as the "Archaeological Resources Protection Act of 1979".

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SEC. 6. (a) * * *

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(d) Any person who knowingly violates, or counsels, procures, solicits, or employs any other person to violate, any prohibition contained in subsection (a), (b), or (c) of this section shall, upon conviction, be fined [not more than $10,000 or imprisoned not more than one year, or both: *Provided, however,* That if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of $500, such person shall be fined not more than $20,000 or imprisoned not more than two years, or both. In the case of a second or subsequent such violation upon conviction such person shall be fined not more than $100,000, or imprisoned not more than five years, or both.] *in accordance with title 18, United States Code, or imprisoned not more than ten years or both; but if the sum of the commercial and archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources does not exceed $500, such person shall be fined in accordance with title 18, United States Code, or imprisoned not more than one year, or both*

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18 U.S.C. 1163

Embezzlement and theft from Indian tribal organizations.

Whoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, goods, assets, or other property belonging to any Indian tribal organization or intrusted to

the custody or care of any officer, employee, or agent of an Indian tribal organization; or

Whoever, knowing any such moneys, funds, credits, goods, assets, or other property to have been so embezzled, stolen, converted, misapplied or permitted to be misapplied, receives, conceals, or retains the same with intent to convert it to his use or the use of another——

Shall be fined under this title, or imprisoned not more than [five years] *10 years* or both; but if the value of such property does not exceed the sum of $1,000 he shall be fined under this title, or imprisoned not more than one year, or both.

As used in this section, the term "Indian tribal organization" means any tribe, band, or community of Indians which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group which is organized under any of such laws.

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18 U.S.C. 1170

Illegal trafficking in Native American human remains and cultural items.

(a) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, [or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years] *imprisoned not more than 10 years* or both.

(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, [imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both] *imprisoned not more than 10 years, or both; but if the sum of the commercial and archaeological value of the cultural items involved and the cost of restoration and repair of such items does not exceed $500, such person shall be fined in accordance with this title, imprisoned not more than one year, or both.*

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