

January 30, 2002

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

Dear Commissioners:

I am writing to you as President of the Society for American Archaeology (SAA). With more than 7000 members, SAA is an international organization dedicated to research, interpreting, and protecting archaeological heritage of the Americas. Since its inception in 1934, SAA has endeavored to stimulate interest and research in American archaeology; advocate and aid in the conservation of archaeological resources; encourage public access to and appreciation of archaeology; oppose all looting of sites and the purchase and sale of looted archaeological materials; and serve as a bond among those interested in the archaeology of the Americas.

Because preservation of our nation's cultural heritage has been one of the Society's central objectives, SAA played an important role in the enactment of the Archaeological Resources Protection Act of 1979 (ARPA) (16 USC 470aa-mm) and the Native American Graves Protection and Repatriation Act (25 USC 3001-3013). It is SAA's position that these and other statutes should be used as effectively as possible to protect cultural heritage resources from the devastating effects of looting and vandalism.

Given this position, I am writing to you on behalf of SAA to express our organization's strong support for the adoption of the proposed amendments to sentencing guidelines, policy statements, and commentary published in the Federal Register (Volume 66, Number 228) on November 27, 2001. We commend the Sentencing Commission for proposing these amendments to the sentencing guidelines and feel that they will greatly enhance efforts to protect cultural heritage resources.

The Society appreciates the opportunity to provide the following responses to the "Issues for Comment" identified by the Sentencing Commission.

Issue for Comment 1:

Large numbers of looters and vandals are not apprehended and are not prosecuted either criminally or civilly due to the vastness of the public and Indian lands on which cultural heritage resources are located, the relatively low level of law enforcement protection available for most of these lands, and the sophisticated methods of operation employed by many heritage looters and vandals. Therefore, it is the Society's position that the enhancement in subsection (b)(4)(B) for a "pattern of similar violations" should be substantially broadened to apply to any defendant who is shown by competent evidence (including but not limited to criminal, civil, or administrative adjudications) to have any past history of two or more violations of Federal, state, or local laws protecting cultural heritage resources.

#### Issue for Comment 2:

Cases will arise in which the value of a cultural heritage resource, as determined under subsection (b)(1) and Application Note 2, is underestimated. As is noted in the discussion of Application Note 2(A) below, the use of only the commercial value and the cost of restoration and repair to determine the value of cultural heritage resources, unless they are archaeological resources, will not indicate the value of these resources as appropriately as will the use of archaeological value and cost of restoration and repair. (This issue and the need to modify Application Note 2 are discussed more fully below.) Also, there are resources of such extreme and irreplaceable importance to the cultural heritage of the nation that even the use of archaeological value and the cost of restoration and repair will not be reflective of their true heritage value and will substantially understate the seriousness of the offense. A timely example of this type of cultural heritage resource is the Liberty Bell, which was recently damaged by a vandal. An example from the prehistoric cultural heritage of the United States is the Cliff Palace ruin at Mesa Verde National Park in Colorado. This site played an important role in the designation of Mesa Verde National Park as a World Heritage Site in 1978. For these reasons, it is the Society's position that Application Note 7 should be revised to affirmatively state that, "There will be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure will be warranted." The third sentence of Application Note 7 should be eliminated or should be revised to cite examples of the types of nationally important cultural heritage resources discussed above.

#### Issue for Comment 3:

It is the Society's position that, although the use of explosives with regard to a cultural resource crime may be covered by other statutes and sentencing guidelines, it would nevertheless be appropriate to include this enhancement in this guideline.

#### Additional Comments

The Society also wishes to comment on two other issues in the proposed amendments to the sentencing guidelines. The first issue pertains to Sec. 2B1.5(b)(1)(A) and the second to Application Note 2(A).

#### Sec. 2B1.5(b)(1)(A):

Sec. 2B1.5(b)(1)(A) states that, "If the value of the cultural heritage resources (A) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level." In one of the important 1988 amendments to ARPA, the penalties section of the Act (16 USC 470ee(d)) was amended to lower the felony threshold from \$5,000 to \$500. The basis for this amendment was the fact that many violations causing serious harm to cultural heritage resources result in hundreds rather than thousands of dollars in monetary damages to these resources. Therefore, it is the Society's position that Sec. 2B1.5(b)(1)(A) of the proposed amendments to the sentencing guidelines should be consistent with the amended penalties section of ARPA and should state that, "If the value of the cultural heritage resources (A) exceeded \$500 but did not exceed \$5,000, increase by 1 level."

#### Application Note 2(A):

In relation to determining the value of cultural heritage resources for the purposes of subsection (b)(1), Application Note 2(A) states that, "Except as provided in subdivision (B), the value of a cultural heritage resource is its commercial value, and the cost of restoration and repair." Subdivision (B) of Application Note 2 allows the use of commercial value or the archaeological value and the cost of restoration and repair for determining the value of cultural heritage resources for the purposes of subsection (b)(1), but only for "archaeological resources" as defined by ARPA (16 USC 470bb(1)). Under this definition, an archaeological resource must be at least 100 years of age. In this regard, it is important to note three facts.

First, many cultural heritage resources important in the history of the United States are less than 100 years old and do not meet the ARPA definition of an archaeological resource (examples include sites and artifacts from World Wars I and II, the Civilian Conservation Corps, and the atomic power development period). Second, the archaeological value of cultural heritage resources less than 100 years old usually will more truly reflect the heritage value of these resources than does their commercial value. In addition, many of these resources either will not have a commercial value, or their commercial value will be difficult to ascertain. Third, the method established by the ARPA Uniform Regulations (.14(a)) for the determination of archaeological value can be applied effectively to cultural heritage resources less than 100 years of age. Therefore, it is the Society's position that the provisions of Application Note 2(B) should apply to determining the value of all cultural heritage resources for the purposes of subsection (b)(1) and that Application Note 2(A) should be eliminated from the proposed amendment to the sentencing guidelines.

Thank you for your consideration of SAA's comments on the proposed amendments of the sentencing guidelines. The Society strongly supports the Sentencing Commission's identification of the need for sentencing guidelines for cultural heritage resource crimes and views adoption of such guidelines as the highest possible priority in efforts to protect our nation's cultural heritage. If the Society may be of any further assistance in this process, please do not hesitate to contact David\_Lindsay@saa.org, Manager of Government Affairs for the SAA, at 202-789-8200 and we will be able to assist you.

Sincerely,

Robert L. Kelly  
President