

# ANNOTATED CULTURAL HERITAGE GUIDELINE FOR TRAINING AND REFERENCE PURPOSES



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**EDITOR'S COMMENT:** The actual text of the federal sentencing guideline, §2B1.5 (promulgated on May 1, 2002, and effective on November 1, 2002), is printed within the text box. This includes BOTH the guideline itself AND the Commentary (Application Notes) to the guideline. The Commission's explanations of this guideline and reasons for its enactment, are contained in italics *preceding* each text box. The **notations in boldface type** represent information obtained from various sources designed to give the user guidance as to the other federal laws and regulations cited in the guideline, as well as general information about the cultural heritage principles embodied in federal law and addressed by this guideline for cultural heritage resources.

*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 for 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*

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*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 resource statutes, such as the Archaeological Resources Protection Act of 1979, 16 U.S.C. § 460ee, (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.*

§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

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Application Note 1:

“Cultural Heritage Resource” Defined. –

For purposes of this guideline, "cultural heritage resource" means any of the following:

- (A) A historic property, as defined in 16 U.S.C. § 470w(5) (see also section 16(l) of 36 C.F.R. Part 800).
- (B) A historic resource, as defined in 16 U.S.C. § 470w(5).
- (C) An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (see also section 3(a) of 43 C.F.R. Part 7, 36 C.F.R. Part 296, 32 C.F.R Part 299, and 18 C.F.R Part 1312).
- (D) A cultural item, as defined in section 2(3) of the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(3)(see also 43 C.F.R. § 10.2(d)).
- (E) A commemorative work. "Commemorative work" (A) has the meaning given that term in section 2(c) of Public Law 99–652 (40 U.S.C. § 1002(c)); and (B) includes any national monument or national memorial.
- (F) An object of cultural heritage, as defined in 18 U.S.C. § 668(a)(2).
- (G) Designated ethnological material, as described in 19 U.S.C. §§ 2601(2)(ii), 2601(7), and 2604.

**Historic property” or “historic resource” means any pre-historic or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records and material remains related to such a property or resource. 16 U.S.C. § 470w(5).**

**“National Register” or “Register” means the National Register of Historic Places established under section 470a of [Title 16].” 16 U.S.C. § 470w(6).**

**The National Register of Historic Places is the nation's official list of buildings, structures, objects, sites, and districts worthy of preservation for their significance in American history, architecture, archaeology, and culture. The National Register was established by the National Historic Preservation Act of 1966. 16 U.S.C. § 470 et seq. The purpose of the Act is to ensure that as a matter of public policy, properties significant in national, state, and local history are considered in the planning of federal undertakings, and to encourage historic preservation initiatives by state and local governments and the private sector. Though the National Register is a federal program, nominations are submitted by the states through state historic preservation offices. The National Register database of all listings and other information on the nomination and selection process is accessible through National Park Service’s internet site at <http://www.cr.nps.gov/nr>.**

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**The term “archaeological resource” means any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this Act. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, projectiles, tools, structures or portions or structures, pit houses, rock paintings, carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in an archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years old. [Further details are available at section 3(a) of 43 C.F.R. Part 7, 36 C.F.R. Part 296, 32 C.F.R. Part 299, and 18 C.F.R. Part 1312.]**

**"Of archaeological interest" means "capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through application of scientific or scholarly techniques." 43 C.F.R. § 7.3(a)(1).**

**“Cultural item” mean human remains and –**

**(A) “Associated funerary objects” which are objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession of control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects. 25 U.S.C. § 3001(3)(A).**

**(B) “Unassociated funerary objects” which are objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe. 25 U.S.C. § 3001(3)(B).**

**(C) “Sacred objects” are specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents. 25 U.S.C. § 3001(3)(C).**

**(D) “Cultural patrimony” which is an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group. 25 U.S.C. § 3001(3)(D).**

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**The term ‘commemorative work’ means any statue, monument, sculpture, memorial, or other structure or landscape feature, including a garden or memorial grove, designed to perpetuate in a permanent manner the memory of a person, group, event or other significant element of history. The term does not include any such item which is located within the interior of a structure or a structure which is primarily used for other purposes.’40 U.S.C. § 1002(c).**

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**See below for definitions of ‘national monument’ and ‘national memorial.’**

**“Object of cultural heritage” means an object [from a museum] that is (A) over 100 years old and worth in excess of \$5,000; or (B) worth at least \$100,000. 18 U.S.C. § 668(a)(2).**

**“The term “. . . ethnological material of the State Party” means . . . “any object of ethnological interest or any fragment or part of any [such] object, which was first discovered within, and is subject to export control, by the State Party. No object may be considered to be an object of ethnological interest unless such object is (1) the product of a tribal or nonindustrial society, and (2) important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people.” 19 U.S.C. § 2601(2)(ii)**

**The term “designated . . . ethnological material” means “any . . . ethnological material of the State Party which – (A) is–**

**(i) covered by an agreement under this chapter that enters into force with respect to the United States, or**

**(ii) subject to emergency action under section 2603 of this title, and**

**(B) is listed by regulation under section 2604 of this title.” 19 U.S.C. § 2601(7)**

**See pp. 14-15 below for more details**

**“After any agreement enters into force under section 2602 or this title, or emergency action is taken under section 2603, the Secretary [of State], after consultation with the Director of the United States Information Agency, shall by regulation promulgate (and when applicable shall revise) a list of the archaeological or ethnological material of the State Party covered by the agreement or by such section. The Secretary may list such material by type or other appropriate classification, but each listing made under this section shall be sufficiently specific and precise to insure that (1) the import restrictions under section 2606 of this title are applied only to the archaeological and ethnological material covered by the agreement or emergency action; and (2) fair notice is given to importers and other persons as to what material is subject to such restrictions.” 19 U.S.C. § 2604.**

*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 economic*

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*crime and property damage 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.*

(b)(1) If the value of the 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.

*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.*

Application Note 2.

Value of the Cultural Heritage Resource Under Subsection (b)(1).—This application note applies to the determination of the value of the cultural heritage resource under subsection (b)(1).

- (A) General Rule.—For purposes of subsection (b)(1), the value of the cultural heritage resource shall include, as applicable to the particular resource involved, the following:
- (i) The archaeological value. (Archaeological value shall be included in the case of any cultural heritage resource that is an archaeological resource.)
  - (ii) The commercial value.
  - (iii) The cost of restoration and repair.
- (B) Estimation of Value.—For purposes of subsection (b)(1), the court need only make a reasonable estimate of the value of the cultural heritage resource based on available information.

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Application Note 2 (continued)

- (C) Definitions. For purposes of this application note:
- (i) "Archaeological value" of a cultural heritage resource means the cost of the retrieval of the scientific information which would have been obtainable prior to the offense, including the cost of preparing a research design, conducting field work, conducting laboratory analysis, and preparing reports, as would be necessary to realize the information potential. (See 43 C.F.R. § 7.14(a); 36 C.F.R. § 296.14(a); 32 C.F.R. § 229.14(a); 18 C.F.R. § 1312.14(a).)
  - (ii) "Commercial value" of a cultural heritage resource means the fair market value of the cultural heritage resource at the time of the offense. (See 43 C.F.R. § 7.14(b); 36 C.F.R. § 296.14(b); 32 C.F.R. § 229.14(b); 18 C.F.R. § 1312.14(b).)
  - (iii) "Cost of restoration and repair" includes all actual and projected costs of curation, disposition, and appropriate reburial of, and consultation with respect to, the cultural heritage resource; and any other actual and projected costs to complete restoration and repair of the cultural heritage resource, including (I) its reconstruction and stabilization; (II) reconstruction and stabilization of ground contour and surface; (III) research necessary to conduct reconstruction and stabilization; (IV) the construction of physical barriers and other protective devices; (V) examination and analysis of the cultural heritage resource as part of efforts to salvage remaining information about the resource; and (VI) preparation of reports. (See 43 C.F.R. § 7.14(c); 36 C.F.R. § 296.14(c); 32 C.F.R. § 229.14(c); 18 C.F.R. § 1312.14(c).)
- (D) Determination of Value in Cases Involving a Variety of Cultural Heritage Resources. In a case involving a variety of cultural heritage resources, the value of the cultural heritage resources is the sum of all calculations made for those resources under this application note.



*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.*

§2B1.1(b)(1) - Monetary Table (incorporated by reference into §2B1.5)

(A)	\$5,000 or less	no increase
(B)	More than \$5,000	add <b>2</b>
(C)	More than \$10,000	add <b>4</b>
(D)	More than \$30,000	add <b>6</b>
(E)	More than \$70,000	add <b>8</b>
(F)	More than \$120,000	add <b>10</b>
(G)	More than \$200,000	add <b>12</b>
(H)	More than \$400,000	add <b>14</b>
(I)	More than \$1,000,000	add <b>16</b>
(J)	More than \$2,500,000	add <b>18</b>
(K)	More than \$7,000,000	add <b>20</b>
(L)	More than \$20,000,000	add <b>22</b>
(M)	More than \$50,000,000	add <b>24</b>
(N)	More than \$100,000,000	add <b>26</b> .
(O)	More than \$200,000,000	add <b>28</b>
(P)	More than \$400,000,000	add <b>30</b>

**Note:** At the time of printing, the Commission was considering revisions to the monetary table. Please consult the May 1, 2003 amendments.

**Detailed information about the calculation of archaeological value and the preparation of damage assessment reports can be obtained in Chapter 4 of Archaeological Resource Protection, Sherry Hutt, Elwood W. Jones, and Martin McAllister, Washington, D.C., Preservation Press, 1992.**

**Also, assistance can be obtained from the Archaeology and Ethnography Program, National Park Service, U.S. Department of Interior, Washington, D.C. (202-343-4101), and the Archaeological and Preservation Office, Bureau of Indian Affairs, U.S. Department of Interior, Washington, D.C. (202-208-5831).**

*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) . . ., relate(s) 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*

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*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.*

(b)(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.

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Application Note 3.

Enhancement in Subsection (b)(2). – For purposes of subsection (b)(2):

- (A) "Museum" has the meaning given that term in 18 U.S.C. § 668(a)(1) except that the museum may be situated outside the United States.
- (B) "National cemetery" has the meaning given that term in Application Note 1 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).
- (C) "National Historic Landmark" means a property designated as such pursuant to 16 U.S.C. § 470(a)(1)(B).
- (D) "National marine sanctuary" means a national marine sanctuary designated as such by the Secretary of Commerce pursuant to 16 U.S.C. § 1433.
- (E) "National monument or national memorial" means any national monument or national memorial established as such by Act of Congress or by proclamation pursuant to the Antiquities Act of 1906 (16 U.S.C. § 431).
- (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.

**“Museum” means an organized and permanent institution, the activities of which affect interstate or foreign commerce, that is established for an essentially educational or aesthetic purpose; has a professional staff; and owns, utilizes and cares for tangible objects that are exhibited to the public on a regular schedule. 18 U.S.C. § 668(a).**

**“National cemetery” means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior. Application Note 1 of §2B1.1.**

**National Historic Landmarks are nationally significant historic places designated by the Secretary of the Interior because they possess exceptional value or quality in illustrating or interpreting the heritage of the United States. Today, fewer than 2,500 historic places bear this national distinction. See <http://www.cr.nps.gov/nhl/>**

**For a description and list of national marine sanctuaries, consult 16 U.S.C. §1433, and also see <http://www.sanctuaries.nos.noaa.gov/>**

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To consult a listing of national monuments and memorials, see 16 U.S.C. § 431 United States Code Annotated and also <http://www.nps.gov>.

For information about the national park system and lists, see:

<http://www.nps.gov/legacy/nomenclature.html>

<http://www.nps.gov/carto/NPSMAP.html> (maps)

For a complete listing of World Heritage Sites, see <http://www.unesco.org/whc/heritage.htm>.

*[The second of these enhancements, at subsection (b)(3) provides] an additional two-level enhancement for 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 in the enhancement 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 because they 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.*

(b)(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.

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Application Note 4.

Enhancement in subsection (b)(3).—For purposes 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 that term in 19 U.S.C. § 2601(6).
- (C) "Designated 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 of 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 that 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)).

**“Cultural patrimony” shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group. 25 U.S.C. § 3001(3)(D).**

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## **BACKGROUND ON CULTURAL PROPERTY DEFINITION**

The United States Department of State is responsible for implementing the Convention on Cultural Property Implementation Act (the Act). This is the enabling legislation for the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. In accordance with the Act, the United States Department of State accepts requests from countries for import restrictions on archaeological or ethnological artifacts, the pillage of which places their national cultural heritage in jeopardy. For more information, see <http://exchanges.state.gov/education/culprop/>. Since the United States implemented Article 9 of the 1970 UNESCO Convention under the Convention on Cultural Property Implementation Act in 1983, it has imposed import restrictions on archaeological or ethnological materials from ten countries to assist in the protection of their cultural property.

Restricted objects may enter the U.S. if accompanied by an export permit issued by the country of origin or verifiable documentation demonstrating that they left the country of origin prior to the date the import restriction went into effect. Because these import restrictions are enforced through the U.S. Customs Service, additional information about these restrictions is also available through U.S. Customs, "What Every Member of the Trade Community Should Know About: Works of Art, Collector's Pieces, Antiques, and Other Cultural Property, An Informed Compliance Publication, February, 2001", available at <http://www.customs.gov/impoexpo/impoexpo.htm>.

No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States. 19 U.S.C. § 2607.

As of February 2001, the U.S. has entered into agreements with the following States Parties: El Salvador, Canada, Guatemala, Italy, Mali, Nicaragua, Peru, and there are emergency restrictions of varying duration for other nations. Consult the State Department's web site for details on the scope of each nation's agreement with the United States and the effective dates.

The term "archaeological or ethnological material of the State Party" means –

- (A) any object of archaeological interest;
  - (B) any object of ethnological interest; or
  - (C) any fragment or part of any object referred to in subparagraph (A) or (B); which was first discovered within, and is subject to export control by, the State Party.
- 19 U.S.C. § 2601(7).

The term "designated archaeological or ethnological material" means an archaeological or

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**ethnological material of the State Party which –**

**(A) is –**

**(i) covered by an agreement under this chapter that enters into force with respect to the United States, or**

**(ii) is subject to emergency action under section 2603 of this title, and**

**(B) is listed by regulation under section 2604 of this title. 19 U.S.C. § 2601(7).**

**After any agreement enters into force under section 2602 or this title, or emergency action is taken under section 2603, the Secretary [of State], after consultation with the Director of the United States Information Agency, shall by regulation promulgate (and when applicable shall revise) a list of the archaeological or ethnological material of the State Party covered by the agreement or by such section. The Secretary may list such material by type or other appropriate classification, but each listing made under this section shall be sufficiently specific and precise to insure that (1) the import restrictions under section 2606 of this title are applied only to the archaeological and ethnological material covered by the agreement or emergency action; and (2) fair notice is given to importers and other persons as to what material is subject to such restrictions. 19 U.S.C. § 2604.**

**The term “pre-Columbian monumental or architectural sculpture or mural” means**

**(A) any stone carving or wall art which \_\_**

**(i) is the product of a pre-Columbian Indian culture of Mexico Central America, South America, or the Caribbean Islands;**

**(ii) was an immobile monument or architectural structure or was part of, or affixed to, any such monument or structure; and**

**(iii) is subject to export control by the country of origin: or**

**(B) any fragment of part of any stone carving or all art described in subparagraph (A) of this paragraph.**

**The term “country of origin” . . . means the country where such sculpture or mural was first discovered.” 19 U.S.C. § 2095(3).**

**Sacred objects” shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents. 25 U.S.C. § 3001(3)(C).**

*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*

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*on a determination that offenders who are motivated by financial gain or other commercial incentive are more culpable than offenders who are motivated solely by their personal interest in possessing cultural heritage resources. Those motivated by financial gain contribute to illicit trafficking and support dealers and brokers who earn a livelihood from illegal activities. Mindful of INTERPOL's findings, as reported by the Department of Justice, that the annual dollar value of art and cultural property theft is exceeded only by trafficking in illicit narcotics, money laundering, and arms trafficking, the Commission seeks to ensure that the penalty structure adequately accounts for these increased harms.*

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

Application Note 5.

Pecuniary Gain and Commercial Purpose. – For purposes of subsection (b)(4):

- (A) “For Pecuniary Gain” means for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services. Therefore, offenses committed for pecuniary gain include both monetary 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 organization, or a private for-profit organization, shall be considered to involve a “commercial purpose,” for purpose of subsection (b)(4).

*This guideline also provides a two level enhancement at subsection (b)(5) if the offense involves a pattern of misconduct, and provides a definition of “pattern” that is designed to interact with other requirements of the guidelines regarding relevant conduct and criminal history.*

*“Pattern of misconduct” is defined as “two or more separate instances of offense conduct involving cultural heritage resources that did not occur during the course of the instant offense (i.e., that did*

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*not occur during the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct))”. Accordingly, under this guideline, separate instances of offense conduct need not result in a criminal conviction or legal adjudication in order for this enhancement to apply. Separate instances of offense conduct involving cultural heritage resources that are included in the defendant’s criminal history may also form the factual basis for the application of this enhancement. The Commission considers such increased punishment to be appropriate for offenders who repeatedly disregard cultural heritage resource laws and regulations and the social values underlying them. These repeat offenders cause serious harm, not only to the resources themselves, but to the nation and the individuals who treasure them.*

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

Application Note 6.

Pattern of Misconduct. –

- (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., 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).

*This guideline also provides at subsection (b)(6) a two-level enhancement and a minimum offense level of level 14 if a dangerous weapon, including a firearm, is brandished or its use threatened. This enhancement reflects the increased culpability of offenders who pose a threat to*

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*law enforcement officers and innocent passersby. Recognizing that there are legitimate uses in remote expanses of tribal and federal land for certain tools and firearms that may otherwise qualify as “dangerous weapons” under the guideline definitions, the Commission has limited the scope of this enhancement by requiring that the dangerous weapon or firearm be brandished or its use threatened, in order for increased punishment to attach under this provision.*

(b)(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**.

Application Note 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).

Application Note 1 to §1B1.1 (incorporated by reference into §2B1.5)

- (c) “Brandished” with reference to a dangerous weapon (including a firearm) means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.
- (d) “Dangerous weapon” means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (e.g. a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

*In light of the increased potential for the symbols of our nation’s heritage and culture to be targets of violent individuals, including terrorists, the Commission has also provided for increased punishment through a cross reference to §2K1.4 (Arson; Property Damage by Use of Explosives), if the offense involved arson or property damage by the use of any explosive, explosive material, or*

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*destructive devices, when the resulting offense level is greater under §2K1.4 than the offense level under this guideline.*

(c) Cross Reference

- (1) If the offense involved arson, or property damage by the use of any explosive, explosive material, or destructive device, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

*This guideline also includes a special rule in the Commentary to address multiple counts of cultural heritage resource offenses as well as multiple counts of conviction involving offenses under this and other guidelines. Consistent with the principles underlying the rules for grouping multiple counts of conviction in §3D1.2 and the unique concerns sought to be addressed by the promulgation of §2B1.5, the new guideline provides that multiple counts of cultural heritage resource offenses are to be grouped under §3D1.2(d). A count of conviction for an offense sentenced under §2B1.5 may not be grouped under this provision with a conviction for an offense sentenced under a different guideline.*

Application Note 8.

Multiple Counts.—For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving cultural heritage offenses 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)

*This guideline also invites an upward departure when the offense level determined pursuant to §2B1.5 substantially understates the seriousness of the cultural heritage resource offense, and gives two illustrations of such situations.*

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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 grave markers or other cultural heritage resources), or (B) the offense involved a cultural heritage resource that has profound significance to cultural identity (e.g., the Statute of Liberty or the Liberty Bell)).

*Finally, this guideline provides a cross-reference at §2B1.1 so that property damage, destruction, and theft offenses which also involve cultural heritage resources are cross-referenced to the new guideline at §2B1.5, if the resulting offense level under §2B1.5 is greater than under §2B1.1. When a case being sentenced under §2B1.1 involves a cultural heritage resource, loss attributable to that cultural heritage resource under §2B1.1 is to be determined using the definition of “value of the cultural heritage resource” from §2B1.5.*

Application Note 9.

§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

\* \* \*

(c)      Cross References

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Commentary to §2B1.1 [Cross Reference to §2B1.5]

\* \* \*

Application Notes:

1. Definitions.—For purposes of this guideline:  
"Cultural heritage resource" has the meaning given that term in Application Note 1 of §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources).

\* \* \*

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

\* \* \*

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

\* \* \*

- (vii) 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 §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources).

**APPENDIX A - STATUTORY INDEX**

<i>16 U.S.C. § 470ee</i>	<i>2B1.5</i>			
<i>16 U.S.C. § 668(a)</i>	<i>2B1.5, 2Q2.1</i>			
<i>16 U.S.C. § 707(b)</i>	<i>2B1.5, 2Q2.1</i>	*	*	*
<i>18 U.S.C. § 541</i>	<i>2B1.5, 2T3.1</i>			
<i>18 U.S.C. § 542</i>	<i>2B1.5, 2T3.1</i>			
<i>18 U.S.C. § 543</i>	<i>2B1.5, 2T3.1</i>			
<i>18 U.S.C. § 544</i>	<i>2B1.5, 2T3.1</i>			
<i>18 U.S.C. § 545</i>	<i>2B1.5, 2Q2.1, 2T3.1</i>			
<i>18 U.S.C. § 546</i>	<i>2B1.5</i>			
		*	*	*
<i>18 U.S.C. § 641</i>	<i>2B1.1, 2B1.5</i>			
		*	*	*
<i>18 U.S.C. § 661</i>	<i>2B1.1, 2B1.5</i>			
<i>18 U.S.C. § 662</i>	<i>2B1.1, 2B1.5</i>			
		*	*	*
<i>18 U.S.C. § 666(a)(1)(A)</i>	<i>2B1.1, 2B1.5</i>			
		*	*	*
<i>18 U.S.C. § 668</i>	<i>2B1.5</i>			
		*	*	*
<i>18 U.S.C. § 1152</i>	<i>2B1.5</i>			
<i>18 U.S.C. § 1153</i>	<i>2A1.1, 2A1.2, 2A1.3,</i> <i>2A1.4, 2A2.1, 2A2.2,</i>  <i>2A2.3, 2A3.1, 2A3.2,</i> <i>2A3.3, 2A3.4, 2A4.1,</i> <i>2B1.1, 2B1.5, 2B2.1,</i> <i>2B3.1, 2K1.4</i>			
		*	*	*
<i>18 U.S.C. § 1163</i>	<i>2B1.1, 2B1.5</i>			
<i>18 U.S.C. § 1168</i>	<i>2B1.1</i>			
<i>18 U.S.C. § 1170</i>	<i>2B1.5</i>			
		*	*	*
<i>18 U.S.C. § 1361</i>	<i>2B1.1, 2B1.5</i>			
		*	*	*
<i>18 U.S.C. § 2232</i>	<i>2B1.5, 2J1.2</i>			
		*	*	*
<i>18 U.S.C. § 2314</i>	<i>2B1.1, 2B1.5</i>			
<i>18 U.S.C. § 2315</i>	<i>2B1.1, 2B1.5</i>	*	*	*

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