

PROVIDING FOR THE PROTECTION OF NATIVE AMERICAN  
GRAVES AND THE REPATRIATION OF NATIVE AMERICAN  
REMAINS AND CULTURAL PATRIMONY

SEPTEMBER 26 (legislative day, SEPTEMBER 10), 1990.—Ordered to be printed

Mr. INOUYE, from the Select Committee on Indian Affairs,  
submitted the following

REPORT

[To accompany S. 1980]

[Including cost estimate of the Congressional Budget Office]

The Select Committee on Indian Affairs, to which was referred the bill (S. 1980) to provide for the protection of Native American graves and the repatriation of Native American remains and cultural patrimony, having awarded the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

PURPOSE

The purpose of S. 1980 is to provide for the protection of Native American graves and the repatriation of Native American remains and cultural patrimony.

BACKGROUND

Legislation to establish a process for the repatriation of Native American human remains, funerary objects, cultural patrimony and sacred objects had its origins in a hearing that was held by the Select Committee on Indian Affairs in February of 1987. In his testimony on a bill to provide for the repatriation of Indian artifacts, Smithsonian Secretary Robert McCormick Adams indicated that of the 34,000 human remains currently in the Institution's collection,

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approximately 42.5% or 14,523 of the specimens are the remains of North American Indians, and another 11.9% or 4,061 of the specimens represent Eskimo, Aleut, and Koniag populations. Tribal reaction to Secretary Adams' testimony was swift, and in the months which followed, Indian tribes around the country called for the repatriation of those human remains that could be identified as associated with a specific tribe or region for their permanent disposition in accordance with tribal customs and traditions, and for the proper burial elsewhere of those remains of Native Americans that could not be so identified.

In 1988, the Select Committee on Indian Affairs held hearings on S. 187, a bill to provide a process for the repatriation of Native American cultural patrimony. In these hearings, the Committee received testimony from witnesses representing museums and various Indian tribes. Several witnesses, including representatives of the American Association of Museums (AAM), requested that the Committee delay any further action on this bill or any other repatriation measure, in order to allow the museum community an opportunity to enter into a dialogue with the Indian community on repatriation issues. The witness representing AAM stated that the Association might be able to develop a mutually-acceptable resolution to the issue of repatriation that would dispense with the need for legislation by meeting with tribal representatives. During 1989, the Heard Museum in Phoenix, Arizona sponsored a year long dialogue between museum professionals (including archaeologists and anthropologists) and Native Americans. The purpose of the dialogue was to develop recommendations to address the necessity of responding to tribal demands for repatriation. Findings and recommendations that were agreed to by the participants in the dialogue were published in the Report of the Panel for a National Dialogue on Museum/Native American Relations, which was issued on February 28, 1990.

The Report of the Panel for a National Dialogue on Museum/Native American Relations contained findings and recommendations, general principles governing the relations between museums and Indian tribes, and established policy guidelines outlining museum responsibilities as well as repatriation policies and procedures. The Panel found that the process for determining the appropriate disposition and treatment of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony should be governed by respect for Native human rights. The Panel report states that human remains must at all times be accorded dignity and respect. The Panel report indicated the need for Federal legislation to implement the recommendations of the Panel.

The Panel also recommended the development of judicially-enforceable standards for repatriation of Native American human remains and objects. The report recommended that museums consult with Indian tribes to the fullest extent possible regarding the right of possession and treatment of remains and objects prior to acquiring sensitive materials. Additional recommendations of the Panel included requiring regular consultation and dialogue between Indian tribes and museums; providing Indian tribes with access to information regarding remains and objects in museum collections;

providing that Indian tribes should have the right to determine the appropriate disposition of remains and funerary objects and that reasonable accommodations should be made to allow valid and respectful scientific use of materials when it is compatible with tribal religious and cultural practices.

On May 11, 1989, Senator Inouye introduced S. 978, the National Museum of the American Indian Act. As part of this legislation to establish a museum for the American Indian within the Smithsonian Institution, the bill also included provisions related to the proper treatment and appropriate disposition of Native American human remains and sacred objects. In hearings of the Select Committee on Indian Affairs on S. 978, the Committee received testimony from several tribal witnesses indicating the significance of certain sacred objects to their respective tribes and the need to have those objects returned to the tribe so that important religious ceremonies in which such objects are central could be resumed. Tribal witnesses also testified that the vast numbers of Native American human remains contained in the Smithsonian collections which, according to tribal religious practices, must be given appropriate burials.

The testimony received by the Committee indicated a need for provisions in S. 978 to provide a process for the inventory, identification and subsequent repatriation of Native American human remains and funerary objects. The Committee worked with the Smithsonian Institution and tribal representatives to develop such a process. These provisions were made a part of S. 978, the National Museum of the American Indian Act. The President signed S. 978 into law on November 28, 1989 (Public Law 101-185). The provisions of Public Law 101-185 which authorize the repatriation of human remains and funerary objects from the collections of the Smithsonian Institution established a precedent for further legislative action.

On May 17, 1989, Senator McCain introduced S. 1021, the Native American Grave and Burial Protection Act, to provide for the protection of Indian graves and burial grounds. On November 21, 1989, Senator Inouye introduced S. 1980, the Native American Repatriation of Cultural Patrimony Act to provide for the repatriation of Native Americans group or cultural patrimony. The provisions of S. 1980 were modeled after the provisions contained in Public Law 101-185. S. 1980 would extend the inventory, identification and repatriation provisions of Public Law 101-185 to all Federal agencies and any institution which receives Federal funding. The provisions of the bill include protections of Native American sacred objects and items of Native American cultural patrimony.

On May 14, 1990, the Select Committee on Indian Affairs held a hearing on S. 1021, S. 1980, and the Report of the Panel for a National Dialogue on Museum/Native American Relations. The Committee received testimony from several professional associations of archaeologists and anthropologists, representatives of several museums with Native American collections, private art dealers and tribal leaders. Tribal witnesses testified at the hearing that their rights to Native American human remains, funerary objects, sacred objects and cultural patrimony have been ignored or discounted by the museum and scientific communities. The Commit-

tee also received testimony from tribal representatives which indicated that in cases where Native Americans have attempted to regain items that were inappropriately alienated from their tribes, they have met with resistance from museums and have lacked the legal ability of financial resources to pursue the return of the items. Several witnesses testified that in many instances Indian tribes do not know what types of remains or objects are in the possession of museums and have been unsuccessful in their attempts to obtain access to this information.

In addition, the Committee received testimony from representatives of museums that there are a few instances where a museum and an Indian tribe have agreed to the repatriation of human remains and sacred objects. There was also testimony about other agreements between Indian tribes and museums that allowed the museums to retain possession of sacred objects except during certain times of the year when those objects were required for tribal religious ceremonies. A witness also described an agreement between an Indian tribe and a museum whereby the human remains of tribal members were returned to the Indian tribe and reinterred and periodically, scientists would be allowed access to the remains to continue their studies of the remains. These examples presented by witnesses indicated the need for a process in which meaningful discussions between Indian tribes and museums regarding their respective interests in the disposition of human remains and objects in the museum's collections could be discussed and the resolution of competing interests could be facilitated.

Tribal leaders and representatives of the archaeological community testified to the great need for Federal legislation which could provide additional protections to Native American burial sites. Indian tribes have had many difficulties in preventing the illegal excavation of graves on tribal and Federal lands. Several witnesses testified that there is a flourishing trade in funerary and sacred objects that have been obtained from burials located on tribal and Federal lands. Additional testimony was received from witnesses which indicated that tribal and Federal officials have been unable to prevent the continued looting of Native American graves and the sale of these objects by unscrupulous collectors.

The Committee also received testimony from tribal witnesses who felt that the return of human remains to Indian tribes has been a most frustrating issue to Native Americans. In cases where remains are identifiable, tribal witnesses felt strongly that they should be returned for proper burial, which is an important part of the religious and traditional life cycle of Native Americans, including Native Hawaiians. Tribal witnesses also testified that in the case of unidentifiable Native American human remains, the human remains should still be given proper burial. The Committee received testimony from professionals in the scientific community who say that there is an overriding interest in the acquisition and retention of human remains for the purpose of scientific inquiry. Scientists have indicated that recent technological advances allow them to analyze bones and learn new facts and pursue important research on diet, disease, genetics and related matters. Native American witnesses have indicated that they do not object to the study of human remains when there is a specific purpose to the

study and a definitive time period for the study. The Native American witnesses did object, however, to museums retaining human remains without a clear purpose, especially when those human remains are identifiable and affiliated with a specific Indian tribe. In addition, at least one tribal witness questioned the scientific value of unidentifiable remains.

#### COMMITTEE AMENDMENT

The Committee adopted an amendment in the nature of a substitute to S. 1980, the Native American Grave Protection and Repatriation Act. The provisions of the substitute amendment would extend the provisions on inventory, identification, and repatriation of Public Law 101-185, the National Museum of the American Indian Act, to Federal agencies and museums receiving Federal funds. The Committee intends the provisions of this Act to establish a process which shall provide a framework for discussions between Indian tribes and museums and Federal agencies. The Committee believes that the process established under this Act will prevent many of the past instances of cultural insensitivity to Native American peoples. The Committee has received testimony describing instances where museums have treated Native American human remains and funerary objects in a manner entirely different from the treatment of other human remains. Several tribal leaders expressed their outrage at the manner in which Native American human remains had been treated, stored or displayed and the use of culturally sensitive materials and objects in violation of traditional Native American religious practices. In the long history of relations between Native Americans and museums, these culturally insensitive practices have occurred because of the failure of museums to seek the consent of or consult with Indian tribes.

#### FINDINGS

The substitute amendment finds that many Federal agencies, as well as state and private museums which receive Federal funding have large numbers of human remains of Native Americans in their collections. Some of the Native American human remains in these collections are culturally affiliated with present day Indian tribes. The Committee finds that many Indian tribes and Native Hawaiians have expressed a clear and unequivocal interest in the return of these remains to the Indian tribe or Native Hawaiian organization so that the tribe, family or organization may determine the appropriate disposition of the remains which is consistent with their religious and cultural practices. The Committee has received testimony from several museums and Indian tribes about agreements that have been reached on the disposition of Native American human remains and objects. One example of an agreement reached between an Indian tribe and a museum is in Nevada where the state museum agreed to return the human remains in their collections to the Fallon Paiute Tribe for appropriate burial on the reservation. The tribe in turn placed the human remains in a specially designed crypt which could be opened periodically to provide access for scientists to continue the study of the human remains. The Committee intends this legislation to allow for the de-

velopment of agreements between Indian tribes and museums which reflect an understanding of the important historic and cultural value of the remains and objects in museum collections.

The Committee agrees with the findings and recommendations of the Panel for a National Dialogue on Museum/Native American Relations. The Committee believes that this legislation will encourage a continuing dialogue between museums and Indian tribes and Native Hawaiian organizations and will promote greater understanding between the groups. The Committee believes that human remains must at all times be treated with dignity and respect. The Committee recognizes the important function museums serve in society by preserving the past to educate the public and increase awareness about our country's history.

#### DEFINITIONS

The substitute amendment contains several definitions which are intended to clearly delineate the scope and application of the bill. The Committee intends that these definitions will provide the necessary clarity to potentially ambiguous terms. The Committee shares the concerns expressed by several hearing witnesses that terms such as "sacred" or "cultural patrimony" could be construed to include a broad range of objects and items which would be outside the scope of this legislation.

There has been much debate with regard to the definitions contained in the Act. Members of the scientific community express concern that if Native Americans are allowed to define terms such as "sacred object", the definition may be so broad as to arguably include any Native American object. In an effort to respond to this concern, the Committee has carefully considered the issue of defining objects within the context of who may be in the best position to have full access to information regarding whether an object is sacred to a particular tribe or Native Hawaiian group. Many tribes have advanced the position that only those who practice a religion or whose tradition it is to engage in a religious practice can define what is sacred to that religion or religious practice. Some have observed that any definition of a sacred object necessarily lacks the precision that might otherwise characterize legislative definitions, given that the definition of sacred objects will vary according to the tribe or religious practice engaged in by the tribe, and pointing to the difficulty that would arise if one were charged with defining objects that are central to the practice of certain religions, such as defining the Bible or the Koran.

The Committee has made every effort to incorporate the comments and address the concerns of members of the scientific and museum communities with regard to the substantive definitions set forth in the Act, while at the same time recognizing that there are over 200 tribes and 200 Alaska Native villages and Native Hawaiian communities, each with distinct cultures and traditional and religious practices that are unique to each community. Accordingly, the definitions of sacred objects, funerary objects, and items of cultural patrimony will vary according to the tribe, village, or Native Hawaiian community.

The substitute amendment establishes four categories of objects subject to the provisions of the Act. These categories are Native American human remains, funerary objects, sacred objects and objects of cultural patrimony. These categories are specifically defined in the substitute amendment. The Committee intends the term "funerary object" to mean any object placed with a deceased Native American as part of a death rite ceremony. The substitute amendment also defines the term "burial site" broadly to include all traditional Native American burial sites such as rock cairns or pyres which do not fall within the ordinary definition of grave site. Throughout the bill, the Committee specifically uses the phrase "associated funerary object" by which the Committee intends that a funerary object must be associated with the remains of a Native American to fall within the protections afforded by the bill.

The substitute amendment includes a revised definition of the term "sacred object." The Committee received comments regarding the ambiguity surrounding the term "sacred," in particular when that term is used in reference to Native American religious practices. There has been concern expressed that any object could be imbued with sacredness in the eyes of a Native American, from an ancient pottery shard to an arrowhead. The Committee does not intend this result. The term sacred object is an object that was devoted to a traditional religious ceremony or ritual when possessed by a Native American and which has religious significance or function in the continued observance or renewal of such ceremony. The Committee intends that a sacred object must not only have been used in a Native American religious ceremony but that the object must also have religious significance. The Committee recognizes that an object such as an altar candle may have a secular function and still be employed in a religious ceremony. The substitute amendment requires that the primary purpose of the object is that the object must be used in a Native American religious ceremony in order to fall within the protections afforded by the bill. It has been suggested that some Native American artisans create objects which could be construed as falling within the definition of sacred object and therefore this provision would adversely impact the trade in Native American artwork. The Committee does not intend the definition of sacred object to include objects which were created for purely a secular purpose, including the sale or trade in Indian art.

The substitute amendment also includes a revised definition of the term "Native American cultural patrimony." The Committee received comments from several witnesses regarding the lack of clarity in the original definition of cultural patrimony. These concerns focused primarily on the character of property within traditional Native American societies where property was held by the whole community, not by an individual. It had been suggested that in traditional Native American societies no object could be conveyed by an individual because it was owned by the collective whole. The substitute amendment defines "Native American cultural patrimony" as an object with significant historical, traditional or cultural importance and which is central to the culture of an Indian tribe or to Native Hawaiians. The Committee intends this term to refer to only those items that have such great importance

to an Indian tribe or to the Native Hawaiian culture that they cannot be conveyed, appropriated or transferred by an individual member. Objects of Native American cultural patrimony would include items such as Zuni War Gods, the Wampum belts of the Iroquois, and other objects of a similar character and significance to the Indian tribe as a whole.

The substitute amendment also includes a definition of the term "right of possession." The term "right of possession" refers to the authority by which a museum or agency came into possession of human remains of a Native American, funerary object, sacred object, or object of cultural patrimony. The Committee intends this term to provide a legal framework in which to determine the circumstances by which a museum or agency came into possession of these remains or objects. The Committee has heard from many tribal leaders situations where important ceremonial objects have been stolen from the Indian tribe only to reappear later in the collections of a museum. The term "right of possession" will provide a clear standard for determining whether an object was originally acquired with the voluntary consent of an individual or an Indian tribe which had the authority to alienate the object. "Right of possession" also refers to the original acquisition of human remains of a Native American. In order to have the "right of possession" to human remains of a Native American a museum must have originally acquired the remains with the full knowledge and consent of the next of kin or the Indian tribe. The "right of possession" to an object requires that the party have obtained possession of the object with the voluntary consent of an individual who has the authority to alienate possession of the object.

The Committee shares the concerns expressed by tribal leaders that museums and agencies have not, until recently, inquired into the circumstances of how an individual came to possess a funerary object, sacred object or object of cultural patrimony. This practice has contributed to the continued growth of a black market in the sale and trade of objects illegally removed from Indian burial sites located on Federal and tribal lands. The Committee intends this definition to provide a standard by which the legal possession of an object may be viewed. Review of the right of possession to a given object is very similar to the transfer of title to other forms of property. The Committee intends this section to operate in a manner that is consistent with general property law i.e., an individual may only acquire the title to property that is held by the transferor.

The substitute amendment includes a revised definition of the term "cultural affiliation." The term "cultural affiliation" means a relationship between a present day Indian tribe and a historic or prehistoric Indian tribe or Native Hawaiian group. The Committee intends the relationship to be reasonably established through an offer of evidence which shows a continuity of group identity from the earlier to the present day group. The Committee intends that the "cultural affiliation" of an Indian tribe to Native American human remains or objects shall be established by a simple preponderance of the evidence. Claimants do not have to establish "cultural affiliation" with scientific certainty. This standard of proof applies to determinations of "cultural affiliation" as well as determinations of "right of possession" as established in the Act.

The types of evidence which may be offered to show cultural affiliation may include, but are not limited to, geographical, kinship, biological, archaeological, anthropological, linguistic, oral tradition, or historical evidence or other relevant information or expert opinion. The requirement of continuity between present day Indian tribes and materials from historic or prehistoric Indian tribes is intended to ensure that the claimant has a reasonable connection with the materials. Where human remains and funerary objects are concerned, the Committee is aware that it may be extremely difficult, unfair or even impossible in many instances for claimants to show an absolute continuity from present day Indian tribes to older, prehistoric remains without some reasonable gaps in the historic or prehistoric record. In such instances, a finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of gaps in the record.

#### NEW EXCAVATIONS OR DISCOVERIES

The substitute amendment provides that for any Native American human remains or funerary objects, excavated or discovered on Federal or tribal land after enactment of this Act, the lineal descendants shall have the right of possession. It further provides that for sacred objects, objects of cultural patrimony and human remains or funerary objects where there are no lineal descendants, the right of possession shall be in the Indian tribe or Native Hawaiian family or organization on whose land the items were found or the Indian tribe or Native Hawaiian family or organization which has the closest cultural affiliation to those items. The substitute amendment also provides that for those human remains or objects discovered on Federal lands where the cultural affiliation cannot be reasonably ascertained, the right of possession shall be in the Indian tribe or Native Hawaiian organization that aboriginally occupied the area where the items were discovered. This section of the bill requires an Indian tribe or Native Hawaiian community or organization to state a claim for the right of possession to objects found outside their traditional or present day lands.

The Committee recognizes that in some areas of the country several Indian tribes may have to claim human remains or objects found on their aboriginal lands. The Committee also recognizes that there may be circumstances where human remains or objects found on one Indian tribe's lands may be culturally affiliated with a different Indian tribe. In these situations, where more than one Indian tribe makes a claim for the right of possession, the Committee intends that a determination of the right of possession shall be based on the best available evidence given the totality of the circumstances. Determinations of the right of possession should be made pursuant to the regulations promulgated by the Secretary in consultation with the Review Committee. The Committee contemplates that the Review Committee could serve as a useful mediator in resolving a dispute between Indian tribes regarding the ownership, control, or right of possession of human remains or objects. In addition, the Committee intends this section to allow for the negoti-

ation of agreements between Indian tribes that provide for mutually acceptable dispositions for human remains or objects over which there are competing claims of the right of possession.

#### EXCAVATION PERMITS

The substitute amendment establishes a permit process for the excavation or removal of Native American human remains or objects from Federal or tribal lands. The process established under this Act would require any party uncovering human remains or objects on Federal or tribal lands to provide notice to the Secretary of the particular Federal Department with authority over those Federal lands and to the appropriate Indian tribe. After notice has been received the party must cease the activity and make all reasonable efforts to protect the remains or objects before resuming the activity. The activity may resume 30 days after notice has been received. An Indian tribe or Native Hawaiian organization may, after notification, determine the appropriate disposition of any remains or objects found on these lands. Under this notification process, an Indian tribe may determine the appropriate disposition of any remains or objects found on Federal or tribal lands without significant interruption of the activity. The substitute amendment also provides that the Secretary of any department or head of any agency of the United States may delegate his responsibilities under this section to the Secretary of the Interior where the Secretary consents to such delegation.

The Committee intends this section to provide for a process whereby Indian tribes and Native Hawaiian organizations have an opportunity to intervene in development activity on Federal or tribal lands in order to safeguard Native American human remains, funerary objects, sacred objects or objects of cultural patrimony. Under this section, Indian tribes or Native Hawaiian organizations would be afforded 30 days in which to make a determination as to the appropriate disposition for these human remains or objects. The Committee does not intend this section to operate as a bar to the development of Federal or tribal lands on which human remains or objects are found. Nor does the Committee intend this section to significantly interrupt or impair development activities on Federal or tribal lands. Finally, the Committee intends the notice and permit provisions of this section to be fully consistent with the provisions of the Archaeological Resources Protection Act, 16 U.S.C. § 470aa et. seq.

#### UNLAWFUL ACTIONS

The substitute amendment also amends title 18 of the United States Code to establish criminal penalties for the sale, purchase, use for profit, or transportation for sale or profit of Native American human remains without the right of possession to those remains. It would further amend title 18 of the United States Code to establish criminal penalties for the sale, purchase, use for profit, or transportation for sale or profit of funerary objects, sacred objects or objects of cultural patrimony which were obtained in violation of this Act. A violation of either section could subject the violator to a fine or imprisonment of up to 12 months or both. The criminal pen-

alties for sale, purchase, use for profit, or transportation for sale or profit of funerary objects, sacred objects, or objects of cultural patrimony are prospective in nature so that objects which were obtained prior to enactment are not covered by these provisions.

The criminal penalties for sale, purchase, use for profit, or transportation for sale or profit of the human remains of a Native American shall apply to any Native American human remains, wherever they have been obtained, where the party does not have the right of possession to those human remains as defined in this Act. The Committee intends these provisions to act as a deterrent to unscrupulous dealers who traffic in Native American human remains or objects unlawfully removed prior to the enactment of this Act from Federal lands or tribal lands. The Committee believes that this section in combination with other penalties already enacted into law will help stem the black market trade in unlawfully obtained Native American artifacts and protect Federal or tribal lands from further looting.

#### INVENTORY OF NATIVE AMERICAN COLLECTIONS

The substitute amendment would require Federal agencies and museums receiving Federal funds to conduct an inventory which identifies the cultural affiliation of remains and objects within their collections. The substitute amendment would require these inventories to be completed within five years from the date of enactment. The substitute amendment provides that once a Federal agency or museum makes a determination of cultural affiliation of human remains or objects in its possession, the amendment would require the agency or museum to provide notice to all culturally affiliated Indian tribes or Native Hawaiian organizations. Upon notification, an Indian tribe or Native Hawaiian organization may make a request for the return of such remains or objects.

The substitute amendment provides that once the cultural affiliation of an object is determined and an Indian tribe or Native Hawaiian organization makes a request for its return, then a museum may refuse to return those items for which they have the right of possession as defined in the Act. A Federal agency may refuse to return those objects which are necessary for the completion of a scientific study of major benefit to the United States and to which it has the right of possession. The substitute amendment provides that any agency which fails to comply with the provisions of the Act shall not be eligible to receive Federal funding for the period of the non-compliance. The substitute amendment also provides that a museum that has made a good faith effort to carry out an inventory and identification and has been unable to complete the process within five years may appeal to the Secretary of the Interior for an extension of the time requirements established in the Act.

The Committee believes that the inventory and notice process should allow for the cooperative exchange of information between Indian tribes or Native Hawaiian organizations and museums regarding objects in museum collections. The Committee recognizes that there will be a significant number of Native American human remains, funerary objects, sacred objects and objects of cultural patrimony, where the cultural affiliation can be reasonably ascer-

tained given the totality of the circumstances surrounding the acquisition of the remains or objects. The determination of cultural affiliation shall be based on a preponderance of the evidence. The Committee intends the inventory and notification process established under this section to provide an opportunity for the museum to provide notice to Indian tribes and Native Hawaiian organizations of culturally affiliated remains and objects identified throughout the process. The Committee does not intend the notice requirement in this section to be interpreted to allow Federal agencies and museums to wait until after completion of the entire inventory process before providing notice to Indian tribes or Native Hawaiian organizations.

The Committee also recognizes that there are a significant number of Native American human remains, funerary objects and sacred objects for which the cultural affiliation may not be readily ascertainable. The Committee does not intend this Act to require museums or Federal agencies to conduct exhaustive studies and additional scientific research to conclusively determine the cultural affiliation of human remains or objects within their collections. The Committee recognizes that the inventory process established under this Act could work some hardship on museums which do not possess the resources to inventory their Native American collections. The Committee intends the provisions for an extension of the five year deadline for the inventory process to alleviate any hardship on such museums.

#### REPATRIATION

The substitute amendment provides that if the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then upon the request of the Indian tribe or Native Hawaiian organization such remains and objects shall be expeditiously returned. The Committee intends that the repatriation of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony shall be accomplished in consultation with the Indian tribe or Native Hawaiian organization that made the request. The Committee intends that this process allow for Indian tribes or Native Hawaiian organization to present additional evidence to establish the cultural affiliation of objects or remains in museum collections. Although this section requires expeditious return of culturally affiliated objects and remains to the particular Indian tribe or Native Hawaiian organization, the Committee recognizes that Indian tribes and museums may agree to a mutually acceptable alternative to repatriation. The Committee intends that this process will facilitate the negotiation of agreements as to appropriate disposition of objects and remains in museum collections.

The substitute amendment also provides that a museum may refuse to return Native American human remains, funerary objects, sacred objects and objects of cultural patrimony, where the cultural affiliation has been established and the culturally affiliated Indian tribe or Native Hawaiian organization has requested its return, if the museum has the right of possession to such re-

mains or objects. A museum must establish the right of possession by a preponderance of the evidence. If a museum fails to satisfy the burden of proof, then such remains or objects shall be expeditiously returned. The substitute amendment further provides that a Federal agency may refuse to return Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony, where the cultural affiliation has been established and the culturally affiliated Indian tribe or Native Hawaiian organization has requested its return, if the Federal agency establishes that the remains or objects are indispensable for the completion of a specific scientific study the outcome of which would be of major benefit to the United States and that the Federal agency has the right of possession to such remains or objects. Such remains or objects shall be returned no later than 90 days after the completion of the scientific study.

#### REVIEW COMMITTEE

The substitute amendment provides for the establishment of a review committee to monitor and review the implementation of the inventory and identification process. The review committee will be responsible for facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, museums, Federal agencies, and lineal descendants. The Committee intends the Review Committee to serve the very important function of facilitating the resolution of disputes between claimants and disputes between Indian tribes and museums as to the determination of cultural affiliation, right of possession or the character of the items or objects, and disputes as to the appropriate disposition of human remains or objects. The Committee intends the review committee to participate in discussions between Indian tribes and museums in the development of agreements which provide for the disposition of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony. The Committee intends that the findings of the review committee shall not be binding on the parties but that the review committee shall be an advisory committee which makes recommendations to the Secretary and helps facilitate the resolution of disputes regarding the provisions of this Act. The review committee shall submit an annual report to the Congress on the progress made and any problems encountered in implementing the inventory and repatriation provisions of this Act. The substitute amendment provides that the review committee shall review museum requests for extensions of time to complete inventories and make recommendations to the Secretary on such requests.

#### GRANTS

The amendment also provides that the Secretary of the Interior is authorized to make grants to Indian tribes or Native Hawaiian organizations to assist such groups in the repatriation of Native American human remains, funerary objects, sacred objects and objects of cultural patrimony. The Secretary of the Interior is also authorized to make grants to museums to assist them in the inventory and identification process established under this Act. The Com-

mittee recognizes that the inventory and identification process may work a hardship on those museums that lack adequate resources to inventory their collections. In order to prevent this hardship, the Committee intends this grant program to provide resources to allow a museum to prepare the inventories required under this Act. The Committee intends that grants to be awarded by the Secretary to Indian tribes or Native Hawaiian organizations would be used for the costs associated with repatriating human remains or objects to Indian tribes. The Committee recognizes that some Indian tribes have expressed interest in curating objects on the reservation once they have been returned. The Secretary may award a grant under this provision to an Indian tribe for the costs of curating certain objects which have been repatriated under this Act.

#### SAVINGS PROVISIONS/ENFORCEMENT

The substitute amendment provides for alternative dispositions of human remains and objects where the Federal agency or museum and the affected Indian tribe or Native Hawaiian organization reach an agreement. In those instances in which the parties cannot reach an agreement regarding the appropriate disposition of Native American human remains, funerary objects, sacred objects and objects of cultural patrimony, the amendment provides that any person may bring an action in Federal court alleging a violation of this Act. The Committee intends this section to provide an avenue after the review committee process for any party, including an Indian tribe, Native Hawaiian organization, museum or agency, to bring a cause of action in the Federal district court alleging a violation of this Act. The Committee intends the Federal District Court to be the forum for a dispute between the parties regarding a determination of cultural affiliation, right of possession, or the character of an article or object in the possession of a museum or Federal agency.

#### LEGISLATIVE HISTORY

S. 1980 was introduced on November 21, 1989 by Senator Inouye and was referred to the Select Committee on Indian Affairs. The Committee held a hearing on S. 1980 on May 14, 1990. On August 1, 1990, Senator McCain offered an amendment in the nature of a substitute to S. 1980. The bill was considered by the Select Committee in an open business session on August 1, 1990, and was ordered reported as amended.

#### COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In open business session on August 1, 1990, the Select Committee on Indian Affairs, by a unanimous vote of a quorum present, ordered S. 1980, as amended, reported with the recommendation that the Senate adopt the bill.

## SECTION-BY-SECTION SUMMARY ANALYSIS

### SECTION 1—SHORT TITLE

Section (1) sets out the short title of the bill as the "Native American Grave Protection and Repatriation Act".

### SECTION 2—FINDINGS

Section (2) of this bill sets out the findings of the Congress.

### SECTION 3—DEFINITIONS

Section (3) of this bill sets out the definitions used in the Act.

### SECTION 4—OWNERSHIP

Subsection (a) of this section provides that for any human remains of a Native American or any Native American funerary objects which are excavated or discovered on Federal or tribal land after the enactment of this Act, the lineal descendants of the Native American shall have the ownership, control, or right of possession. It further provides that for human remains and Native American funerary objects where the lineal descendants of the Native American cannot be determined and for sacred objects and objects of Native American cultural patrimony the ownership, control or right of possession shall be in the Indian tribe or the Native Hawaiian organization on whose land the remains or objects are found or in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation.

Subsection (b) provides that the Secretary shall prescribe regulations regarding the disposition of Native American human remains and funerary objects, sacred objects and objects of cultural patrimony not claimed under subsection (a) in consultation with the review committee established under section 5 and Indian tribes and Native Hawaiian organizations.

Subsection (c) provides that nothing in this section shall prevent any Indian tribe or Native Hawaiian organization from expressly relinquishing title to or control over any human remains, funerary objects, sacred objects or objects of cultural patrimony.

### SECTION 5—EXCAVATIONS

Subsection (a) establishes a permit process for the excavation or removal of human remains, funerary objects, sacred objects, or objects of cultural patrimony from Federal or tribal lands. It provides that such remains or objects may only be excavated or removed after notice to and upon the consent of the lineal descendants or the appropriate Indian tribe or Native Hawaiian organization. It further provides that a permit issued under this section may only be issued upon proof of notice and consent under this Act.

Subsection (b) provides that any person who knows or has reason to know that he or she has discovered human remains, funerary objects, sacred objects or objects of cultural patrimony on Federal or tribal lands shall notify the Secretary of the agency with primary management authority over those lands as well as the appropriate Indian tribe or Native Hawaiian organization. It further requires any person to cease the activity in the area of discovery and

to make all reasonable efforts to protect said remains and objects before resuming such activity. The activity may resume 30 days after certification that the notice provided for under this section has been received.

Subsection (b) also provides that the responsibilities under this section may be delegated to the Secretary of the Interior by the Secretary of any department or the head of any Federal agency, if the Secretary of the Interior consents.

#### SECTION 6—UNLAWFUL ACTIONS

Subsection (a) amends Chapter 53 of title 18 of the United States Code to provide a new section 1166. Section 1166(a) provides that whoever knowingly sells, purchases, uses for profit, or transport for sale or profit the human remains of a Native American without the right of possession to those remains shall be subject to a fine or imprisoned not more than 12 months or both. Section 1166(b) provides that whoever knowingly sells, purchases, uses for profit, or transports for sale or profit Native American funerary objects, sacred objects or objects of cultural patrimony obtained in violation of this Act shall be subject to a fine or imprisoned not more than 12 months or both.

#### SECTION 7—INVENTORY OF NATIVE AMERICAN COLLECTIONS

Subsection (a) requires each Federal agency and museum receiving Federal funds that has possession or control over any human remains or funerary objects of a Native American, or any Native American sacred objects or cultural patrimony to compile an inventory of objects in its possession and control and to identify the geographic and cultural affiliation of the objects to the extent possible.

Subsection (b) sets out the requirements for inventories and identifications required under subsection (a). The inventory and identification shall be conducted in consultation with Indian tribes and must be completed within five years of enactment. The identifications shall be based on the best available historic and scientific documentation. The inventories and identifications shall be completed in consultation with the Indian tribes and Native Hawaiian organizations. The Review Committee established under Section 6 shall have access to the inventories and identifications while they are being conducted and afterward.

Subsection (d) provides that a museum that is unable to complete the inventory and identification process within the five year time period can appeal to the Secretary for an extension of time upon a showing of good faith.

Subsection (e) provides that if the Native American cultural affiliation of an item is established in the identification process by a preponderance of the evidence then the Indian tribe or Native Hawaiian organization shall be notified within 6 months after the completion of the inventory and a copy of the notice shall be sent to the Secretary who shall publish each notice in the Federal Register. Under this section, notice may be provided to the Indian tribe or Native Hawaiian organization prior to the completion of the entire inventory process.

**SECTION 8—REPATRIATION**

Subsection (a) provides that if the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then upon the request of the tribe or Native Hawaiian organization or the lineal descendants of the Native American, they shall be expeditiously returned. If the cultural affiliation of remains or objects is subsequently established by an Indian tribe or Native Hawaiian organization then upon the request of the Indian tribe or Native Hawaiian organization or lineal descendant such objects shall be expeditiously returned.

Subsection (b) provides that if a lineal descendant, Indian tribe or Native Hawaiian organization requests the return of culturally affiliated remains or objects, the Federal agency or museum shall expeditiously return such remains or objects unless they are indispensable for the completion of a specific scientific study of major benefit to the United States and the museum or agency has the right of possession of said remains or objects.

Subsection (c) provides that once an Indian tribe, Native Hawaiian organization or lineal descendant requests the return of culturally affiliated remains or objects, the museum must prove by a preponderance of the evidence that the museum has the right of possession to such remains or objects. If a museum fails to satisfy the burden of proof, then such remains or objects shall be expeditiously returned.

Subsection (d) provides that the museum shall share information with the known lineal descendant, Indian tribe or Native Hawaiian organization regarding an item in its possession to assist in establishing the cultural affiliation of the remains or objects.

Subsection (e) provides that any museum that fails to comply with the provisions of this section shall not be eligible to receive any Federal funds for the period of non-compliance.

**SECTION 9—REVIEW COMMITTEE**

Subsection (a) of this section provides that the Secretary shall establish a review committee within 120 days after enactment of this Act to monitor and review the implementation of the inventory and identification process.

This section provides a description of the composition of the committee and the duties and responsibilities of the committee. It provides that the review committee shall review requests for extensions for the completion of the inventory process, facilitate the resolution of any dispute among Indian tribes, Native Hawaiian organizations, Federal agencies, museums or lineal descendants relating to the return of remains or objects, and compile an inventory of unidentifiable human remains that are in the possession or control of Federal agencies or museums.

This section provides that the review committee shall issue a preliminary report on the inventory no later than 3 years after the date the committee was established. The committee shall make a final report and recommendations to the Congress and the President no later than 6 years after the date the committee was established. The committee shall terminate 120 days after the Secretary

certifies in a report to the Congress that the work of the committee is completed.

#### SECTION 10—GRANTS

This section provides that the Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations to assist such groups in the repatriation of remains and objects and to make grants to museums to assist museums in the inventory and identification process under this Act.

#### SECTION 11—SAVINGS PROVISIONS

This section provides that nothing in this Act shall be construed to limit the authority of any Federal agency or museum to return or repatriate any remains or objects to Indian tribes, Native Hawaiian organizations or lineal descendants or to enter into agreements for the disposition of control over objects covered by this Act. It further provides that nothing in this Act shall be construed to limit any substantive or procedural right secured to a Native American or an Indian tribe or Native Hawaiian organization or limit the application of any State or Federal law pertaining to theft or stolen property.

#### SECTION 12—REGULATIONS

This section authorizes the Secretary of the Interior to promulgate regulations to carry out this Act.

#### SECTION 13—AUTHORIZATION OF APPROPRIATIONS

This section authorizes the appropriation of such sums as are necessary to carry out the provisions of this Act.

#### SECTION 14—ENFORCEMENT

This section provides that the United States District Court shall have jurisdiction over any action brought alleging a violation of this Act and may issue such orders as are necessary to enforce the provisions of this Act.

#### COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 1980 as provided by the Congressional Budget Office, is set forth below.

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
Washington, DC, September 21, 1990.

HON. DANIEL K. INOUE,  
*Chairman, Select Committee on Indian Affairs,*  
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1980, the Native American Grave Protection and Repatriation Act, as ordered reported by the Select Committee on Indian Affairs, August 1, 1990. CBO estimates that enactment of this legislation would cost the federal government between \$20 million and \$55 million over five years, assuming appropriation of the neces-

sary funds. The range of total estimated costs is wide primarily because of uncertainty about the cost of compiling an accurate inventory of Native American human remains.

S. 1980 would regulate ownership, trade and disposition of Native American remains, burial objects, and objects of sacred or cultural significance. Human remains or funerary objects found on federal land would be returned to the most closely affiliated tribes, permits would be required for excavation of remains found on federal or tribal lands, and it would be illegal to trade in Native American remains or funerary objects.

S. 1980 also would require that federal agencies and museums that receive federal funding create inventories of Native remains and objects covered by the bill, notify tribes of their holdings and return objects to tribes upon request. The bill would require that inventories be completed within five years of enactment. A review committee would be established to oversee the process of repatriation, mediate disputes and review museums' progress in completing inventories. The bill would authorize the appropriation of such sums as are necessary for grants to assist museums in compiling inventories and to assist tribes in pursuing their claims. Although no funds are specifically authorized for federal agencies that have collection of remains and other objects, the estimated costs to these agencies (primarily the Department of the Interior and the Department of the Army) are included in this estimate. The bill exempts the Smithsonian, which is covered by the National Museum of the American Indian Act.

The main costs from enactment of S. 1980 would be the cost to federal agencies of preparing the inventories required by the bill and the cost of grants to museums to assist them in carrying out inventories. To some extent, the total cost is discretionary—the more funds made available, the more accurate and comprehensive will be the information collected by museums. This estimate represents the cost of compiling an initial inventory based on existing information. Two variables determine the cost: the number of remains and associated objects and the cost to inventory each object. This estimate assumes that museums and federal agencies hold between 100,000 and 200,000 Native American remains and 10 million to 15 million other objects that would have to be reviewed.

The cost of preparing an accurate inventory of the origin and tribal affiliation of human remains can vary considerably depending on the information already available, the amount of research needed to accurately determine tribal affiliation and the contentiousness surrounding individual pieces. There is considerable disagreement about the nature of the inventory required by S. 1980, and widely varied estimates of costs. Based on the experience of museums that have already repatriated remains, we assume costs of \$50 to \$150 per remain, or a total cost of between about \$5 million and \$30 million over five years. This estimate includes the costs of an inventory of museums' collections, as well as a review of existing studies and research to determine origin. More extensive studies costing up to \$500-\$600 per remain may be necessary to determine the origin of some of the remains; however, such studies generally are not required by S. 1980.

Other objects covered by S. 1980 are less costly to inventory and identify. CBO estimates cost of about \$10 million to \$15 million over five years for museums to prepare inventories of their archaeological collections based on existing information and to identify objects which may be of interest to tribes. Finally, S. 1980 would provide grants to tribes to assist them in the repatriation of the remains and objects covered in the bill. This effort could include assistance in pursuing tribal claims as well as assistance in repatriating the remains. CBO estimates costs of \$5 million to \$10 million over five years for these grants.

As operators of about one-third of all museums, state and local governments could face costs from enactment of S. 1980. Assuming appropriation of adequate amounts by the federal government, however, these costs would be covered by federal grants made available under the bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Marta Morgan, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER,  
*Director.*

#### REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 1980 will have minimal regulatory or paperwork impact.

#### EXECUTIVE COMMUNICATIONS

The only communications received by the Committee from the Executive Branch regarding S. 1980 were in the form of testimony from the Department of the Interior and a letter from the Department of Justice. Set forth below is the testimony of Mr. Jerry L. Rogers, Associate Director, Cultural Resources, National Park Service, Department of the Interior at the May 14, 1990 hearing of the Select Committee on Indian Affairs and a letter from Mr. Bruce C. Navarro, Deputy Assistant Attorney General, Department of Justice dated August 1, 1990.

#### STATEMENT OF JERRY L. ROGERS, ASSOCIATE DIRECTOR, CULTURAL RESOURCES, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE SELECT COMMITTEE ON INDIAN AFFAIRS, ON S. 1021 AND S. 1980, MAY 14, 1990

Mr. Chairman, I appreciate the opportunity to appear before the committee to discuss S. 1021 and S. 1980's, treatment of human remains, funerary objects, sacred objects, and objects of Native American patrimony from archeological sites.

The Administration has not had an opportunity to thoroughly review the draft substitute for S. 1980 recently developed by committee staff. Thus, the Administration cannot take a position on the legislation until an interagency review is completed. A report

outlining the Administration's views will be available early this summer. I would note that in March, Secretary Lujan directed the National Park Service to develop a new policy and revise an existing guideline on the treatment of human remains and funerary objects. The Park Service has been working informally at the staff level for over a year on a review of the current policy and guideline. This informal review has included meetings with representatives of Indian groups, as well as with archeological and museum groups.

Secretary Lujan wants a more sensitive treatment of archeological human remains, funerary objects, sacred objects, and objects of Native American cultural patrimony by managers of Interior lands. He wants other Federal, State and local agencies that look to the Secretary of the Interior for guidance to adopt similar sensitive approaches. The specifics of the Interior policy and guidelines remain to be defined following more detailed consultation with Indian, archeological, museum, and other interested groups. However, the Secretary has indicated that he wants to affirm the rights of Tribes to determine the treatment that is afforded human remains and associated objects that are affiliated clearly with the Tribe.

This concludes my prepared remarks, Mr. Chairman. I would be pleased to answer any questions you may have.

U.S. DEPARTMENT OF JUSTICE,  
OFFICE OF LEGISLATIVE AFFAIRS,  
Washington, DC, August 1, 1990.

HON. DANIEL K. INOUE,  
Chairman, Select Committee on Indian Affairs,  
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter presents the views of the Department of Justice on an amendment proposed by Senator McCain in the nature of a substitute to S. 1980, the "Native American Grave Protection and Repatriation Act." The McCain bill would protect and provide for repatriation of Native American human remains, objects associated with those remains, and other objects of Native American culture.

On the policy goals and efficacy of this bill, we defer to the federal agencies responsible for administration of Native American programs, particularly the Department of the Interior. As to the legal issues involved, however, we believe that S. 1980—in its current form—may raise constitutional concerns.

1. *Repatriation.*—Section 4(c)(3)(A) of S. 1980 would require the Secretary of the Interior to "prescribe regulations . . . that provide for the repatriation to the appropriate Native American group" of protected objects "which may have been excavated under the authority of any Federal law or under any permit issued by a federal agency." (Emphasis added.) As currently drafted, the language of this section is unclear on whether repatriation would be required of protected objects excavated in the past pursuant to federal permits. The use of the passive voice—"may have been excavated"—might be interpreted to suggest such retrospective application.

If that is the intent of Congress, then section 4(c)(3)(A) would implicate the Takings Clause of the Fifth Amendment, which pro-

vides that "private property" shall not be taken for "public use" without the payment of "just compensation" to the owner. Depending upon the circumstances, protected objects excavated by a private party pursuant to a federal permit might constitute "private property" within the meaning of the Takings Clause. The Antiquities Act of 1906, for example, provides that a permit shall be required for "excavation of archaeological sites" on federal lands. 16 U.S.C. § 432. As a condition for receipt of such a permit, the applicant must provide for "permanent preservation [of excavated objects] in public museums." *Id.* A private party who has acted in accordance with a permit under the Antiquities Act would have a strong argument that excavated items displayed in compliance with the conditions set by the permit constitute the "private property" of that party.

This problem could be resolved by an amendment to section 4(c)(3)(A) to clarify that the repatriation regulations required by S. 1980 shall apply only prospectively. Alternatively, section 4(c)(3)(A) might specifically provide that any protected object in which a private party has "legal title" would not be subject to repatriation. Such an amendment would bring section 4(c)(3)(A) into line with section 5(c)(1) of the bill, which would permit private museums to resist repatriation upon a showing of "legal title" to the requested object. Under either suggested amendment, "private property" would not be taken within the meaning of the Takings Clause.

Absent such revisions, further issues would arise under the "public use" and "just compensation" requirements of the Takings Clause. The courts generally will defer to Congress' determination of what constitutes a "public use" of private property. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984). The Government "does not itself have to use property to legitimate the taking," *id.* at 244; transfers of property from one private party to another have been upheld when designed by the legislature to further a public purpose, see e.g., *id.* Here, however, Congress has inserted no findings in S. 1980 to explain how the transfer of protected objects from private parties to Native American groups will advance the public good. Should Congress wish to reach private property through S. 1980, it would be advisable that such findings be included.

Finally, the Takings Clause requires that "just compensation" be paid for the taking of private property. The absence of a compensation procedure in S. 1980 would not prevent a private party from obtaining payment in the event that a taking is effected. Under the Tucker Act, a private party may seek compensation in the Claims Court. 28 U.S.C. § 1491(a) (jurisdiction to resolve claims against the United States based upon the Constitution). Such compensation payments might significantly increase the cost of repatriation legislation.

**2. Appointment of Review Committee.**—Under section 6(a)(2) of S. 1980, the Secretary of the Interior would be required to establish a "review committee" that "shall be composed of 7 members, 4 of whom shall be appointed from nominations submitted by Native American groups." The committee shall, *inter alia*, "review[] upon the request of any affected party, any finding relating to" the iden-

tification of a protected object or the return of such an object. § 6(a)(3)(B).

As drafted, the bill would not accord binding legal force to the committee's review. Indeed, section 6(b)(5) states that the committee shall not have authority to transfer "legal title" to any protected object. Should Congress intend otherwise, section 6(a)(2) of the bill would need to be amended to conform the procedures for appointment of the review committee to the Constitution's Appointments Clause. See U.S. Const., Art. II, § 2, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 126, 141 (1976) (officials exercising "significant authority pursuant to the laws of the United States" must be appointed pursuant to the Appointments Clause). While the Appointments Clause permits Congress to vest the appointment of "inferior Officers" in the President alone, we do not believe that it sanctions limitations upon the power of appointment by reference to a fixed list of nominees, because such a requirement would permit the creator of the list—here, Native American organizations—to share in the appointment power.

3. *Access Requirement.*—Section 6(a)(5) of H.R. 5237 also concerns the review committee. This section would require the Secretary of the Interior to "ensure" that the committee will have "full and free access" to any protected objects necessary for their review. In its current form, the language of section 6(a)(5) might implicate the Takings Clause in particular situations. A court will ask whether the particular intrusion "unreasonably impair[s]" the economic value of private property. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). In this "ad hoc inquiry," the court will regard several factors as "particularly significant—the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982).

Here, a requirement of "full and free" access might be read broadly to authorize the sequestration of protected objects that would otherwise be part of a major exhibition in a private museum. Although the result would turn largely upon the particular facts, a private museum would have a substantial argument that such an intrusion constitutes a taking and, thus, must be accompanied by the payment of just compensation. To avoid such a situation, we recommend amendment of section 6(a)(5) to provide merely for "reasonable access" to protected items by the review committee.

The Office of Management and Budget has advised the Department that it has no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

BRUCE C. NAVARRO,  
*Deputy Assistant Attorney General.*

#### CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that enactment of S. 1980 will result in the following changes in existing law:

Chapter 53 of Title 18 of the United States Code is amended by adding at the end thereof section 1166 (a) which provides that 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 shall be subject to a fine or imprisoned not more than 12 months or both, and section 1166 (b) which provides that whoever knowingly sells, purchases, uses for profit, or transports for sale or profit Native American funerary objects, sacred objects or objects of cultural patrimony obtained in violation of this Act shall be subject to a fine or imprisoned not more than 12 months or both.

○

**NATIVE AMERICAN GRAVE PROTECTION AND REPARATION ACT**

Mr. CAMPBELL, of Colorado. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 5217) to provide for the protection of Native American graves, and for other purposes, as amended.

The Clerk read as follows:

H.R. 5217

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Native American Grave Protection and Reparation Act".

**SEC. 2. DEFINITIONS.**

For purposes of this Act, the terms—

- (1) "burial site" means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited;
- (2) "cultural affiliation" means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group;
- (3) "cultural item" means human remains and—

(A) "associated funerary objects" which shall mean 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 or 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;

(B) "unassociated funerary objects" which shall mean 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;

(C) "sacred objects" which 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 descendants; and

(D) "cultural patrimony" which 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;

(4) "Federal agency" means any department, agency, or instrumentality of the United States and shall include, except as may be inconsistent with the provisions of P.L. 101-185, the Smithsonian Institution;

(6) "Federal lands" means any land other than tribal lands which are controlled or owned by the United States;

(6) "Iki Kaulana I Na Kupuna O Hawaii" means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues;

(7) "Indian tribe" shall have the meaning given such term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b);

(8) "museum" means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, native American cultural items, but does not include any Federal agency;

(9) "Native American" means of, or relating to, a tribe, people, or culture that is indigenous to the United States;

(10) "Native Hawaiian" means any individual who is a descendant of the aboriginal people who, prior to 1776, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii;

(11) "Native Hawaiian organization" means any organization which—

(A) serves and represents the interests of Native Hawaiians;

(B) has as a primary and stated purpose the provision of services to Native Hawaiians; and

(C) has expertise in Native Hawaiian Affairs.

shall include the Office of Hawaiian Affairs and Iki Kaulana I Na Kupuna O Hawaii and

(12) "Office of Hawaiian Affairs" means the office of Hawaiian Affairs established by the constitution of the State of Hawaii;

(13) "Right of possession" means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The ethical acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to

give right of possession of that object, unless the phrase so defined would, as applied in Section 9(c), result in a Fifth Amendment taking by the United States as determined by the United States Claims court pursuant to 28 U.S.C. 1491 in which event the "right of possession" shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

(14) "Secretary" means the Secretary of the Interior.

(15) "tribal land" means—

- (A) all lands within the exterior boundaries of any Indian reservation;
- (B) all dependent Indian communities;
- (C) lands conveyed to, or subject to an Indian conveyance of, Native Corporations pursuant to the Alaska Native Claims Settlement Act; and
- (D) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 96-3.

#### SEC. 4. OWNERSHIP.

(a) **NATIVE AMERICAN HUMAN REMAINS AND OBJECTS.**—The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after the date of enactment of this Act shall be (with priority given in the order listed)—

- (1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or
- (2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony—

(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;

(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or

(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission of the United States Court of Claims as the aboriginal land of some Indian tribe—

(1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects; or

(2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

(b) **UNCLAIMED NATIVE AMERICAN HUMAN REMAINS AND OBJECTS.**—Native American cultural items not claimed under subsection (a) shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 4. Native American groups, representatives of museums and the scientific community.

(c) **INTENTIONAL EXCAVATION AND REMOVAL OF NATIVE AMERICAN HUMAN REMAINS AND**

**OBJECTS.**—The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if—

(1) such items are excavated or removed pursuant to a permit issued under section 4 of the Archaeological Resources Protection Act of 1979 (93 Stat. 731; 16 U.S.C. 4708a) which shall be consistent with this Act;

(2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b); and

(4) proof of consultation or consent under paragraph (3) is shown.

(d) **INTENTIONAL DISCOVERY OF NATIVE AMERICAN REMAINS AND OBJECTS.**—(1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after the date of enactment of this Act shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable. If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. The activity may resume after a reasonable amount of time and following notification under this subsection.

(2) The disposition of and control over any cultural items excavated or removed under this subsection shall be determined as provided for in this section.

(3) If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary with respect to any land managed by such other Secretary or agency head.

(e) **REQUIREMENTS.**—Nothing in this section shall prevent the government body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains or title to or control over any funerary object, or sacred object.

#### SEC. 4. ILLEGAL TRAFFICKING.

(a) **ILLEGAL TRAFFICKING.**—Chapter 83 of title 18, United States Code, is amended by adding at the end thereof the following new section:

**"SEC. 1174. 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, 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, in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both."

(b) **TITLE OF CHAPTERS.**—The table of contents for chapter 83 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"1170. Illegal Trafficking in Native American Human Remains and Cultural Items."

#### SEC. 5. INVENTORY FOR HUMAN REMAINS AND ASSOCIATED FUNERARY OBJECTS.

(a) **IN GENERAL.**—Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such items.

(b) **REQUIREMENTS.**—(1) The inventories and identifications required under subsection (a) shall be—

(A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;

(B) completed by not later than the date that is 5 years after the date of enactment of this Act; and

(C) made available both during the time they are being conducted and afterward to review committees established under section 4.

(2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or Federal agency shall supply additional available documentation to supplement the information required by subsection (b) of this section. The term "documentation" means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and this Act shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.

(c) **EXTENSION OF TIME FOR INVENTORY.**—Any museum which has made a good faith effort to carry out an inventory and identification under this section, but which has been unable to complete the process, may appeal to the Secretary for an extension of the time requirements set forth in subsection (b)(1)(B). The Secretary may extend such time requirements for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and identification process.

(d) **NOTIFICATION.**—(1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.

(3) The notice required by paragraph (1) shall include information—  
(A) which identifies each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition;

(B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and

(C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.

(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

(e) Inventory.—For the purposes of this section, the term "inventory" means a simple itemized list that summarizes the information called for by this section.

SEC. 4. SUMMARY FOR UNASSOCIATED FUNERARY OBJECTS, SACRED OBJECTS, AND CULTURAL PATRIMONY.

(A) In General.—Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum. The summary shall describe the scope of the collection, kinds of objects included, references to geographical location, means and period of acquisition and cultural affiliation, where really ascertainable.

(b) Requirements.—The summary required under subsection (a) shall be—  
(A) in lieu of an object-by-object inventory;

(B) followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and

(C) completed by not later than the date that is 3 years after the date of enactment of this Act.

(2) Upon request, Indian tribes and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

SEC. 5. REPATRIATION.

(b) REPATRIATION OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS POSSESSED OR CONTROLLED BY FEDERAL AGENCIES AND MUSEUMS.—(1) If, pursuant to section 4, the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (c) of this section, shall expeditiously return such remains and associated funerary objects.

(3) If, pursuant to section 4, the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects or objects of cultural patri-

mony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to subsections (b), (c) and (e) of this section, shall expeditiously return such objects.

(3) The return of cultural items covered by this Act shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.

(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 4, or the summary pursuant to section 4, or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (c) and, in the case of unassociated funerary objects, subsection (c), such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

(5) Upon request and pursuant to subsections (b), (c) and (e), sacred objects and objects of cultural patrimony shall be expeditiously returned where—  
(A) the requesting party is the direct lineal descendant of an individual who owned the sacred object;

(B) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization; or

(C) the requesting Indian tribe or Native Hawaiian organization can show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the lineal descendants, upon notice, have failed to make a claim for the object under this Act.

(b) Scientific Study.—If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of cultural items affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned no later than 30 days after the date on which the scientific study is completed.

(c) STRAINING OF REPRESENTATION.—If a known lineal descendant or an Indian tribe or Native Hawaiian organization request the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this Act and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

(d) STRAINING OF REPRESENTATION BY FEDERAL AGENCIES AND MUSEUMS.—Any Federal agency or museum shall share what information it does possess regarding the object in question with the known lineal descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section.

(e) CONGRESSIONAL CLAIMS.—Where there are multiple requests for repatriation of any cultural item and, after complying with the

requirements of this Act, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this Act or by a court of competent jurisdiction.

(f) MUSEUMS.—(1) Any museum which repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this Act.

SEC. 6. REVIEW COMMITTEE.

(a) ESTABLISHMENT.—Within 120 days after the date of enactment of this Act, the Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 4, 5, and 7.

(b) MEMBERSHIP.—(1) The Committee established under subsection (a) shall be composed of 7 members.

(A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 3 of such persons being traditional Indian religious leaders.

(B) 3 of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations and

(C) 1 who shall be appointed by the Secretary from a list of persons developed and consented to by all of the members appointed pursuant to subparagraphs (A) and (B).

(3) The Secretary may not appoint Federal officers or employees to the committee.

(4) In the event vacancies shall occur, such vacancies shall be filled by the Secretary in the same manner as the original appointment within 90 days of the occurrence of such vacancy.

(4) Members of the committee established under subsection (a) shall serve without pay, but shall be reimbursed at a rate equal to the daily rate for GS-18 of the General Schedule for each day (including travel time) for which the member is actually engaged in committee business. Each member shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

(c) REPRODUCTION.—The committee established under subsection (a) shall be responsible for—

(1) designating one of the members of the committee as chairman;

(2) monitoring the inventory and identification process conducted under sections 4 and 5 to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(3) reviewing upon the request of any affected party any finding relating to—

(A) the identity or cultural affiliation of cultural items; or

(B) by the return of such items;

(4) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;

(5) compiling an inventory of cultural unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains.

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and consulting with Indian tribes and Native Hawaiian organizations and individuals on matters within the scope of the work of the committee affecting such tribes or organizations.

(7) Consulting with the Secretary in the development of regulations to carry out this Act.

(8) Performing such other related functions as the Secretary may assign to the committee and

(9) Making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated.

(d) RECOMMENDATIONS AND REPORT.—The committee shall make the recommendations under paragraph (c)(5) in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups.

(e) ACCESS.—The Secretary shall ensure that the committee established under subsection (a) and the members of the committee have reasonable access to Native American cultural items under review and to associated scientific and historical documents.

(f) DUTIES OF SECRETARY.—The Secretary shall—

(1) establish such rules and regulations for the committee as may be necessary, and

(2) provide reasonable administrative and staff support necessary for the deliberations of the committee.

(g) ANNUAL REPORT.—The committee established under subsection (a) shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing this section during the previous year.

(h) TERMINATION.—The committee established under subsection (a) shall terminate at the end of the 180-day period beginning on the day the Secretary certifies, in a report submitted to Congress, that the work of the committee has been completed.

#### SEC. 3. PENALTY.

(a) PENALTY.—Any museum that fails to comply with the requirements of this Act may be assessed a civil penalty by the Secretary of Interior pursuant to procedures established by the Secretary through regulation. A penalty assessed under this subsection shall be determined on the record after opportunity for an agency hearing. Such violation under this subsection shall be a separate offense.

(b) AMOUNT OF PENALTY.—The amount of a penalty assessed under subsection (a) shall be determined under regulations promulgated pursuant to this Act, taking into account, in addition to other factors—

(1) the archaeological, historical, or commercial value of the items involved,

(2) the damages suffered, both economic and noneconomic, by an aggrieved party, and

(3) the number of violations that have occurred.

(c) ACTIONS TO RECOVER PENALTIES.—If any museum fails to pay an assessment of a civil penalty pursuant to a final order of the Secretary that has been issued under subsection (a) and not appealed or after a final judgment has been rendered on appeal of such order, the Attorney General may institute a civil action in an appropriate district court of the United States to collect the penalty. In such action, the validity and amount of such penalty shall not be subject to review.

(d) HEARINGS.—In hearings held pursuant to subsection (a), subpoenas may be issued for the attendance and testimony of witnesses and the production of relevant papers, books, and documents. Witnesses so summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

#### SEC. 4. GENERAL

(a) INDIAN TRIBES AND NATIVE HAWAIIAN ORGANIZATIONS.—The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the repatriation of Native American cultural items.

(b) MUSEUMS.—The Secretary is authorized to make grants to museums for the purpose of assisting the museums in conducting the inventories and identification required under sections 5 and 6.

#### SEC. 5. MUSEUMS

Nothing in this Act shall be construed to—

(1) limit the authority of any Federal agency or museum to—

(A) return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals, and

(B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by this Act;

(2) delay actions on repatriation requests that are pending on the date of enactment of this Act;

(3) deny or otherwise affect access to any court;

(4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or

(5) limit the application of any State or Federal law pertaining to theft or stolen property.

#### SEC. 6. SPECIAL RELATIONSHIP BETWEEN FEDERAL GOVERNMENT AND NATIVE TRIBES

This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.

#### SEC. 7. REGULATIONS

The Secretary shall promulgate regulations to carry out this Act within 13 months of enactment.

#### SEC. 8. APPROPRIATION OF APPROPRIATIONS

There is authorized to be appropriated such sums as may be necessary to carry out this Act.

The SPEAKER pro tempore. Is a second demanded?

Mr. RHODES. Mr. Speaker, I demand a second.

The SPEAKER pro tempore. Without objection, a second will be considered as ordered.

The SPEAKER pro tempore. The gentleman from Colorado [Mr. CAMPBELL] will be recognized for 20 minutes, and the gentleman from Arizona [Mr. RANNEY] will be recognized for 20 minutes.

The Chair recognizes the gentleman from Colorado [Mr. CAMPBELL].

Mr. CAMPBELL of Colorado asked and was given permission to revise and extend his remarks.

□ 1319

#### GENERAL LEADS

Mr. CAMPBELL of Colorado. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days within which to revise and extend their remarks and include therein extraneous material on H.R. 5237, the bill now under consideration.

The SPEAKER pro tempore [Mr. BARRON] is there objection to the request of the gentleman from Colorado?

There was no objection.  
Mr. CAMPBELL of Colorado. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, H.R. 5237 is a bill whose time has come. Today thousands upon thousands of native American human remains and sacred objects are housed in museums and Federal agencies across the country. They are kept in boxes, crates, and small wooden file drawers tagged and numbered. Many of these remains and sacred objects came from the all-too-common practice of digging looting graves and using the contents for profit or to satisfy some morbid curiosity.

In 1968 the Surgeon General issued an order to all Army field officers to send him Indian skeletons. This was done so that studies could be performed to determine whether the Indian was inferior to the white man due to the size of the Indian's cranium. These studies were also expected to show that the Indian was not capable of being a handover. Today this study may be considered grotesque but the result of such an attitude in the name of the U.S. Government was the desecration of countless sacred grounds in which Indian ancestors were buried.

For many years several Indian tribes have attempted to have these remains returned to them so that they may be handled according to the laws and traditions of their tribe. In some cases, repatriation has occurred but in far too many cases the tribes have been shut out and told they have no standing. In fact under current law native American human remains found today on a public land are still considered to be Federal property.

The legislation before us today will help end this practice and give standing to tribes which are culturally affiliated with human remains currently being curated. It will set up a process whereby museums and Federal agencies will work in cooperation with descendants and tribes to identify and reach agreement as to the disposition of such collections.

This legislation does not include every basket, every pot and every blanket ever made by Indian hands. It refers to human remains, funerary objects, and only the most sacred of religious items which were taken from a tribe without permission. It affords certain day Indians the opportunity to determine the proper way that their ancestors be treated.

Much of the groundwork for this legislation was laid last year when Congress mandated that the Smithsonian Institution build the Museum of the American Indian to honor contributions of native Americans. That law also directed the Smithsonian to be-

ventory and identify its collection of some 18,000 native American human remains and funerary objects, contact the tribes affiliated with them and discuss repatriating them. The legislation before us today extends that directive to Federal agencies and federally funded museums.

This bill comes after many, many, long hours of negotiations among interested parties. Among the participants in these negotiations were representatives of the museum community, the scientific community and the Indian community. They met on several occasions to reach agreement and what is currently before the House conforms to those agreements.

The inventory section of the bill had been of concern to many. It was felt that the directive for the museums to inventory entire collections of native American human remains, funerary objects, and sacred objects would be too onerous and expensive for them. Changes made in committee now allow that only human remains and associated funerary objects be inventoried and identified. The unassociated funerary objects, sacred objects and objects of cultural patrimony will be surveyed and if a descendant or tribe requests a specific object, then, and only then will the museum further study that object and attempt to identify it. This change will go a long way to reduce cost to the museum and at the same time encourage both sides to sit down early together to discuss their options.

The standard to be used to determine whether or not something is to be repatriated was also changed in committee. If a sacred object is requested to be repatriated, the requesting tribe must first show that the object was separated from the tribe without its permission. If the tribe cannot show this, then the repatriation request may be denied. If the tribe, however, does make such a showing then the burden shifts to the museum to show that it did in fact receive the object with the permission of the tribe.

Changes have been made to tighten and clarify definitions of several key terms used in the legislation including the definitions for the terms "sacred objects," "cultural affiliation," and "unassociated funerary objects." These changes should aid in the implementation of the act.

The illegal trafficking section of the bill is meant to prohibit trafficking and profiting from the sale of native American human remains without the right of possession. As is consistent with current Federal criminal law, the term "knowingly" as it appears in this section refers not only to anyone who "sells, purchases, uses for profit, or transports for sale or profit," but also to those without the right of possession.

This bill takes into account that many of these items may be of considerable scientific value and allows for

current studies to continue with repatriation occurring after the completion of such a study. It further acknowledges that repatriation is not the only alternative and I encourage all sides to try and work out agreeable compromises where all interested parties can benefit from access to some of the items.

Mr. Speaker, in the past several years the United States Government has done much to retrieve the human remains of our brave service men and women who died during the Vietnam war. Sparing little so that the remains of these fine people can be brought home to the ones who loved them, buried with full military honors and by the wishes of their families. We now have the opportunity to continue and extend this stance to native Americans so that their ancestors can finally be put to rest.

This bill has the approval of the American Association of Museums, the Society of American Archeology, the Native American Rights Fund, the National Congress of American Indians, the Friends Committee, and the Association of American Indian Affairs to name a few.

I urge my colleagues to join me in supporting H.R. 5237, the Native American Grave Protection and Repatriation Act.

Mr. RHODES. Mr. Speaker, I yield myself such time as I may consume.

(Mr. RHODES asked and was given permission to revise and extend his remarks.)

Mr. RHODES. Mr. Speaker, in the interest of time this afternoon, the gentleman from Colorado (Mr. CAMPBELL) has very adequately explained the purposes behind the bill and the technical nature of the bill.

I would simply like to pay special tribute to the gentleman from Colorado (Mr. CAMPBELL) who has been among the leaders in this House to get this very noteworthy and very emotional issue resolved here in this Congress.

I would also like to pay special tribute to the Heard Museum in Phoenix, AZ, which in 1989 established a year long dialog among the archaeological community, the museum community, and the native American community, which led to many of the agreements which are embodied in this bill. The museum deserves a lot of credit for getting this bill to the point where it is right now. I urge my colleagues to support it.

Mr. Speaker, I rise in support of H.R. 5237, the Native American Grave Protection and Repatriation Act. This bill is one of the most emotional and intricate bills that the committee has considered this year. It is a noteworthy bill because it represents a major policy statement by the Congress with regard to the treatment of native American human remains, funerary objects, sacred objects, and objects of cultural patrimony.

Congress took its first step toward establishing a comprehensive and uniform Federal policy on this subject with the enactment of

Public Law 101-185, which authorized the National Museum of the American Indian under the Smithsonian Institution. In that bill, Congress established a process to repatriate native American human remains and funerary objects in the possession of the Smithsonian. H.R. 5237 would be an extension of the policy initiated in Public Law 101-185 by expanding coverage to other Federal agencies and to museums that receive Federal funds. In addition, H.R. 5137 would expand the scope of the policy to include native American sacred objects and objects of cultural patrimony.

There are many factors that make this bill ripe for action. First, during 1989 the Heard Museum in Phoenix sponsored a year-long dialog between museum professionals and native Americans, specifically to address the need to respond to increasing tribal demands for repatriation of human remains and other objects in museum collections. The report of the dialog was presented to the committee as its hearing on H.R. 5237 and helped immensely to shape the policies contained in the bill. Through the dialog process, and perhaps for the first time ever, museum professionals and native Americans sat down face to face to express their feelings on the issue.

Second, Secretary of the Interior, Manuel Lujan, announced earlier this year the Department's efforts to improve and update internal policies regarding the treatment of native American grave sites and the items found therein. I understand that the Smithsonian Institution has embarked on a similar course. Third, there is an increasing number of State legislatures that have recognized the importance of this issue by enacting State laws to provide better protection of native American graves and grave goods.

Finally, and perhaps most importantly, it appears that the content of H.R. 5237 may represent a consensus among the constituency groups most affected by the policy reflected in the bill—museums, scientists, and native Americans. Each of the constituency groups has a legitimate viewpoint with regard to how native American human remains and cultural items are handled. It is my hope that this bill will encourage these groups to interact with one another respectfully and amiably. By doing so, the disposition and treatment of native American human remains and cultural items can be achieved in a manner that reflects respect for the human rights of native Americans, and for the values of science and public education.

For all of these reasons, I support passage of H.R. 5237, and I urge my colleagues to do the same.

Mr. CAMPBELL of Colorado. Mr. Speaker, I yield 3 minutes to the gentlewoman from Illinois (Mrs. COLLINS).

(Mrs. COLLINS asked and was given permission to revise and extend her remarks.)

Mrs. COLLINS. Mr. Speaker, I want to strongly commend my colleague from Colorado, Mr. CAMPBELL. He has worked long and hard to ensure the rights of native Americans and to bring long-overdue protection of Indian burial sites and artifacts. H.R. 5237 is a crucial first step in returning native American remains and artifacts to their descendants. And it is also

critical to protecting tribal lands from further uninvited and unapproved encroachments by the unscrupulous.

I share Mr. Casper's concerns. My Subcommittee on Government Activities and Transportation of the Government Operations Committee has been conducting an investigation into this country's cultural institutions' hiring practices and how they impact public policy regarding our many minority communities. What we found during more than 3 years of investigation is that African-Americans, Hispanics, Asian-Americans, and native Americans are conspicuously absent in most decisionmaking positions. Not surprisingly, the rich life, art, culture, and history of these groups have not been accurately and fairly reflected.

The executive director of the National Congress of American Indians, Ms. Suzan Shown Harjo, testified before my subcommittee more eloquently than I can express here today and I'd like to share her feelings with you.

We are, in our organization, quite concerned about the single face, which is white, which is presented by the Smithsonian to the world. . . . Throughout the Smithsonian, a people of color are treated in demeaning and derogatory ways, which is unfortunately reflective of our society at large. While people have "history". The nonwhite people have "stories". White people have "religion", the nonwhite people have "myths" and "lore".

Ms. Harjo reminded us that in the Smithsonian, depictions of native Americans are "placed alongside the dinosaurs and the elephants. Our relatives' skulls and skeletons are displayed on the walls, primarily to illustrate misguided notions about our origins." Her remarks at the hearing, I believe, compellingly explain why underrepresentation of minorities in our cultural institutions has dramatic, long-term impacts on how we perceive each other and ourselves. Had native Americans been part of the institutional hierarchy or even consulted, it's unlikely that such policies would have been approved, much less continued.

As Ms. Harjo further testified:

If there were not racial imbalance in the Smithsonian and in American society, the American people would not permit the Smithsonian to keep 19,000 of our ancestors' remains in the Nation's side.

I believe that the Smithsonian, under the leadership of Secretary Robert McCormick Adams, has made some strides in bringing more minorities to senior- and mid-level management positions. And I commend him for those efforts, for his personal commitment to the subcommittee to involve native Americans and Alaska Natives in plans for the new museum of the American Indian and to develop a more responsible repatriation policy.

Subsequent to the subcommittee hearings, several States have passed new laws protecting all burial sites; the Smithsonian has made important progress in hiring practices, programming and the return of Indian ances-

tral remains and artifacts; and in my home city of Chicago, the Field Museum of Natural History has revised its repatriation policy.

But I believe we must do more. H.R. 5237 is necessary to ensure the repatriation of hundreds of sacred objects to native American communities to reverse several hundreds years of abuses of a people, their lands and their very roots.

Columbus remains and artifacts sit in collections, not in the hands of their descendants. Those collections too often are not used to build pride among native Americans and understanding among other ethnic groups. And those collectors do not prohibit wholesale grave-robbing.

H.R. 5237 first provides for the protection of Indian burial sites, Indian remains, and sacred or cultural artifacts on Federal and tribal land, and second, establishes criminal penalties for persons who knowingly profit from or sell any Indian remains or artifacts from Federal or tribal lands.

Mr. Speaker this is good, sound legislation and I urge my colleagues to support it.

Mr. CAMPBELL of Colorado. Mr. Speaker, I yield 3 minutes to the gentleman from Colorado (Mr. Richardson).

(Mr. RICHARDSON asked and was given permission to revise and extend his remarks.)

Mr. RICHARDSON. Mr. Speaker, the legislation we are considering, H.R. 5237, the Native American Grave Protection and Repatriation Act, presents a delicate balance between two important and compelling interests.

This legislation will protect native American burial sites from exploitation and allow tribes to repatriate human remains and sacred ceremonial objects, which were improperly taken from their possession. The native American community sees this legislation fundamentally as an issue of human rights.

While there is a compelling need to address the exploitation and improper acquisition of Indian artifacts, this must be done in a manner which protects those museums and collectors who acquired ceremonial objects with the full consent of the native American or community of origin.

This consideration is of tremendous importance when one realizes that museums and collectors are responsible for enhancing our understanding and appreciation of our Nation's Indian heritage.

years or centuries

Considering the difficult issues at hand, this legislation does a remarkable job of incorporating the concerns of the native American community, the museums, the scientific community and collectors and dealers.

The several points on which key compromises were reached included:

The definition of sacred objects, cultural affiliation, and inalienable communal property.

The scope of individuals covered by the legislation.

Museum inventory requirements have been made more reasonable.

Burden of proof requirements have been placed on the tribes requesting repatriation rather than on museums; and

The composition of the review committee has been adjusted to include balanced representation of all groups affected by the measure.

Mr. Speaker, this measure embodies several delicate compromises. The Chairman of the Interior Committee is to be commended for allowing the full participation of all groups which will be affected.

**SUMMARY OF INCORPORATION OF AMERICAN NATIVE ARTS DEALERS ASSOCIATION SUGGESTIONS FOR H.R. 5237**

**DEFINITION OF "CULTURAL AFFILIATION"**

ATADA suggested that the act include a definition which incorporated anthropological and archeological criteria.

The final definition stipulates that the definition shall be based on "relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or native Hawaiian organization and an identifiable earlier group."

**DEFINITION OF "INALIENABLE COMMUNAL PROPERTY"**

ATADA suggested two changes: (1) that the object be of "ongoing" cultural or religious importance, and (2) that language stipulate that the object must be deemed inalienable at the time of expropriation. Both suggestions are incorporated in the bill's final language.

**DEFINITION OF "MUSEUM"**

ATADA was concerned that the broad definition of museum could possibly include private individuals who receive Federal grants or payments such as social security. This would have included many collectors and dealers in the scope of the bill.

The definition of museum was narrowed to include only "institutions of state or local government agencies."

**DEFINITION OF "SACRED OBJECT"**

ATADA was concerned that the definition of "sacred object" was so broad as to be unworkable. The ATADA suggested that the definition should stipulate that the object need be "irreplaceable" and "necessary for the continued practice of tribal religions."

The final version of H.R. 5237 incorporates the latter suggestion regarding necessity for continued practice in the definition of sacred objects. The word "irreplaceable" was not included in the definition due to native American objections that courts should not determine what is intrinsically necessary for the practice of a religion.

**MUSEUM INVENTORY REQUIREMENTS**

ATADA expressed concern that the bill's original inventory requirements would pose enormous financial and bureaucratic burdens on museums.

The bill includes specific simplified inventory requirements and authorizes a Federal grant program to assist museums in their inventory activities. The Association of American Museums (AAAM) has agreed to the new provisions and the ATADA has concurred.

**STATUS OF PROOF REQUIREMENT**

ATADA's strongest objections arose from provisions of the original bill which would have placed the burden of proving owner-

ship of objects in museum collections. This objection was echoed by the AAM.

The revised measure makes substantial changes in this section of the bill. Sections of the bill are deleted from the measure to the tribes or native American individuals hoping to repatriate objects. Specifically, the act stipulates that the requesting party be a tribal or band descendant of an individual who owned the object; the requesting tribe or organization can demonstrate the tribe or organization owned the object; and, above that the object was owned by a member of that requesting tribe or organization and that there are no identifiable tribal descendants to make a claim.

These revisions shift burden of proof to the native American or Hawaiian groups. The new language was arrived at with the cooperation of the AAM.

**COOPERATION OF THE SERVICE COMMITTEE**

ATADA raised concerns that representation of the review committee established by the act was weighted in favor of native American groups. AAM raised similar objections.

The revised act stipulates that of the seven board members, three are to be appointed from a list provided by native American groups and three from a list provided by museum and scientific organizations. The final board member would be appointed from a list developed by those appointed from the first two lists.

This compromise was supported by ATADA and AAM.

**OTHER PROVISIONS AMENDING AVIATION CONCERNS**

The final bill includes a provision stipulating that the act shall not supersede right of possession property established under State property laws.

Funerary objects have been divided into "associated" and "unassociated" funerary objects, providing greater specificity to the objects covered in the bill.

Mr. BENNETT. Mr. Speaker, I rise in support of H.R. 5237, to protect Native American artifacts, burial sites and funerary objects. I am deeply interested in this issue and was one of the first to introduce legislation to provide for the Federal protection of burial sites and mandate the return of sacred objects to the proper Indian tribes.

As a nation, we have failed to respect the burial sites of native Americans and have virtually turned our backs on the pillaging and theft of Indian remains and sacred objects. I support H.R. 5237 because it thoughtfully begins to resolve what I consider to be a national tragedy. Unfortunately, in my opinion the bill does not go far enough, as it only protects lands owned by Federal lands and in federally owned agencies and museums. While this is a good start, I would hope that Congress will soon consider legislation similar to what I introduced earlier in this session to protect native American remains on all lands.

In fact, it was the pillaging of a private burial site that made me interested in this issue. A March 1989, National Geographic magazine article titled, "Who Owns Our Past?" told of the desecration of over 850 native American graves on the Slack farm in Kentucky. Graves were unearthed, funerary objects sold and bones of the dead were left strewn about the farm. I am outraged by this immoral and inhumane treatment of the dead and am committed to reversing the tragedy.

More than 20 States, including my home State of Florida, have enacted legislation to

secure all human burials and skeletal remains to equal treatment and respect without regard to ethnic origin, culture background or religious affiliation. However, these laws are insufficient to protect native American burial sites nationwide. It is time for Congress to act on behalf of those who have been wronged for too long. I urge all Members to support H.R. 5237, but also be willing to support the protection of native American remains and sacred objects on private lands as well.

Mr. MIYAK. Mr. Speaker, I rise today in support of H.R. 5237, the native American Grave Protection and Repatriation Act of 1990. Native Americans, including native Hawaiians, have long been deprived of many of the cultural artifacts, sacred objects and even human remains of their ancestors that lay in the basements and storage rooms of museums across this country. This bill would serve to correct this injustice and assure that native American and Hawaiian burial sites will be protected in the future.

The legislation provides for the return of native American and Hawaiian remains, associated burial objects, and other sacred or cultural artifacts currently held by Federal agencies or museums which receive Federal funds. These organizations would be required to inventory such objects and contact the appropriate tribe or native Hawaiian organization to negotiate the return of those items. For future protection of these cultural objects, the bill establishes a process under which those seeking to encroach such items must first obtain a permit pursuant to the Archeological Resources Protection Act. The bill also provides Federal grants to assist tribes and Hawaiian organizations in the repatriation of these objects.

Preserving native American and Hawaiian culture is in the interest of all Americans, for these unique cultures are a part of the history and heritage of our Nation. Mr. Speaker my State has long sought to preserve the unique culture of the Hawaiian people and this bill will help us to pursue this goal. Last year the Hawaii State Legislature passed a bill to protect burial sites on State and private lands. H.R. 5237 would extend similar procedures to Federal lands as well.

I commend the work of Chairman (bush) and the House Interior and Insular Affairs Committee in tackling this sensitive and difficult issue. I must also recognize the hard work and dedication of my colleague from Hawaii, Senator DAMEL K. MOORE, who has spent many years trying to resolve this issue. I think their solution is equitable. It respects the remains of the native Americans yet encourages us to allow our cultural institutions to study the rich heritage and culture of this group of people. I urge the House to join me in supporting the bill.

Mr. BENNETT. Mr. Speaker, I rise in support of S. 555, the De Soto Expedition Trail Commission Act. This bill would encourage and direct research of Hernando De Soto's 16th century exploration of the southeastern United States. Knowledge gained as a result of the expedition contributed significantly to the subsequent exploration and colonization of the region. The chronicles of the native provides a rare description of the native societies present in the New World at the time.

Additional research of De Soto's expedition will enhance the public's awareness of the early historic period of the southeastern United States. A number of southern States

have already visited studies of De Soto's march and coordination of these studies at the Federal level will help to identify expedition sites and determine the exact route De Soto traveled.

Although the bill no longer includes a commemorative highway route through the 10 States that De Soto traveled, it is important to recognize that such a designation would be an excellent way to inform and educate the public of this historic route. Florida and Alabama have already designated State highways in this manner. It is my hope that, following additional research, Congress can establish a commemorative highway through all 10 States, thereby further enhancing the public's knowledge of De Soto's expedition.

In 1983, we will celebrate the 450th anniversary of the De Soto expedition. Passage of the De Soto Expedition Trail Commission Act would be a fitting tribute to the first major European exploration of the southeastern United States.

Mr. RHODES. Mr. Speaker, I yield back the balance of my time.

Mr. CALDWELL. Mr. Speaker, I yield back the balance of my time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Colorado (Mr. CANNON) that the House suspend the rules and pass the bill, H.R. 5237, as amended.

The question was taken, and (two-thirds having voted in favor thereof) the rules were suspended, and the bill, as amended, was passed.

A motion to reconsider was laid on the table.

AMENDMENT NO. 8112

Purpose: To make certain amendments to the bill.

Mr. GARN. Mr. President, I send an amendment to the desk on behalf of Mr. McCARY and for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Utah (Mr. GARY), for Mr. McCARY, proposes an amendment numbered 8112.

Mr. ECKON. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 3, strike out lines 18 through 21 and insert in lieu thereof the following:

(7) "Indian tribe" means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

On page 3, line 12, immediately before the period insert a comma and the following: "including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971."

On page 4, strike out line 16 through 17 and reletter the succeeding paragraph accordingly.

On page 6, line 19, strike out "judgment" and insert in lieu thereof "judgment":

On page 8, line 16, immediately before the period insert a comma and the following: "and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971, the appropriate corporation or group":

On page 9, line 22, beginning with "The," strike out all through the period on line 24 and insert in lieu thereof the following:

"Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification."

On page 14, strike out line 20 and 21 and insert in lieu thereof the following:

(3) upon the request of any affected party, reviewing and making findings related to—

On page 20, between lines 17 and 18, insert the following and reletter succeeding subsections accordingly:

(d) Any records and findings made by the review committee pursuant to this Act relating to the identity or cultural affiliation of any cultural items and the return of such items may be admissible in any action brought under section 13 of this Act.

On page 20, after line 9, add the following:

SEC. 11. ENFORCEMENT.

The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provisions of this Act.

The PRESIDING OFFICER. If there be no further debate, the ques-

**NATIVE AMERICAN GRAVE PROTECTION AND REPATRIATION ACT**

Mr. ECKON. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of H.R. 5337, the Native American Grave Protection and Repatriation Act which is now at the desk.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

A bill to provide for the protection of Native American graves, and for other purposes.

The PRESIDING OFFICER. Is there objection to the immediate consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

AMENDMENT NO. 8111

(Purpose: To amend certain definitions) Mr. ECKON. Mr. President, I send an amendment to the desk on behalf of Mr. POSE and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Nebraska (Mr. ECKON), for Mr. POSE, proposes an amendment numbered 8111.

Mr. ECKON. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 3, line 8, beginning with "and," strike out all through "Institution" on line 10 and insert in lieu thereof a period and the following: "Such term does not include the Smithsonian Institution."

On page 3, line 28, beginning with the second comma, strike out all through "Agency" on line 29 and insert in lieu thereof a period and the following: "Such term does not include the Smithsonian Institution or any other Federal agency."

The PRESIDING OFFICER. If there be no further debate, the question is on agreeing to the amendment of the Senator from Kentucky.

So amendment (NO. 8111) was agreed to.

tion is on agreeing to the amendment of the Senator from Arizona.

The amendment (No. 3173) was agreed to.

Mr. EXON. Mr. President, I move to reconsider the vote.

Mr. GARN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

THE PRESIDING OFFICER. The bill is open to further amendment. If there be no further amendment to be proposed, the question is on the engrossment of the amendments and the third reading of the bill.

The amendments were ordered to be engrossed and the bill to be read a third time.

The bill (H.R. 5237) was read the third time and passed.

Mr. EXON. Mr. President, I move to reconsider the vote.

Mr. GARN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

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**NATIVE AMERICAN GRAVE PROTECTION AND REPATRIATION ACT**

**Mr. BREAUX.** Mr. President, I ask unanimous consent that the Senate now proceed to the consideration of H.R. 5237, the Native American Grave Protection and Repatriation Act now at the desk.

**The PRESIDING OFFICER.** The bill will be stated by title.

The assistant legislative clerk read as follows:

A bill (H.R. 5237) to provide for the protection of Native American graves, and for other purposes.

**The PRESIDING OFFICER.** Is there objection to the immediate consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

**Mr. McCAIN.** Mr. President, I would like to thank my colleagues for giving this legislation their full consideration and support. H.R. 5237, the Native American Grave Protection and Repatriation Act is a House companion to S. 1980 a bill sponsored by the chairman of the Select Committee on Indian Affairs, my good friend, Senator INOUYE. The passage of this legislation marks the end of a long process for many Indian tribes and museums. The subject of repatriation is charged with high emotions in both the Native American community and the museum community. I believe this bill represents a true compromise. Many parties interested in this legislation did not receive everything they wanted in H.R. 5237. The amendments I am offering to H.R. 5237 reflect a further compromise in the development of this legislation. I believe these amendments will serve to improve and enhance the provisions of H.R. 5237. In the end, each party had to give a little in order to strike a true balance and to resolve these very difficult and emotional issues.

On October 17, 1990, I joined Senator INOUYE in sponsoring S. 3217, amendments to the National Museum of the American Indian Act. This bill was introduced by Senator INOUYE when it became apparent that to include the Smithsonian in the provisions of H.R. 5237 would not be possible. I strongly support this legislation

and I am committed to join my good friend Senator INOUYE in advancing legislation that will apply the same standards for the repatriation of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony in H.R. 5237 to the Smithsonian Institution. While the Senate considers S. 3217, the current provisions of the National Museum of the American Indian Act will require the Smithsonian Institution to inventory their collections of Native American Human remains and funerary objects and to return those culturally affiliated remains or objects to the appropriate Indian tribe or Native Hawaiian organization. I believe this process is already well underway.

For several years, the Congress has considered the difficult issue of the repatriation of Native American human remains and funerary objects from museum collections to Indian tribes. Our committee has heard hours of testimony from persons representing Indian tribes, Native Hawaiian organizations, the American Association of Museums, the Society of American Archaeology, and a variety of other interested groups. The Select Committee on Indian Affairs, under the leadership of my good friend from Hawaii, Senator INOUYE, has been very active in efforts to bring both sides closer to agreement on these very difficult issues.

For 2 years, representatives of the museum community, including archaeologists and anthropologists, met with tribal representatives to discuss the repatriation of human remains and other objects of cultural and religious significance from museum collections. H.R. 5237, reflects the thoughtful deliberations of these discussions. I believe this legislation effectively balances the interest of Native Americans in the rightful and respectful return of their ancestors with the interest of our Nation's museums in maintaining our rich cultural heritage, the heritage of all American peoples. Above all, I believe this legislation establishes a process that provides the dignity and respect that our Nation's first citizens deserve.

I would like to recognize the contributions of the trustees of the Heard Museum and the personal commitment of Michael Fox, the former director of the Heard Museum, to facilitate and coordinate the discussions between museum professionals and Native American leaders. These discussions have formed the basis of the report of the panel for a National Dialog on Museum/Native American Relations which provided a framework for the legislation we are considering today. I would also like to recognize the substantial contributions made by Phillip Thompson the director of the Museum of Northern Arizona and Martin Sullivan, the new director of the Heard Museum to this process. Fi-

I would like to appreciate the diligent efforts of the representatives of the American Association of Museums, the Society of American Archaeology, the Native American Rights Fund, the National Congress of American Indians and the many other representatives of Native Americans to develop the consensus which is reflected in this legislation. Again, I want to express my deep gratitude to our chairman, Senator LEVITT, for once again providing the patient and diligent leadership which has enabled us all to make substantial progress in this area. Thank you.

The PRESIDING OFFICER. Are there amendments?

ANNE MURPHY

Mr. BREWSTER. To amend certain definitions of the American Association of Museums, the Society of American Archaeology, the Native American Rights Fund, the National Congress of American Indians and the many other representatives of Native Americans to develop the consensus which is reflected in this legislation. Again, I want to express my deep gratitude to our chairman, Senator LEVITT, for once again providing the patient and diligent leadership which has enabled us all to make substantial progress in this area. Thank you.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Louisiana (Mr. Brewster) for Mr. Peon, proposes an amendment numbered 3171.

Mr. BREWSTER. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 3, line 8, beginning with "and", strike out all through "Institution" on line 10 and insert in lieu thereof a period and the following: "Such term does not include the Smithsonian Institution".

On page 3, line 25, beginning with the second comma, strike out all through "agency" on line 28 and insert in lieu thereof a period and the following: "Such term does not include the Smithsonian Institution or any other Federal agency".

Mr. FORD. Mr. President, I rise to offer an amendment to H.R. 5237 to strike the references to the Smithsonian Institution from the provisions of this bill. I do so for two reasons. First, the Committee on Rules and Administration has not had the opportunity to review the provisions of H.R. 5237 as they affect the Smithsonian Institution. Appreciating the fact that this legislation has been 3 years in the making, I do not wish to delay Senate action on this measure. However, because matters affecting the Smithsonian Institution come within the jurisdiction of the Committee on Rules and Administration, I must insist that the provisions of the bill which relate to the Smithsonian be stricken from the bill.

Second, Mr. President, as you know, there has recently been introduced in the Senate a separate bill that would extend the provisions of the reparation policy contained in H.R. 5237 to the Smithsonian Institution. This bill, S. 3217, has been jointly referred to the Committee on Rules and Administration and the Select Committee on Indian Affairs, and I look forward to a hearing and the development of a full record on this matter.

I very much appreciate the willingness of the managers of this legislation to accommodate the concerns of the Committee on Rules and Administration.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment (No. 3171) was agreed to.

Mr. INOUYE. Mr. President, I am pleased to rise in support of H.R. 5237, the Native American Grave Protection and Repatriation Act. Native Americans have waited a long time for this restoration of their rights and I urge the Senate to not delay any longer in undoing this injustice that began so long ago.

Mr. President, the Smithsonian Institution set a national precedent for museums last year when it agreed to the repatriation provisions contained in the legislation to create a National Museum of the American Indian. That legislation was the result of many hearings and meetings of the Select Committee on Indian Affairs and the negotiations between Smithsonian officials and native Americans. The Smithsonian was courageous in its action and set a standard which, I believe, appropriate for other museums and institutions in this country to follow.

When the Army Surgeon General ordered the collection of Indian osteological remains during the second half of the 19th century, his demands were enthusiastically met not only by Army medical personnel, but by collectors who made money from selling Indian skulls to the Army Medical Museum. The desires of Indians to bury their dead were ignored. In fact, correspondence from individuals engaged in robbing graves often speaks of the dangers these collectors faced when Indians caught them digging up burial grounds.

When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are cultural inferior to non-Indians. This is racism.

In light of the important role that death and burial rites play in native American cultures, it is all the more offensive that the civil rights of America's first citizens have been so flagrantly violated for the past century. Even today, when supposedly great strides have been made to recognize the rights of Indians to recover the skeletal remains of their ancestors and to repossess items of sacred value or cultural patrimony, the wishes of native Americans are often ignored by the scientific community. In cases where native Americans have attempted to repatriate remains that were inadvertently alienated from the tribe, they have often met with resistance from

museums and have not had the legal ability or financial resources to pursue the return of the goods. It is virtually only in instances where a museum has agreed for moral or political reasons to return the goods that tribes have had success in retrieving property. Tribes have had similar difficulties in preventing the excavation and sale of goods that unscrupulous collectors have acquired.

The legislation before us today is the product of a great deal of dialog and compromise and I believe it is a good bill and is fair to all sides. In 1957, the Select Committee on Indian Affairs held a hearing on legislation to provide a process for the repatriation of native American human remains and cultural patrimony. At that time, the representative of the American Association of Museums asked the committee if it would consider delaying action on the measure for 1 year, while the museum community attempted to fashion a dialog with representatives of the Indian community to see whether they could develop a policy together to guide the repatriation of native American remains and cultural patrimony. The committee agreed, and that dialog proceeded. Their final report was submitted to the committee in February of this year.

I believe we all recognize the value of the work carried out by museums. When we visit museums and look at remnants of past civilizations, we are really learning about ourselves, and how our societies and civilizations have evolved. Museums enhance our quality of life. As enlightened people, we welcome scientific inquiry and the opportunity to know more about ourselves. Accordingly, we welcome the preservation and scientific purposes that museums fulfill.

Mr. President, the bill before us today is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights. I do not anticipate that this legislation will result in a wholesale raid on museum collections, as I have heard previous versions of this bill characterized. I do not believe the rights of antique collectors will be taken away. It is ironic to note that the greatest opposition to this proposal has come from those who have most strongly ignored native Americans in their efforts to retrieve items that were improperly alienated from their tribes or who are trying to prevent inappropriate and insensitive display of their ancestors' goods and remains. This legislation is designed to facilitate a more open and cooperative relationship between native Americans and museums. For museums that have dealt honestly and in good faith with native Americans, this legislation will have little effect. For museums and institutions which have consistently ignored the requests of native

cans, this legislation will give native Americans greater ability to negotiate.

Mr. President, I believe this bill represents a major step in correcting an injustice that started over 100 years ago. It is appropriate that Congress take an active role in helping to restore these rights to native Americans and I urge the adoption of this measure by the Senate.

Mr. AKAKA. Mr. President, I rise in support of H.R. 5237, the Native American Grave Protection and Repatriation Act.

I testified in July before the House Committee on Interior and Insular Affairs in support of this measure for several reasons.

Native Hawaiians have always considered the burial of their kupuna, or ancestors, the epitome of cultural respect. It is understood that once the kupuna leaves this world to journey on to the spiritual world, their remains should never be disturbed. Their bones are the only connection between the spirit world and the physical world. However, over the decades, native Hawaiian remains and objects, uncovered accidentally or during scientific excavations, have been placed in museums such as the Smithsonian Institution.

Mr. President, the National Museum of the American Indian Act of 1989 has set a precedent for the return of native Hawaiian and native American remains and funerary objects from the Smithsonian Institution to their rightful resting places. I am proud to say that a native Hawaiian organization, Hui Malama I Na Kupuna o Hawai'i Nei, received the first repatriated Hawaiian remains under the act this July. Native Hawaiian remains still at the Smithsonian will be repatriated next year when land set-aside to receive the remains is properly prepared.

H.R. 5237 is the next step in returning remains and objects still in the possession of other federally funded museums and Government agencies to the native homeland. The bill is a comprehensive effort to repatriate native American, Native Alaskan, and native Hawaiian remains, prohibit the trafficking and profiting from the sale of native American human remains without the right of possession, and eliminate the longstanding policy of scientific research on future remains found. I also strongly support a provision that would name the Office of Hawaiian Affairs and Hui Malama I Na Kupuna o Hawai'i Nei as the native Hawaiian organizations responsible for receiving the repatriated remains and objects.

Mr. President, I am pleased that the Hawaii State Legislature, and other State legislatures, have also taken strides in providing for the protection of native remains and burial grounds. With this gesture, they have reaffirmed their recognition of cultural sensitivity and respect toward their native American and native Hawaiian populations.

It is long overdue that the remains of native Hawaiians and native Americans be accorded proper dignity and respect, and not allowed to be treated as objects of curiosity.

Mr. MOYNIHAN. Mr. President, first let me say that this is hugely important legislation. The treatment of native Americans has been one of our Nation's greatest failures. It is due to the distinguished chairman of the Select Committee of Indian Affairs that we shall now rightfully move to restore tens of thousands of remains to the families and tribes to whom these remains ought most appropriately be entrusted.

It is also my understanding that many museums, including the American Museums of Natural History, the Field Museum of Natural History, Harvard University, and others, have now, because of the efforts of the chairman, changed their policy relating to native American remains by agreeing to return these remains to the tribes that request them.

Many museums have recognized the rights and concerns of native Americans. As well, the museums want to deal fairly with the funerary objects.

Is it not the view of the chairman of the Select Committee on Indian Affairs that the museums have changed their position on the return of native American remains and funerary objects?

Mr. INOUE. Yes; the senior Senator of New York is correct.

Mr. MOYNIHAN. Would it not be possible to encourage the museums and native Americans to resolve in a similar manner the return of artifacts, such as sacred objects and objects of cultural patrimony? The distinguished chairman of the select committee, of course, has been much more involved than I. And I would accept his view.

Mr. INOUE. This legislation does nothing to prevent voluntary agreements from being negotiated between museums and native Americans with respect to the return of remains or any other items.

Mr. MOYNIHAN. I thank the distinguished senior Senator from Hawaii.

The PRESIDING OFFICER. Are there further amendments to the bill?

AMENDMENT NO. 3173

(Purpose: To make certain amendments to the bill)

Mr. CHAFEE. Mr. President, I ask that an amendment at the desk be called up on behalf of Senator McCANN.

The PRESIDING OFFICER. The clerk will report the amendment.

The assistant legislative clerk read as follows:

The Senator from Rhode Island (Mr. CHAFEE), for Mr. McCANN, proposes an amendment numbered 3173.

Mr. CHAFEE. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 3, strike out lines 19 through 21 and insert in lieu thereof the following:

(7) "Indian tribe" means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

On page 3, line 12, immediately before the period insert a comma and the following: "including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971".

On page 8, strike out lines 15 through 17 and reletter the succeeding paragraph accordingly.

On page 8, line 19, strike out "judgement" and insert in lieu thereof "judgment".

On page 8, line 18, immediately before the period insert a comma and the following: "and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971, the appropriate corporation or group".

On page 8, line 23, beginning with "The", strike out all through the period on line 24 and insert in lieu thereof the following: "Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification".

On page 13, strike out lines 20 and 21 and insert in lieu thereof the following:

(3) upon the request of any affected party, reviewing and making findings related to—

On page 20, between lines 17 and 18, insert the following and reletter succeeding subsections accordingly:

(d) Any records and findings made by the review committee pursuant to this Act relating to the identity or cultural affiliation of any cultural items and the return of such items may be admissible in any action brought under section 15 of this Act.

On page 23, after line 8, add the following:

SEC. 14. ENFORCEMENT.  
The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provisions of this Act.

The PRESIDING OFFICER. If there be no debate on the amendment, the question is on agreeing to the amendment.

The amendment (No. 3173) was agreed to.

Mr. SIMPSON. Mr. President, I have a few brief questions for my colleague Mr. McCANN. As a legal matter, I would like to clarify for the purposes of legislative intent, some potential ambiguities in the language of this bill.

As my colleague knows, a sizeable portion of Wyoming is federally owned land. Wyoming is also very proud to have the Wind River Indian Reservation within its borders, home of the Shoshone and Arapaho Tribes. Wyoming is also fortunate to have vast mineral resources under our public lands and much of the mining in our state is surface mining.

As you can well understand, if a permitted mining development could be halted on the assertion that it had a "sacred site," that could be potentially devastating to the coal industry in Wyoming and the uranium mining industry as well. I fully appreciate the need to be carefully sensitive in our respect to objects which are sacred to native Americans. However, what legal balance is achieved in this legislation in order to protect the interests of industries that are critical to the economy of states like Wyoming in situations such as the one I have described?

Mr. McCAIN. I thank the Senator from Wyoming (Mr. Stevenson) for his interest in this legislation. Let me assure my good friend from Wyoming that there is nothing in this bill that would result in a permanent interruption of development activity on Federal lands. I think it is important to note that the provisions of this bill only apply to Federal and tribal lands. State and private lands are not covered by the bill. In considering the potential impact of H.R. 5237 on the development of Federal lands, both the House and Senate Committees gave significant consideration to the interest in the development of Federal lands. Under this bill if a sacred object, as defined in the bill, has been found on Federal land during the excavation stage of mineral development, the party uncovering such object would be required to notify the Secretary of the particular Federal department with authority over those lands. In this situation, an object must be determined to fall within the limited definition of sacred object as set out in the bill. H.R. 5237 is intended to provide an opportunity for culturally affiliated Indian tribes to make the appropriate disposition of objects found on Federal lands. The bill would require the party uncovering the object to take reasonable steps to safeguard the cultural items. Development of the site could continue 30 days after such notice has been received by the Secretary. This section of the bill is not intended as a bar to the development of Federal or tribal lands on which cultural items are found. Nor is this bill intended to significantly interrupt or impair development activities on Federal or tribal lands. In addition, any activity on Federal lands which would impact archaeological sites would still be governed by the provisions of the Archaeological Resources Protection Act.

Mr. STEUBEN. I thank my colleague. I also have concerns about property rights that this bill seems to create and whether lawful owners such as miners will be fairly compensated upon the transfer of property to parties asserting rights under this bill.

Mr. McCAIN. H.R. 5237 includes a definition of the term "right of possession" which refers to the manner by which a museum or Federal agency comes into possession of any native

American cultural item. During the consideration of this legislation both the House and Senate committees received testimony from tribal leaders regarding situations where important ceremonial objects have been stolen from the Indian tribes only to resurface later in the collections of a museum. This term will provide a clear standard for determining whether an item was originally acquired with the consent of the individual or Indian tribe which had the authority to alienate the item. Review of the right of possession to a native American cultural item is very similar to the transfer of title to other forms of property. This definition is intended to operate in a manner that is consistent with general property law. As you know, under the common law, an individual may only acquire the title to property that is held by the transferor. In addition, the bill provides that an individual may seek redress in the U.S. Court of Claims and the Court of Customs and Patent Appeal in a fifth amendment taking by the United States if found to have occurred. Finally, H.R. 5237 would require an Indian tribe or native Hawaiian organization to establish a prima facie case that a museum or Federal agency did not have the right of possession to a cultural item before it could be subject to the repatriation provisions of the act. I believe that this bill has been crafted in such a way as to avoid any problems with unconstitutional takings under the fifth amendment.

Mr. STEUBEN. Again, I thank my colleague. I have only a few more questions, relating to the notice provisions in this bill.

As I understand it, anyone who discovers an object covered under this bill is to give notice to the agency in charge of the Federal land in question. The Indian tribes, Alaska Natives or native Hawaiian organizations then have 30 days to respond. The 30 day time limit begins running when the Federal Government is notified by the discoverer. My first question is, who is charged with determining which native American group has the right to the objects and, second, whether or not the 30-day time limitation will begin to run from time of notice to the Government or whether it only begins to run from the time the determination is made with respect to which native American group is the rightful owner?

Mr. McCAIN. H.R. 5237 provides that if the ownership of cultural items discovered on Federal lands is known or readily ascertainable then the appropriate Indian tribe or native Hawaiian organization shall receive notice of the discovery. The bill requires the party discovering a native American cultural item to provide notice to the Secretary of this particular Federal department with authority over those Federal lands. The Secretary of the Interior will have responsibility to determine the ownership of cultural

items discovered on Federal lands. This section of H.R. 5237 is intended to provide a process whereby Indian tribes and native Hawaiian organizations have an opportunity to intervene in development activity on Federal lands in order to safeguard and to provide for the appropriate disposition of culturally affiliated items found on Federal lands. This process allows 30 days from the time notice is received by the Secretary, for Indian tribes and native Hawaiian organizations to provide for the appropriate disposition of cultural items found on Federal lands.

Mr. STEUBEN. Many good people in Wyoming enjoy walking and hiking our public lands and some have some small but quite important collections of various artifacts. Do these are any questions will this bill affect the private collector and if so, what are the private collector's potential liabilities?

Mr. McCAIN. H.R. 5237 will only cover those objects which are described in the definition of cultural items. The definition of cultural items in the bill only applies to those objects discovered after enactment on Federal or tribal lands. Private collectors will still be able to pursue their hobbies on state or private lands. In addition, the bill has been carefully crafted to ensure that its provisions provide adequate protections to prevent the illegal excavation of graves on tribal and Federal lands. Testimony received by both the House and Senate committees indicated that there is a flourishing trade in funerary and sacred objects that have been obtained from burials located on tribal and Federal lands. This testimony also indicated that tribal and Federal officials have been unable to prevent the continued looting of native American graves and the sale of these objects by unscrupulous collectors. H.R. 5237 provides that any person who knowingly sells, purchases, uses for profit or transports for sale or profit any native American cultural items obtained in violation of this act shall be subject to criminal penalties. The definitions of cultural items in H.R. 5237 are limited to application. These definitions do not include objects which were created for a purely secular purpose, such as for sale or trade as Indian art. The definitions include objects which are necessary for the continuing practice of native American religions, funerary objects and objects that are of central cultural importance to the tribe such that they cannot be owned, alienated or conveyed by any individual. The scope of these definitions is a very limited one. In this way the bill provides adequate protections to native American grave sites while still allowing private collectors to pursue their pastimes.

Mr. DOMINICK. Mr. President, I support this legislation to accomplish a noteworthy goal for the Indian people of America. Many museums hold sacred objects important

Indian tribes. This bill provides a mechanism whereby Indian tribes will be able to reclaim ceremonial and other objects important to present day rituals and practices.

The legislation also addresses human remains, funerary objects, and cultural patrimony. In simple terms we are providing for the return of Indian burial items and other religious items that properly belong with Indian tribes rather than storage rooms in museum collections.

If enacted, this bill will promote the return of these items to their true owners and users.

A famous modern day case involves the Zuni War Gods, carved from wood and used as a shrine to protect the tribe. For at least 100 years, more than 80 of these wooden statues were in 21 museums and 3 private collections.

The New York Times reported on August 13, 1930, that the—

Zunis were moved to try to reclaim their idols not out of ambition to change laws or policies, but out of a desire for these blessings and the need to fill a gap in a complex structure of ritual and belief.

Each Ahayuda serves as guardian for the tribe until he is relieved by a new one, and then the older ones must remain there, contributing their strength until they go back to the earth. Pezencio Lardio was quoted as saying:

Pezencio is the Zuni Tribe's Lieutenant Governor and a good friend of mine.

The Zuni war gods do not function in a climate controlled museum case. The Zunis want them in the rain and elements so they can do their work as religious objects. Disintegration is actually essential to their function.

Mr. President, the legislation before us today will make it easier for proper tribal claimants to regain possession of items sacred to tribal beliefs and rituals.

I would like to add that the Museum of New Mexico in Santa Fe, NM has been a leader in the repatriation of cultural patrimony. This bill will generally enact many of the practices pioneered at the Museum of New Mexico.

Unfortunately, not all museums adhere to the principles of returning valuable and needed objects to the tribes, as practiced by the Museum of New Mexico. This legislation will support Indian tribes in their efforts to regain vital items like the Zuni war gods. On the other hand, the burdens on museums to inventory their collections have been sensibly modified to promote these ends with a minimal financial impact on those museums with Indian collections.

The Smithsonian Institution's vast collections are subject to repatriation under the terms of the act establishing a National Museum of the American Indian, enacted last year. Those conditions for repatriation, however, are not as thorough as the conditions in this bill.

My good friend, Senator Dwyer and Senator McCarr, have introduced separate legislation to bring the

Smithsonian up to these more rigorous standards. I applaud this effort and will support it in the Senate.

I believe the House provisions we are passing today reflect the agreement reached between scientists, museum, and Indian tribes.

I commend Chairman Dwyer and Vice Chairman McCarr for their 3-year effort to create a national policy of repatriation of Indian cultural items. The policies embodied in this bill are fair and will promote a fast return of important religious and cultural items as well as human remains and related funerary objects.

The PRESIDING OFFICER. Are there any further amendments? The Chair hearing none, the bill is considered having been read the third time and passed.

So the bill (H. R. 8377), as amended, was passed.

Mr. BREADY. Mr. President, I move to reconsider the vote.

Mr. CHAIRMAN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.





FEDERAL ARCHAEOLOGICAL RESOURCES  
PROTECTION ACT PERMIT

NO. \_\_\_\_\_

To conduct work upon public and Indian lands owned, controlled or held in trust by the United States under the Archaeological Resources Protection Act (93 Stat. 721, 16 U.S.C. 470AA-11) approved October 31, 1979 and the regulations thereunder (43 CFR 7, 32 CFR 229).

1. PERMIT ISSUED TO: \_\_\_\_\_ DATE: \_\_\_\_\_

2. NAME, ADDRESS AND OFFICIAL STATUS OF PERSON: \_\_\_\_\_

a. In general charge:

b. In actual direct charge:

3. UNDER APPLICATION DATED: \_\_\_\_\_

4. AUTHORIZES: \_\_\_\_\_

LANDS DESCRIBED AS FOLLOWS: \_\_\_\_\_

Control No. \_\_\_\_\_

5. FOR PERIOD: \_\_\_\_\_ to \_\_\_\_\_

7. MATERIALS COLLECTED UNDER THIS PERMIT WILL BE DEPOSITED FOR PERMANENT PRESERVATION IN THE \_\_\_\_\_

OR IN OTHER ACCREDITED INSTITUTIONS UNDER SUITABLE LOAN AGREEMENTS. A COPY OF A CURRENT, VALID CURATION AGREEMENT MUST BE KEPT ON FILE WITH THE LAND MANAGING AGENCY(S).

8. SPECIAL CONDITIONS \_\_\_\_\_

This permit is subject to the provisions of the Archeological Resources Protection Act approved October 1979 and the regulations thereunder, as well as special conditions (copies attached).

9. PRELIMINARY REPORT: Within approximately 6 weeks of the conclusion of field work a preliminary report of work performed under this permit, illustrated with representative photographs and listing new or significant collected materials should be furnished the \_\_\_\_\_

at \_\_\_\_\_ (attached address list(s)).

SIGNATURE AND TITLE OF APPROVING OFFICIAL \_\_\_\_\_

B. (CONTINUED) SPECIAL CONDITIONS ARE CHECKED (X) AS APPROPRIATE TO THIS PERMIT

- a.  This permit shall not be exclusive in character, and there is hereby reserved unto the landowner the right to use, lease or permit the use of said land or any part thereof for any purpose.
- b.  Other institutions may be engaged in archeological research in the general area covered by this permit, and in case there should be conflict with respect to a site not specifically designated in a permit, the parties concerned shall reach agreement between themselves as to which shall work the site.
- c.  The Department of the Interior, including its bureaus and employees and the landowners and their grantees, shall be held blameless for any and all events, deeds or mishaps, regardless of whether or not they arise from operations under this permit.
- d.  Such guidance and protection as is consistent with duties of the Department of the Interior official in charge of the area will be afforded the permit holder and his party.
- e.  Transportation in Department of the Interior vehicles cannot be furnished, except in cases where no extra expense to the Department is involved.
- f.  All costs shall be borne by the permittee.
- g.  The exploration or excavation of any Indian grave or burial ground on Indian lands and reservations under the jurisdiction of the Department of the Interior is restricted solely to qualified archeologists. No grave or burial ground abandoned less than 200 years may be investigated without permission of the governing council of the Indians concerned, which supplemental authority must be promptly recorded with the superintendent or other official in charge of the designated area.
- h.  All excavated areas shall be restored by filling in the excavations and otherwise leaving the area in a near to original condition as is practicable.
- i.  The permittee shall conduct all operations in such a manner as to prevent the erosion of the land and pollution of the water resources, and damage to the watershed, and to do all things necessary to prevent or reduce to the fullest extent the scarring of the lands.
- j.  Any findings of mined or processed precious metals or other treasure or treasure trove in the area covered by this permit are the exclusive property of the landowners, and shall not be disturbed or removed from the site without specific written permission from the Department of the Interior.
- k.  Two copies of the final report, accompanied by a completed NTIS report documentation form (optional form 272), will be submitted to the \_\_\_\_\_.
- l.  Before undertaking any work on lands administered by the Bureau of Reclamation, clearance should be obtained from the official in charge of the area. (see attached map)
- m.  Before undertaking any work on lands administered by the National Park Service, clearance should be obtained from the superintendent in charge of the area.
- n.  Before undertaking any work on lands administered by the Bureau of Land Management, clearance should be obtained from the Office of the State Director, and from the BLM District Officer in direct charge of the area concerned. (see attached list)
- o.  Before undertaking any work on lands administered by the Fish and Wildlife Service, clearance should be obtained from the Office of the Regional Director, (see attached list) and the Refuge Manager in charge at the appropriate Fish and Wildlife Refuge. Possession or use of firearms in such areas is prohibited.
- p.  Before undertaking any work on Indian tribal lands or on individually owned trust or restricted Indian lands, clearance should be obtained from the Bureau of Indian Affairs official having immediate jurisdiction over the property. (see attached list)
- Other special conditions continued on attached sheet(s).

**UNITED STATES of America,  
Plaintiff,**

**v.**

**Ben DIAZ, Defendant.**

**Magistrate's No. 346.**

**No. 2-A.**

**United States District Court,  
D. Arizona.**

**Dec. 12, 1973.**

Defendant was adjudged guilty by a United States magistrate of appropriating Indian artifacts on government land, and he appealed. The District Court, Frey, J., held, inter alia, that implicit finding that the artifacts in question were objects of "antiquity" within statute even if they were less than five years old was not clearly erroneous.

**Affirmed.**

**1. Criminal Law ⇐260.11(3)**

Acting in the capacity of an appellate court, district court is required to

accept the finding of fact of a magistrate unless such finding is clearly erroneous. 18 U.S.C.A. § 3401.

**2. Criminal Law ⇐260.11(5)**

In light of expert testimony as to significance and importance of certain Indian artifacts in the cultural heritage of the Indians, uniqueness of such artifacts, and fact that case was one of first impression, magistrate's implicit finding, in prosecution for appropriating Indian artifacts on government land, that artifacts less than five years old were objects of "antiquity" was not clearly erroneous. 16 U.S.C.A. § 433,

See publication Words and Phrases for other judicial constructions and definitions.

**3. Public Lands ⇐8**

Statute prohibiting, inter alia, the appropriation of "any object of antiquity" situated on government lands was intended to protect American Indians from those who would appropriate, excavate or injure any historic monument or object of "antiquity" situated on Indian lands. 16 U.S.C.A. § 433.

**4. Criminal Law ⇐260.11(3)**

In prosecution for appropriating Indian artifacts on government land, it was for magistrate, as trier of facts, to resolve evidentiary conflicts concerning whether defendant did appropriate artifacts in question from an Indian reservation, and reviewing court was obliged to assume that the magistrate resolved all such matters in a manner which would support the judgment.

**5. Criminal Law ⇐554**

Magistrate, as trier of fact, had right to disbelieve defendant's story and, from the totality of the circumstances, including inconsistencies, objective testimonial evidence, and manner in which defendant testified, to draw a contrary conclusion, provided that all evidence was weighed against standard of reasonable doubt, and magistrate was not precluded from disbelieving defendant's story on theory that the burden of proof was thereby shifted to defendant.

William C. Smitherman, U. S. Atty., presented by Gerald S. Frank, Asst. U. S. Atty., Tucson, Ariz., for plaintiff.

Harold A. Donegan, Jr., Scottsdale, Ariz., for defendant.

**MEMORANDUM AND ORDER ON APPEAL FROM MAGISTRATE**

FREY, District Judge.

Appellant, Ben Diaz, was adjudged guilty by a United States Magistrate, of appropriating Indian artifacts (objects of antiquity) on Government land, in violation of Title 16, United States Code, Section 433. Mr. Diaz consented in writing to be prosecuted before the Magistrate pursuant to Title 18, United States Code, Section 3401, after being apprised of his right to be tried before a District Court Judge and the consequences of a waiver of same.

On September 13, 1973, appellant was sentenced to payment of a fine of \$500 to be paid by September 24, 1973. Appellant has appealed and urges three assignments of error: (1) the Court erred in holding that any object less than five years old is an "object of antiquity", (2) the Court erred in finding appellant to have appropriated an object situated on lands owned or controlled by the government when no evidence was introduced placing appellant on such lands, and (3) the Court erred in shifting the burden of proof to appellant.

On March 13, 1973, Joe P. Sparks, an attorney and expert on Apache Indian culture observed the contents of a box, designated Government's Exhibit Number 1, containing authentic Apache religious artifacts, on display in a storefront window in Scottsdale, Arizona. Sparks learned that appellant was the owner of the artifacts. He called appellant on the telephone inquiring as to the asking price for the artifacts. During the telephone conversation appellant stated that he had found approximately twenty-two face masks, headdresses, ocotillo sticks, bull-roarers, fetishes and muddogs in a medicine man's cave on the San Carlos Indian Reservation. The

specific area where appellant said he found the artifacts was within five or six miles of the Triplett's place near Peridot. Appellant told Sparks that he would not sell the artifacts for twelve hundred dollars because he had been offered that much and refused the offer, but that he would probably be asking several thousand dollars.

On March 18, 1973, Agent Hunt and another FBI agent drove to appellant's residence where Agent Hunt indicated to appellant that he was interested in the artifacts that were for sale. Appellant directed the agents to the back of his house where the artifacts contained in Government Exhibits 2 through 7 were located. At this time Agent Hunt advised appellant that he was an FBI agent and informed appellant of his Miranda rights. Appellant elected to continue talking to the agents. Appellant stated that he may have obtained the objects from the San Carlos Indian Reservation, but when asked if he had ever told anyone that he had removed the artifacts from the reservation, appellant terminated the conversation.

[1] Acting in the capacity of an appellate court, this Court is required to accept the finding of fact of a Magistrate unless such finding is clearly erroneous. *Campbell v. United States*, 373 U.S. 487, 83 S.Ct. 1356, 10 L.Ed.2d 501 (1962); *United States v. Graves*, 428 F.2d 196 (5th Cir. 1970); *United States v. Margraf*, 347 F.Supp. 230 (E.D.Pa. 1972).

[2, 3] Appellant disputes the implicit finding in the verdict of guilty that the artifacts were objects of antiquity within the meaning of Title 16, United States Code, Section 433. Said Section reads as follows:

"Any person who shall appropriate, excavate, injure or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without permission of the Secretary of the Department of the Government having

jurisdiction over the lands . . . shall . . . be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court."

The instant case appears to be one of first impression with respect to the legal definition "antiquity".

The testimony of Dr. Keith Basso, Professor of Anthropology at the University of Arizona, appears to have weighed heavily in the Magistrate's determination of the definition of the word "antiquity". Dr. Basso testified that something made today could very easily become an "antiquity" tomorrow. He testified that the artifacts in the instant case were, in his opinion "antiquities" and explained as follows:

"They are not of the present. They are very much of the past and they are decided and viewed by Apaches as articles which are, if left alone, able to return to nature, to their former state, to disintegrate slowly according to the natural processes of time, and to that extent to return to the past from whence they came. This too, is a religious tenant of the people involved." (TR p. 61)

Dictionary definitions of the word "antiquity" are of no aid in the present case. When the pertinent statute was enacted in 1906, the Apache Indian Reservations were approximately 80 years old, therefore, under such definitions there could be no objects of "antiquity", in the common usage of the term, on Apache lands. In a case such as this, there can be no specific definite time limit as to when an object becomes an "antiquity". The determination can be made only after taking into consideration the object or objects in question, the significance, if any, of the object and the importance the object plays in a cultural heritage.

The statute in question must be construed as one which was intended to protect the American Indians from those

who would appropriate, excavate or injure any historic monument or object of "antiquity" situated on Indian lands. It was clearly not the intent of Congress to allow a person to enter upon Indian lands and appropriate religious or sacred artifacts, such as the ones in this case, without threat of prosecution.

In light of Dr. Basso's expert testimony, the uniqueness of the Indian artifacts, and the fact that this is a case of first impression the Magistrate's implicit finding that the artifacts were objects of "antiquity" is not clearly erroneous.

[4] Appellant argues that there is not enough evidence to show appellant appropriated artifacts situated on lands owned or controlled by the United States. This argument is without merit.

There was substantial evidence that appellant did in fact appropriate the artifacts from the San Carlos Indian Reservation. Mr. Sparks testified appellant told him in a phone conversation that, while hunting on the San Carlos Reservation, he came upon a cave containing the objects in question. Appellant stated that he removed the material and took it home.

Dr. Basso and Mr. Cassador, an Apache Medicine Man, testified that the objects in Exhibits 1 through 7 were authentic religious and ceremonial materials which were customarily placed in caves or other remote places on the reservation, after they had been used once. Mr. Cassador testified that the Indian headdresses were probably made by Ed Lee, a San Carlos Apache Medicine Man between the years 1969 and 1970. Mr. Cassador recognized them as having been made by Mr. Lee because of their distinctive markings and coloring.

Although appellant denied ever having been on the reservation, the reviewing Court is required to view the evidence in light most favorable to the Government. *Carr v. United States*, 317 F.2d 409 (9th Cir. 1963); *Gilbert v. United States*, 291 F.2d 586 (9th Cir. 1961), vacated, 370 U.S. 650, 82 S.Ct. 1399, 8 L.Ed.2d 750. It is the exclusive function of the

trier of fact to determine the credibility of witnesses, resolve evidentiary conflicts and draw reasonable inferences from proven facts. Therefore, this Court must assume that the Magistrate resolved all such matters in a manner which would support the Judgment.

[5] Finally, appellant argues that the trial Court having no evidence about appellant's presence on the reservation and having disbelieved appellant's story, the burden of proof shifted from the Government to appellant. This argument is also without merit.

Appellant testified that while returning from a hunting trip, he picked up an Indian hitchhiker along the road. The hitchhiker was carrying all the Indian artifacts, designated as Government Exhibits 1 through 7, in just two bags and a small box. Appellant stated that he became curious about the objects and after some discussion with the hitchhiker, decided to buy them for \$290. According to his testimony, appellant was not sure of the significance of the artifacts; yet he paid the \$290 right on the spot. In addition, at the time appellant bought the objects, he was out of a job.

The Magistrate, as trier of fact had the right to disbelieve appellant's story. A trier of fact is not compelled to accept and believe the self-serving stories of a vitally interested defendant. His evidence may not only be disbelieved, but from the totality of the circumstances such as inconsistencies of the record, objective testimonial evidence and the manner in which the defendant testifies, a contrary conclusion may be properly drawn. *United States v. Cisneros*, 448 F.2d 298 (9th Cir. 1971); *Dyer v. MacDougall*, 201 F.2d 265 (2nd Cir. 1952).

All that is required of the trier of fact is that he weigh all the evidence, direct or circumstantial, against the standard of reasonable doubt. *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1955). In the present case the Magistrate weighed all the evidence presented by both parties

in arriving at his decision. At no time did the burden of proof shift to appellant.

Upon careful review, this Court finds that the Magistrate's determination was correct; therefore,

It is ordered that the judgment and conviction heretofore entered by the Magistrate, is affirmed.

It is further ordered that the Clerk of this Court forthwith mail a copy of this Memorandum and Order to the Magistrate and to all counsel of record.

ment or any object of antiquity situated on lands owned and controlled by the Government of the United States, and which did not define "ruin," "monument" or "object of antiquity," was unconstitutionally vague.

Reversed.

Constitutional Law ¶258(3)  
Public Lands ¶8

Statute which prohibited the appropriation, excavation, or injuring of any historic or prehistoric ruin or monument or any object of antiquity situated on lands owned or controlled by the United States Government, which did not define such terms as "ruin," "monument," or "object of antiquity," and which was asserted by Government to protect objects not only on the basis of their age but also on basis of use for which they were made and to which they were put was fatally vague in violation of due process clause. U.S.C.A.Const. Amend. 5; 16 U.S.C.A. § 433.

Harold A. Donegan, Jr. (argued),  
Scottsdale, Ariz., for defendant-appellant.

Gerald S. Frank, Asst. U. S. Atty.  
(argued), Tucson, Ariz., for plaintiff-appellee.

Before MERRILL and KOELSCH,  
Circuit Judges, and SWEIGERT,\* District Judge.

OPINION

MERRILL, Circuit Judge:

Appellant was charged in 1973 with appropriating "objects of antiquity situated on lands owned and controlled by the Government of the United States without the permission of the Secretary of Interior," contrary to 16 U.S.C. § 433.<sup>1</sup>

1. That section provides:

"Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any ob-

UNITED STATES of America,  
Plaintiff-Appellee,

v.

Ben DIAZ, Defendant-Appellant.

No. 74-1177.

United States Court of Appeals,  
Ninth Circuit.

June 24, 1974.

Defendant was convicted in the District Court for the District of Arizona, William C. Frey, J., 368 F.Supp. 856, of appropriating objects of antiquity from government land and he appealed. The Court of Appeals, Merrill, Circuit Judge, held that statute which prohibited the appropriation, excavation, or injuring of any historic or prehistoric ruin or monu-

\* Honorable William T. Sweigert, Senior United States District Judge for the Northern District of California, sitting by designation.

The items appropriated were face masks found in a cave on the San Carlos Indian Reservation. They were identified by a San Carlos medicine man as having been made in 1969 or 1970 by another medicine man personally known to him. A professor of anthropology at the University of Arizona testified as an expert on the religious systems of the Western Apache in the State of Arizona. He testified that artifacts such as those appropriated by appellant were used by the Apache Indians in religious ceremonies and that after the conclusion of ceremonies the artifacts traditionally were deposited in remote places on the reservation for religious reasons; that the artifacts are never allowed off the reservation and that they are considered sacred and may not be handled by anyone except the medicine man once they are stored in a cave. He further testified that in anthropological terms "object of antiquity" could include something that was made just yesterday if related to religious or social traditions of long standing. In his opinion the artifacts in the instant case were antiquities despite the fact that they were no more than three or four years old.

We have no doubt as to the wisdom of the legislative judgment (made close to seventy years ago and reinforced by experiences of the present in the despoliation of public lands) that public interest in and respect for the culture and heritage of native Americans requires protection of their sacred places, past and present, against commercial plundering.

Protection, however, can involve resort to terms that, absent legislative definition, can have different meanings to different people. One must be able to know, with reasonable certainty, when he has happened on an area forbidden to his pick and shovel and what objects he must leave as he has found them.

ject of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situat-

Nowhere here do we find any definition of such terms as "ruin" or "monument" (whether historic or prehistoric) or "object of antiquity." The statute does not limit itself to Indian reservations or to Indian relics. Hobbyists who explore the desert and its ghost towns for arrowheads and antique bottles could arguably find themselves within the Act's proscriptions. Counsel on neither side was able to cite an instance prior to this in which conviction under the statute was sought by the United States.

In *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L. Ed. 322 (1926), the Court, in discussing the due process requirement of legislative specificity, stated:

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972), it was stated:

"Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. [Footnote omitted]

ed, shall, upon conviction, be fined in a sum of not more than \$500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court."

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

Here there was no notice whatsoever given by the statute that the word "antiquity" can have reference not only to the age of an object but also to the use for which the object was made and to which it was put, subjects not likely to be of common knowledge.

In our judgment the statute, by use of undefined terms of uncommon usage, is fatally vague in violation of the due process clause of the Constitution.

Judgment reversed.



DEC 28 1977

*J. Paulson, Clerk*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CRIM. NO. 77-284

WILLIAM R. SMYER and  
BYRON R. MAY,

Defendants.

ORDER

This matter coming on for consideration upon the Motions of defendants to dismiss, for a bill of particulars, for discovery, to suppress evidence and for the return of seized property, and the Court having considered the evidence adduced at the Motion hearing, the memoranda filed, together with the entire file in this cause, it is concluded that the Motions are disposed of as follows:

One portion of defendants' motion to dismiss is based on the theory that the Antiquities Act, 16 U.S.C. § 433, under which defendants are charged, is unconstitutionally vague.<sup>1</sup> It is defendants' position that regardless of what it is that they are alleged to have done, a person of ordinary intelligence who "explores the desert and the forrest [sic] for arrowheads, chards (pieces of pottery) [or] old bottles" cannot anticipate whether the objects he finds fall within the scope of the words "any historic or prehistoric ruin or monument, or any object of antiquity."

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<sup>1</sup>The Act provides as follows:

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situate on lands owned or controlled by the Government of the United States, without the permission of

hypothetical situations in which it would be difficult to determine whether a particular course of conduct violates the Act and that, accordingly, the Act is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

The proper analysis to be followed under the circumstances<sup>2</sup> is suggested by United States v. National Dairy Products Corp., 372 U.S. 29 (1962), in which the Supreme Court considered an attack upon § 3 of the Robinson-Patman Act, 15 U.S.C. § 13a, for vagueness. In that case National Dairy had been indicted for selling milk "at unreasonably low prices for the purpose of destroying competition." The indictment specified that National Dairy had intentionally sold milk below cost. National Dairy moved to dismiss the Robinson-Patman counts on the ground that the statutory provision, "unreasonably low prices," was so vague and indefinite as to violate the due process requirement of the fifth amendment.

National Dairy argued that § 3 should be tested solely "on its face" rather than as applied to the acts charged in the indictment. The government took the

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the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum not more than \$500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

<sup>2</sup>It is noted that the Antiquities Act is not a statute which infringes upon first amendment interests, as in Broaderick v. Oklahoma, 413 U.S. 601 (1972), or which, like a vagrancy ordinance, establishes "no standards governing the exercise of the discretion granted by the ordinance, [and thus] permits and encourages an arbitrary and discriminatory enforcement of the law." Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1971). Consequently, the increased scrutiny appropriate in considering a challenge for vagueness of a statute in either of these categories is not applicable here.

position that in considering an attack for vagueness the Court ought to determine whether the statute was unconstitutionally vague in its application to the conduct alleged in the indictment, regardless of whether or not there is doubt as to the validity of the statute in all its possible applications. Before concluding that § 3 is not unconstitutionally vague, the Court explained the proper course for analysis:

It is true that a statute attacked as vague must initially be examined "on its face," but it does not follow that a readily discernible dividing line can always be drawn, with statutes falling neatly into one of the two categories of "valid" or "invalid" solely on the basis of such an examination.

We do not evaluate § 3 in the abstract.

"The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases . . . ." \* \* \* United States v. Raines, 362 U.S. 17, 22 (1960).

The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. \* \* \* Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation. \* \* \*

Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. \* \* \* In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged. \* \* \* In view of these principles we must conclude that if § 3 of the Robinson-Patman Act gave National Dairy and Wise sufficient warning that selling below cost for the purpose of destroying competition is unlawful, the statute is constitutional as applied to them. \* \* \* We therefore consider the vagueness attack solely in relation to whether the statute sufficiently warned National Dairy and Wise that selling "below cost" with predatory intent was within its prohibition of "unreasonably low prices." (citations and footnotes omitted)

National Dairy Products Corporation, at 32-33.

Applying the same analysis to the facts in the present case, the question is whether the Antiquities Act gave defendants sufficient notice that the excavation of two 800 to 900 year old Nimbres Indian ruins and the appropriation from such ruins of seven classic Nimbres black and white

bowls, a bone awl and a clay effigy, all of which are approximately 800 to 900 years old, was within the prohibition of the Act.

The words "ruin" and "monument" plainly require no guessing at their meaning, and the term "objects of antiquity" is no less comprehensible. Webster's Third New International Dictionary defines "antiquity" as "ancient times; times long since past," so an object of antiquity is an object out of or from ancient times or times long since past.

While it may not be possible to state in the abstract a precise number of years that must pass before something becomes an "object of antiquity," such exactitude is not required.

"The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language [of a statute challenged for vagueness is acceptable if it] conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."

United States v. Petrillo, 332 U.S. 1, 7-8 (1946), See American Communications Association v. Doud, 339 U.S. 382, 412 (1950) As we are "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110 (1971).

The Antiquities Act must necessarily use words "marked by 'flexibility and reasonable breadth, rather than meticulous specificity,'" id, in order to accomplish its purposes.

It is clear that the acts alleged in the information fall squarely within the proscription of the Antiquities Act. In light of what the evidence adduced at the motion hearing indicated was the defendants' experience with Indian artifacts and the age of the artifacts described in the information, the argument that the defendants could not

reasonably have had notice from the language of the Antiquities Act that their alleged activities violated that statute is simply not credible. When measured by common understanding and practice, it is evident that the language of the Act is not indefinite, vague or uncertain.<sup>3</sup>

Another portion of defendants' Motion to dismiss is based on the theory that the information unfairly multiplies charges. This portion of the Motion is not well taken, and will be denied.

The Motions to suppress are not well taken, as the evidence adduced at the Motion hearing establishes that the items recovered were the fruits of valid searches, and the statements made by the defendants were given freely and voluntarily after defendants had been advised of their rights. The Motions to suppress will be denied.

The Motion for a bill of particulars is not well taken and will be denied.

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<sup>3</sup>The Ninth Circuit Court of Appeals reached a contrary result in United States v. Diaz, 499 F.2d 113 (9th Cir. 1974). The defendant in that case was charged with violation of the Antiquities Act for having appropriated some face masks from an Indian reservation. Although it was established at trial that the masks involved were only 3 or 4 years old, a professor of anthropology testified that such masks were "objects of antiquity" because they were related to religious or social traditions of long standing. Accepting that definition, the court held that the Act was void for vagueness, for it gave no notice of the meaning of "undefined terms of uncommon usage." 499 F.2d at 115.

Presented with the facts of that case, the Ninth Circuit opted not to give the Antiquities Act a limiting construction, which would have avoided an "unnecessary pronouncement on constitutional issues, [and] premature interpretations of statutes in areas where their constitutional application might be cloudy." United States v. Raines, 362 U.S. 17, 22 (1960). As the Supreme Court has stated, "Our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 571 (1973). At any rate, it is extremely doubtful that Congress intended the Antiquities Act to prohibit the acquisition of objects manufactured as recently as 3 or 4 years ago.

Finally, with respect to the Motion for discovery, the government has stated that it either has complied or will comply with all of defendants' requests with the exception of a request for a list of government witnesses. Such information is not discoverable pursuant to Rule 16, and that portion of the motion will be denied; Now, Therefore,

IT IS BY THE COURT ORDERED that defendants' Motions to dismiss, for a bill of particulars, and to suppress evidence be, and hereby are denied, as is that portion of defendants' Motion for discovery which seeks discovery of a witness list.

  
UNITED STATES DISTRICT JUDGE

New Mexico, Howard C. Bratton, Chief Judge, of violating the Antiquities Act, and they appealed. The Court of Appeals, Breitenstein, Circuit Judge, held, inter alia, that the Act was not unconstitutionally vague and uncertain.

Affirmed.

**1. Public Lands —8**

As applied in prosecution of defendants for taking artifacts from ancient sites for commercial motives, Antiquities Act was not unconstitutionally vague or uncertain. 16 U.S.C.A. § 433; U.S.C.A.Const. art. 4, § 3, cl. 2; Amend. 1.

**2. Public Lands —8**

In prosecution for violation of Antiquities Act, evidence failed to support defendants' contention that they believed that they were on private property when they excavated for artifacts. 16 U.S.C.A. § 433; U.S.C.A.Const. Amend. 6.

**3. Jury —22(2), 29(6)**

Record in prosecution for violation of Antiquities Act established that defendants knowingly and voluntarily waived their right to jury trial; in any case, defendants had no right to jury trial where concurrent sentences of less than six months were imposed. 16 U.S.C.A. § 433; U.S.C.A.Const. Amend. 6.

**4. Criminal Law —627.8(1)**

In prosecution of defendants for violation of Antiquities Act, record disclosed that Government sufficiently complied with court rule with respect to discovery and inspection of map of area in which antiquity sites were located. 16 U.S.C.A. § 433; U.S.C.A.Const. Amend. 6; Fed.Rules Crim. Proc. rule 16, 18 U.S.C.A.

**5. Criminal Law —412(5)**

In prosecution for violation of Antiquities Act, trial court did not err in receiving in evidence testimony concerning defendant's question to federal officer concerning



UNITED STATES of America,  
Plaintiff-Appellee,

v.

William R. SMYER and Byron R. May,  
Defendants-Appellants.

No. 78-1134, 78-1135.

United States Court of Appeals,  
Tenth Circuit.

Submitted Jan. 26, 1979.

Decided April 2, 1979.

Rehearing Denied April 30, 1979.

Defendants were convicted in the United States District Court for the District of

truck which had been impounded, and officer's response to such question. 16 U.S.C.A. § 433.

**6. Criminal Law —412.2(3, 5)**

Statements to federal officers by persons accused of violating Antiquities Act were properly admitted in evidence where they were made after *Miranda* warnings were administered and each had signed waiver of rights and where officer denied defendants' claims of threats and promises of leniency.

**7. Criminal Law —394.4(10)**

In prosecution for violation of Antiquities Act, articles seized from defendant's residence were properly admitted in evidence after being adequately identified.

**8. Criminal Law —394.4(12)**

Photograph found in truck belonging to person suspected of violating Antiquities Act was properly admitted in subsequent prosecution where seizure occurred during routine inventory intended to protect owner's property while vehicle was in police custody. 16 U.S.C.A. § 433.

Robert Bruce Collins, Asst. U. S. Atty., Albuquerque, N. M. (Victor R. Ortega, U. S. Atty., Albuquerque, N. M., with him, on brief), for plaintiff-appellee.

Frederick H. Sherman, Deming, N. M. (Sherman & Sherman, Deming, N. M., with him, on briefs), for defendants-appellants.

Before McWILLIAMS, BREITENSTEIN and McKAY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

After trial to the court without a jury, the defendants-appellants were found guilty of each count of an eleven-count information charging violations of 16 U.S.C. § 433 which relates to American antiquities. They received 90-day concurrent sentences on each count.

The offenses occurred in the Mimbres Ranger District, Gila National Forest, New Mexico. Count I charges that, without permission from the Secretary of Agriculture,

the defendants excavated a prehistoric Mimbres ruin at an archaeological site, herein designated as 250, which was inhabited about 1000-1200 A.D. Count II charges excavation of a ruin at a site designated as 251. Counts III through XI charge the appropriation from the ruins of specified objects of antiquity, 800-900 years old.

The two sites are about 800 yards apart and may be approached either from the north or the south. Forest Rangers had observed "very wide, deep-lugged" tire tracks at the sites. On October 29, 1977, a Forest Service Recreation Officer, Roybal, discovered that a vehicle with "wide, deep-lugged" tires had entered the northern road leading to the sites and had passed a Forest Service sign warning that the area was protected by the American Antiquities Act. Upon his request for assistance, Ranger Bradsby and Enforcement Officer Dresser came and the three followed the tire tracks to the ruins. They found freshly dug holes at each ruin, shovels, picks, a sifting screen, and a small pottery bowl. In an arroyo between the sites they found a four-wheel drive truck, the tires on which matched the earlier discovered tire marks. No one was present at the sites. The officers inventoried the contents of the truck and had it towed away. That evening defendant May came to Ranger Bradsby's home and said that "he had been scouting for deer and that his truck had been stolen." A few days later federal officers interviewed, and obtained statements from, both May and Smyer. The officers took some artifacts from Smyer's home without objection and later, on the execution of a search warrant, seized other pieces of Indian bowls.

[1] Defendants urge that the Antiquities Act is unconstitutional because it is vague and uncertain. The Act, which was passed in 1906, provides:

"Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of

the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than \$500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court."

The claim of vagueness and uncertainty is based on the use in the statute of the words "ruin," and "object of antiquity." In *United States v. Diaz*, 9 Cir., 499 F.2d 113, 114-115, the Ninth Circuit held that "the statute, by use of undefined terms of uncommon usage, is fatally vague in violation of the due process clause of the Constitution." We respectfully disagree. In *Diaz* the charge was appropriation of objects of antiquity consisting of face masks found on an Indian Reservation. The masks had been made in 1969 or 1970. The government evidence was that "'object of antiquity' could include something that was made just yesterday if related to religious or social traditions of long standing." *Id.* at 114. Those facts must be contrasted with the instant case where the evidence showed that objects 800-900 years old were taken from ancient sites for commercial motives. We do not have a case of hobbyists exploring the desert for arrow heads. See, *id.* at 114. Defendants admitted visiting the sites on several occasions and May had sold Mimbres bowls to an archaeologist.

The charges here were the excavation of two ruins and the appropriation of several objects of antiquity. The defendants' attack can go only to "ruin" and "antiquity." A ruin is the remains of something which has been destroyed. Webster's New International Dictionary, 2d Ed., 1960, p. 2182, ruin (4). Antiquity refers to "times long since past." *Id.* p. 119, antiquity (1). When measured by common understanding and practice, the challenged language conveys a sufficiently definite warning as to the proscribed conduct. *United States v. Petrillo*, 332 U.S. 1, 8, 67 S.Ct. 1538, 91 L.Ed. 1877; see also *United States v. Goeltz*, 10 Cir., 513 F.2d 193, 196-197, cert. denied, 423 U.S. 830, 96 S.Ct. 51, 46 L.Ed.2d 48.

The case under consideration is not a "sit-in" case like *Bouie v. City of Columbia*, 378 U.S. 847, 84 S.Ct. 1697, 12 L.Ed.2d 894, a vagrancy case like *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 81 L.Ed.2d 110, nor an antipicketing case like *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 83 L.Ed.2d 222. We are not concerned with the deprivation of any First Amendment right. In their briefs defendants charge selective enforcement, but their claim has no support in the record. The statute in question was designed for the protection of American antiquities. It affects the property of the United States and is well within the power over public lands given to Congress by the federal Constitution. Art. IV, § 3, cl. 2.

In assessing vagueness, a statute must be considered in the light of the conduct with which the defendant is charged. See *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33, 83 S.Ct. 594, 9 L.Ed.2d 561. The Antiquities Act gives a person of ordinary intelligence a reasonable opportunity to know that excavating prehistoric Indian burial grounds and appropriating 800-900 year old artifacts is prohibited. See *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 83 L.Ed.2d 222. We find no constitutional infirmity in § 433.

[2] The Gila National Forest was established in 1899. *United States v. New Mexico*, 938 U.S. 696-699, 98 S.Ct. 3012, 3013, 57 L.Ed.2d 1052. The Secretary of Agriculture has jurisdiction over historic sites within forest reserves. 43 C.F.R. § 3.1(a). To bolster their claim that they did not know they were in the National Forest, defendants argue that the Department gave inadequate notice that the two sites were on government land. The tire tracks of the vehicle went by an Antiquities Act sign. When the defendants saw the forest officers, one of whom was in uniform, they fled. Each defendant in his statement to officer Dresser admitted that he had been to the site several times. Mimbres bowls were found in Smyer's home. The trial court rejected the defendants' claim that they believed they were on private proper-

ty. The overwhelming evidence shows violations of § 433.

[3] Defendants claim that they were wrongfully denied a jury trial in violation of the Sixth Amendment. In *Baldwin v. New York*, 399 U.S. 66, 69, 90 S.Ct. 1886, 1888, 26 L.Ed.2d 437, the Court said:

"[N]o offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."

The maximum penalty authorized by the Antiquities Act is 90 days imprisonment plus a fine of \$500. Violations of the Act are petty offenses under 18 U.S.C. § 1. The information contained 11 counts, each of which was charged as a separate offense. Each defendant was found guilty of each count. If consecutive sentences were imposed, the potential existed of 990 days imprisonment. The court sentenced defendants to 90 days on each count with the sentences to run concurrently.

The case was set for trial in Albuquerque, New Mexico on December 12, 1977. By written motion the defendants requested that the trial be held in Las Cruces, New Mexico. The court then set the trial for January 9 in Las Cruces. The defendants requested a jury. The court said that no jury would be available in Las Cruces and that the defendants could have a jury trial in Albuquerque on January 23. After some discussion the defendants and their counsel each signed waivers of jury trial. Government counsel also signed waivers and they were approved by the court. The record shows that the waivers were made knowingly, voluntarily and with the approval of competent counsel. See *Adams v. United States*, 317 U.S. 269, 275-278, 63 S.Ct. 236, 87 L.Ed. 268.

On this appeal defendants assert that they could not have a fair trial in Albuquerque. The record contains nothing to sustain this contention. In the trial court, defendants claimed that they could not afford a trial in Albuquerque. At the sentencing the trial court, with regard to this contention, said it "is simply not a fact." The waivers were made freely and intelligently and defendants are bound thereby.

In any event, defendants' reliance on *Codispoti v. Pennsylvania*, 418 U.S. 506, 94 S.Ct. 2687, 41 L.Ed.2d 912, is misplaced. That case held that where consecutive sentences aggregating more than six months are imposed, defendant has a right to a jury trial. Here, concurrent sentences of less than six months were imposed. Where the actual sentence for multiple petty offenses is less than six months, there is no jury trial right. See, *Muniz v. Hoffman*, 422 U.S. 454, 475-476, 95 S.Ct. 2178, 45 L.Ed.2d 319, and *Taylor v. Hayes*, 418 U.S. 488, 495-496, 94 S.Ct. 2697, 41 L.Ed.2d 897. *Scott v. Illinois*, — U.S. —, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979) which deals with a defendant's right to counsel, is consistent with this view.

[4] Defendants assert that the government did not comply with Rule 16, F.R. Crim.P., relating to discovery and inspection. At the trial much controversy arose over the government's compliance with a defense motion for discovery. One dispute related to a map of the area in which the antiquity sites were located. The defense claimed that they did not know that they were on government property. A land surveyor presented an area map. The defense claims that they did not receive an exact copy and that the evidence given by the surveyor included scientific tests or experiments within the purview of Rule 16(a)(1)(D). We are not impressed. We are convinced that the government complied with Rule 16. The record sustains the government's contention that the defendants knew they were on government land. If there was any misunderstanding about the map, the defendants were not prejudiced.

[5] The defendants assert that the statements which they made to the officers should have been suppressed. The first complaint relates to statements of May to officer Bradaby on the evening that the officers impounded the truck. May came to Bradaby's home to inquire about the truck which, he said had been taken while he was

"scouting for deer." Bradsby told him that the truck had been impounded. All the officer did was to answer defendant May's questions. Bradsby's testimony was properly received.

[6] Officer Dresser separately interviewed Smyer and May. Neither was in custody at the time. Dresser gave each the required *Miranda* warnings and each signed a "Waiver of Rights." Each defendant was educated, intelligent, and under no compulsion. Dresser denied defendants' claims of threats and promises of leniency. Credibility is a matter for the trier of the facts. The court chose to believe Dresser. The defendants' statements were properly received.

[7] The next objection goes to the receipt in evidence of the tangible objects which are the bases of Counts III to XI. During his interview with officer Dresser, May admitted digging at the ruins and selling two bowls. May offered to return the artifacts. At Smyer's home, May selected a number of artifacts from a collection and turned them over to the officer. Later the officer returned to Smyer's home with a search warrant and seized 31 bowls. A government expert testified that certain bowls were "all Mimbres classic or Mimbres Black on White Bowls." A shard found at the site fitted one of the bowls. A government expert placed the value of the artifacts taken by the defendants at about \$4,000. The sites were prehistoric ruins inhabited by Mimbres Indians, a sub-group of the Mogollon culture, from about 1000 to 1200 A.D., and the bowls were made sometime during that period. The questioned evidence was either given voluntarily to the officer or obtained by a search warrant of unquestioned validity. The bowls were adequately identified with the site, both by physical evidence and the admissions of the defendants. The evidence was properly received.

[8] Defendants object to the receipt in evidence of a photograph of defendant May, seized by the officers during an inventory search of the truck. The photo showed May

standing with a skull on his head and on each shoulder. He was holding skeletal bones in his hands. The evidence showed the presence of skeletal bones at the sites. On cross-examination May said that the photo was of him.

After the officers found the truck, they investigated the surrounding area and found no one. They decided to impound the truck and made a routine inventory of its contents. While doing so, officer Roybal lowered a sun visor, and the questioned photo fell down. The routine inventory protected the owner's property while in police custody, protected the officers against claims and disputes and against potential danger. *South Dakota v. Opperman*, 428 U.S. 364, 368-372, 96 S.Ct. 8092, 49 L.Ed.2d 1000, sustains the actions of the officers. They had reasonable cause to connect the truck with the excavations at the sites, and it had been abandoned. The seizure of the photo was proper. The evidence showed that the picture had been taken at site 250. The picture connected May with the site and was properly received in evidence.

Ranger Bradsby testified that the special-use permits, which authorized exploration of antiquity sites, were kept in his office and that neither May nor Smyer had a permit. The government introduced a computer print-out which named those who had the necessary permits. The introduction of the print-out is said to violate the Rules of Evidence, particularly Rule 802 (hearsay) and 602 (witnesses-lack of personal knowledge). The government says that the print-out is admissible under Rule 803(6) (Records of regularly conducted activity). The controversy need not be decided because other evidence showed that defendants did not have a permit, and they did not claim to have one. The government did not need to offer the print-out to prove its case, and the defendants were not prejudiced by its receipt.

Affirmed.



**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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No. 78-1900

WILLIAM R. SMYER AND BYRON R. MAY, PETITIONERS

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE TENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES  
IN OPPOSITION**

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. A) is reported at 596 F. 2d 939. The opinion of the district court (Pet. App. B) is not reported.

**JURISDICTION**

The judgment of the court of appeals was entered on April 2, 1979. A petition for rehearing was denied on April 30, 1979. The petition for a writ of certiorari was filed on June 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

**QUESTIONS PRESENTED**

1. Whether the American Antiquities Act, 16 U.S.C. 433, is unconstitutionally vague as applied to the excavation and appropriation of 800-year old artifacts of a prehistoric Indian civilization.
2. Whether petitioners were denied their right to a jury trial.
3. Whether certain statements and physical evidence were improperly withheld from petitioners before trial or improperly admitted at trial.

**STATUTE INVOLVED**

The American Antiquities Act, 16 U.S.C. 433, provides:

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined a sum of not more than \$500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

**STATEMENT**

After a jury-waived trial in the United States District Court for the District of New Mexico, petitioners were convicted on 11 counts of unlawful excavation of a prehistoric site and theft of specific objects of antiquity, in violation of the American Antiquities Act, 16 U.S.C. 433. Petitioners were sentenced to concurrent terms of 90 days' imprisonment on each count. The court of appeals affirmed (Pet. App. A1 to A7).

The evidence at trial showed that in October 1977 officers of the United States Forest Service stationed in the Gila National Forest, New Mexico, noticed signs of recent digging at a prehistoric Mimbres ruin. On October 29, 1977, an officer noticed new tire tracks leading past a Forest Service Antiquities Act sign to archaeological sites 250 and 251 (Tr. 24, 79, 117). Freshly dug holes and digging tools were found at one of the sites (Tr. 33-34, 81-83), and a pick-up truck whose tire tracks matched those seen entering the area was found in an arroyo between the two sites (Tr. 36, 116). The truck was registered to petitioner May (Tr. 40, 90, 117).

On the following day, May was interviewed by a special agent of the Forest Service. After signing a waiver of rights form (Tr. 92), May admitted that he and petitioner Smyer had been digging for artifacts at the sites and offered to return bowls which they had taken from the area (Tr. 92-94). The two men then proceeded to Smyer's house, where May gave the officer certain artifacts uncovered at the site (Tr. 94-96, Gov't Exhs. 13A-H). Smyer, after being informed of his rights, admitted that he had dug for artifacts at the site with May (Tr. 100). A subsequent warrant-authorized search of Smyer's house uncovered 31 Mimbres bowls (Tr. 102). The recovered artifacts were estimated to date from 1000-1200 A.D. and to have a wholesale value of at least \$1,000 each (Tr. 129-131, 138).

In his defense, May admitted that he excavated the artifacts but contended that he was unaware that the area was federal property (Tr. 181-182, 187, 188). Petitioner Smyer did not take the stand.

#### ARGUMENT

1. Petitioners argue (Pet. 6) that the American Antiquities Act, 16 U.S.C. 433, is unconstitutionally

vague because it fails to define the term "object of antiquity." Whatever merit this claim might have in other situations, it has no force in this case.

As both the district court and the court of appeals noted, a statute that is impermissibly vague as applied in some contexts may nonetheless provide fair warning that other conduct falls within its scope (Pet. App. A3-A4, B2 to B5). Where, as here, the statute does not broadly trench upon First Amendment freedoms, "one to whom application of [the] statute is constitutional will not be heard to attack the statute on the ground that impliedly it might be also taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines*, 362 U.S. 17, 21 (1960). See also *United States v. Powell*, 423 U.S. 87 (1975); *United States v. Mazurie*, 419 U.S. 544, 550 (1975); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963).

These settled principles govern here, for it is beyond question that an 800-year old archaeological artifact, created by a prehistoric civilization, is an "object of antiquity" within the meaning of the statute. The statute thus gave fair warning of its clear intent to forbid the excavation and appropriation of the objects taken by petitioners in this case.<sup>1</sup> Even if the statute was vague as

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<sup>1</sup>The history of the statute further demonstrates Congress' intent to protect these artifacts from plunder and destruction. "[I]n view of the fact that the historic and prehistoric ruins and monuments on the public lands of the United States are rapidly being destroyed by parties who are gathering them as relics and for the use of museums, and colleges, etc., your committee are of the opinion that their preservation is of great importance." S. Rep. No. 3797, 59th Cong., 1st Sess. (1906). See also comments by Rep. Lacey, 40 Cong. Rec. 7888 (1906), stating that the purpose of the bill "is to preserve these old objects of special interest and the Indian remains in the pueblos of the Southwest \* \* \*."

applied to the excavation of less ancient objects of less significant cultural origin, the statute provided ample notice that the conduct charged in this case was unlawful. See *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. Mazurie*, *supra*, 419 U.S. at 551-553.

*United States v. Diaz*, 499 F. 2d 113 (9th Cir. 1974), on which petitioners rely (Pet. 6), is distinguishable on this very basis. In *Diaz*, the defendant was charged with appropriating Indian face masks that were only three or four years old at the time of the theft. The court of appeals could have reversed the conviction in *Diaz* simply on the ground that objects only four years old are not "objects of antiquity" under any reasonable interpretation of the statute.<sup>2</sup> Instead, although the constitutionality of the statute was neither briefed nor argued on appeal, the court held that the statute failed to afford notice of its application to objects of such recent origin and was therefore "fatally vague \* \* \*." *Id.* at 115. In ruling as it did, the court of appeals in *Diaz* violated the fundamental principle that a court should "never anticipate a question of constitutional law in advance of the necessity of deciding it \* \* \*." *Liverpool, New York, & Philadelphia Steamship Co. v. Commissioners of Immigration*, 113 U.S. 33, 39 (1885). See also *United States v. Raines*, *supra*, 362 U.S. at 21. Moreover, the decision antedated this Court's reversal of a similar decision by another panel of the Ninth Circuit in *United States v. Powell*, *supra*. Thus, there is little reason to suppose that the approach taken in *Diaz* would be perpetuated by the Ninth Circuit if it were confronted with the same issue again today. At most, therefore, *Diaz*

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<sup>2</sup>The government contended in *Diaz* that the face masks were "objects of antiquity" because they "related to religious or social traditions of long standing." 499 F. 2d at 114.

stands as a ruling that the statute is unconstitutionally vague as applied to objects of recent origin, a holding not in conflict with the decision in this case. There is no basis for concluding that, because the statute does not fairly warn that a four-year old object is an "antiquity," the statute is similarly vague as applied to the 800-year old archaeological artifacts stolen in this case.<sup>3</sup>

2. Petitioners' case was originally set for trial in Albuquerque, New Mexico. Prior to trial, however, petitioners requested as a matter of convenience that the trial be held in Las Cruces, New Mexico, instead. The district court agreed to transfer the trial to Las Cruces but informed the defendants that a jury would not be available there on the scheduled trial date. Petitioners chose to have the trial in Las Cruces on the scheduled date anyway, and they therefore signed jury-trial waivers that were approved by the court (Pet. App. A5).

Petitioners now contend (Pet. 6-7) that they were denied the right to a jury trial. The court of appeals correctly concluded, however, that this "record shows that the waivers were made knowingly, voluntarily and with the approval of competent counsel" (Pet. App. A5). Petitioners chose to waive their right to a jury trial to obtain the perceived advantage of going to trial in Las Cruces on the scheduled trial date.

Nor were petitioners entitled by law to have their trial in Las Cruces rather than Albuquerque. Rule 18 of the

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<sup>3</sup>We note, moreover, that Congress has before it legislation (the "Archaeological Resources Protection Act of 1979") that will specify the age of archaeological resources covered by the Antiquities Act. The House version limits its application to objects at least 100 years of age (H.R. 1825), while the Senate version would apply to any item at least 50 years of age (S. 490). See H.R. Rep. 96-311, 96th Cong., 1st Sess. 7 (1979); S. Rep. 96-179, 96th Cong., 1st Sess. 2, 7 (1979).

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION



UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

MICHAEL LEE PRESTON, )

Defendant. )

Criminal No. 91-10005

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS

Comes now the United States by and through its counsel Ed Bryant, United States Attorney for the Western District of Tennessee, and moves this honorable court to deny defendant's suppression motion. In support of its position, the United States would show the following.

1. On the evening of February 23, 1991, Park Rangers at Shiloh National Military Park became unauthorized individuals on the grounds.

2. For several hours the Rangers attempted to keep these individuals under surveillance.

3. During that time Park Rangers identified a suspicious, unoccupied automobile located just outside the park boundaries.

4. When the people under surveillance began walking toward the car, the Rangers nearby were alerted.

5. The car was pulled over within the park grounds.

6. At no time during the stop did Rangers draw their weapons.

7. Metal detectors were in plain view in the back of the automobile.

8. A Bayonet was in plain view on the front passenger side of the car.

9. The automobile was searched and evidence tagged.

10. The Prestons were then transported to the Ranger office where they were advised of their constitutional rights per Miranda.

11. The Prestons did not request an attorney.

12. Statements made by the Prestons about their search of the grounds and the objects found were made freely and without coercion or duress.

13. The Prestons telephoned family members to pick them up from the Park.

Based on the assertions outlined above, the United States respectfully moves its honorable court to deny defendant's Motion to Suppress.

Respectfully submitted,

ED BRYANT  
United States Attorney

By:

  
Cam Towers Jones  
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION



UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

Criminal No. 91-10005

MICHAEL LEE PRESTON, and, )  
GARY EUGENE PRESTON, )

Defendant. )

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MOTION FOR DISCLOSURE OF FACTS AND DATA  
UNDERLYING EXPERT OPINION

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Comes now the United States by and through its counsel Ed Bryant, United States Attorney for the Western District of Tennessee, and moves this honorable court to require disclosure of underlying facts and data relied upon by expert witnesses of the defendants in the above styled cause: In support of its motion the United States would show the following:

1. Pursuant to Rule 705 of the Federal Rules of Criminal Procedure the Court may require facts and data upon which an expert bases his/her opinion.

2. The government can better prepare to respond to defense inferences and opinion, if information is made available prior to the actual testimony.

3. The government is willing to make its expert available to defense counsel for questions regarding inferences and opinions derived from scientific analysis.

4. Judicial economy is served by knowing in advance of trial what opinions will be offered.

Wherefore the United States respectfully moves this honorable court to require disclosure of facts and data relied upon by defendant's expert witness.

Respectfully submitted,

ED BRYANT  
United States Attorney

By:

  
Cam Towers Jones  
Assistant United States Attorney



U.S. Department of Justice

United States Attorney  
Western District of Tennessee

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1026 Federal Office Building  
Memphis, Tennessee 38103-1898

June 17, 1991

Mr. Scott Kirk  
Attorney at Law  
213 E. Lafayette  
Jackson, Tennessee 38301

Re: U.S.A. v. Michael Preston  
Cr. No. 91-10005  
Response to Request for Discovery

Dear Mr. Kirk:

I have received your request for discovery dated June 7, 1991, requesting discovery in the above styled cause. The United States responds as follows to your request:

1. Your client made oral statements acknowledging his involvement in the theft of artifacts from Shiloh National Military Park. He also marked a map for the Park Ranger to note specific areas where he had been digging on the night he was apprehended.

2. The defendant has no known criminal history. If information of a record is found, it will be forward to you.

3. The United States is in possession of flashlights, metal detectors, books, tapes, maps, shovels, dark jump suits, the car and other property used by the defendants in commission of this crime. You may see these items by contacting Park Ranger Kent Higgins at 901-689-5275 to set up a mutually convenient appointment at Shiloh National Military Park.

4. Photographs taken by Park Rangers are also available for your inspection at Shiloh.

5. A copy of the Archaeological Report is available at Shiloh.

6. As evidence of like and similar conduct the government will introduce a baggie containing mini balls that had been washed off and were clean at the time the defendants were stopped.

7. No electronic surveillance or wiretap was used in this investigation.

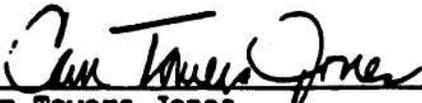
8. Lab results of soil samples will be forwarded to you as soon as received.

9. There is no exculpatory material know to the United States Attorney.

10. The United States hereby requests reciprocal discovery under Rule 16 of the Federal Rules of Criminal Procedure.

Sincerely,

ED BRYANT  
United States Attorney

By:   
Cam Towers Jones  
Assistant United States Attorney

CTJ:mc

Enclosures

cc: U.S. District Court Clerk's Office  
Jackson, Tennessee



*United States Attorney  
Western District of Tennessee*

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1026 Federal Office Building  
Memphis, Tennessee 38103-1898  
June 10, 1991

Roger Staton  
Attorney at Law  
211 E. Main Street  
Jackson, Tennessee 38301

Re: USA v. Gary Eugene Preston  
CR. 91-10020  
Response to Request for Discovery

Dear Mr. Staton:

I have received your letter requesting discovery in the above styled cause. The United States responds as follows to your request:

1. Your client made oral admissions to law enforcement officers after his arrest. His statements corroborate observations by park rangers, i.e. that he was on park grounds, after hours, with a metal detector for the purpose of locating and taking from the premises, Civil War artifacts. He admitted borrowing one of the metal detectors from a man in Memphis.

2. The defendant has no known criminal history. If information of a record is found, it will be forwarded to you.

3. The United States is in possession of flashlights, metal detectors, books, tapes, maps, shovels, dark jump suits, the car and other property used by the defendants in commission of this crime. You may see these items by contacting Park Ranger Kent Higgins at 901-689-5275 to set up a mutually convenient appointment at Shiloh National Military Park.

4. Photographs taken by Park Rangers are also available for your inspection at Shiloh.

5. A copy of the Archaeological Report is available at Shiloh.

6. As evidence of like and similar conduct the government will introduce a baggie containing mini balls that had been washed off and were clean at the time the defendants were stopped.

7. No electronic surveillance or wiretap was used in this investigation.

8. Lab results of soil samples will be forwarded to you as soon as received.

9. There is no exculpatory material know to the United States Attorney.

10. The United States hereby requests reciprocal discovery under Rule 16 of the Federal Rules of Criminal Procedure.

Sincerely,

ED BRYANT  
United States Attorney

By: Cam Towers Jones  
Cam Towers Jones  
Assistant United States Attorney

CTJ:ms

Enclosures

cc: U.S. District Court Clerk's Office  
Jackson, Tennessee

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. ) Criminal No. 91-10005  
 )  
 MICHAEL LEE PRESTON, AND, )  
 GARY EUGENE PRESTON, )  
 )  
 Defendants. )

THE GOVERNMENT'S REQUEST FOR JURY INSTRUCTIONS

I.

Direct and Circumstantial Evidence

There are two types of evidence which you may properly use in deciding whether a defendant is guilty or not guilty.

One type of evidence is called direct evidence. Direct evidence is where a witness testifies as to what he saw, heard or observed. In other words, when a witness testifies about what is known to him of his own knowledge by virtue of his own senses - what he sees, feels, touches or hears - that is called direct evidence.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. There is a simple example of circumstantial evidence which is often used in this courthouse.

Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom blinds were drawn and you could not look outside.

As you were sitting here someone walked in with an umbrella which was dripping wet. Somebody else then walked in with a raincoat which was also dripping wet.

Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of the fact. But on the combination of facts which I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining.

That is all there is to circumstantial evidence. You infer on the basis of reason and experience and common sense from an established fact the existence or the non-existence of some other fact.

Circumstantial evidence is of no less value than direct evidence; for, it is a general rule that the law makes no distinction between direct and circumstantial evidence, but simply requires that a before convicting a defendant, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case.

## II.

### Reasonable Doubt

I have said that the government must prove the defendant guilty beyond a reasonable doubt. The question naturally is what is a reasonable doubt? The words almost define themselves. It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt which would cause a reasonable person to hesitate to

act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. A reasonable doubt is not a caprice or a whim; it is not a speculation or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. And it is not sympathy.

The burden is at all times upon the government to prove guilt beyond a reasonable doubt. The law does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to the defendant, which means that it is always the government's burden to prove each of the elements of the crimes charge beyond a reasonable doubt.

If, after fair and impartial consideration of all of the evidence, you have a reasonable doubt, it is your duty to acquit the defendant. On the other hand if after fair and impartial consideration of all the evidence you are satisfied of the defendant's guilt beyond a reasonable doubt you should vote to convict.

### III.

#### Expert Witness

You have heard testimony from an expert. An expert is allowed to express his opinion on most matters about which he has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in the field can assist

you in understanding the evidence or in reaching an independent decision on the facts.

In weighing the experts' testimony, you may consider the expert's qualifications, his opinions, his reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not however, accept this witness' testimony merely because he is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

#### IV.

#### Inference of Guilty Knowledge

During the trial you have heard the attorneys use the term "inference," and in their arguments they have asked you to infer, on the basis of your reason, experience and common sense, from one or more established facts, the existence of some other facts.

An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact which you know exists.

There are times when different inferences may be drawn from facts, whether proved by direct or circumstantial evidence. The government asks you to draw one set of inferences, while the defense asks you to draw another. It is for you, and you alone, to decide what inferences you will draw.

The process of drawing inferences from facts in evidence is not a matter of guesswork of speculation. An inference is a deduction or conclusion which you, the jury, are permitted to draw-but not required to draw-from the facts which have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your common sense.

So, while you are considering the evidence presented to you, you are permitted to draw, from the facts which you find to be proven, such reasonable inferences as would be justified in light of your experience.

Here again, let me remind you that, whether based upon direct or circumstantial evidence, or upon the logical, reasonable inference drawn from such evidence, you must be satisfied of the guilt of the defendant beyond a reasonable doubt before you may convict.

V.

Willful Intent or Guilty Knowledge

Willful intent or guilty knowledge may be inferred from the defendant's secretive or irregular manner in which a transaction is carried out.

VI.

Consciousness of Guilt

There has been evidence that the defendant may have used a false name. If you find that the defendant knowingly used a name other than his own in order to conceal his identity and to avoid identification, you may, but are not required to, infer that the

defendant believed that he was guilty. You may not, however, infer on the basis of this alone, that the defendant is, in fact guilty of the crime for which he is charged. Whether or not evidence of the use of a false name shows that the defendant believed he was guilty and the significance, if any, to be attached to the evidence are matters for you determine.

You have heard testimony that the defendant made certain statements outside the courtroom to law enforcement authorities in which the defendant claimed that his conduct was consistent with innocence and not with guilt. The government claims that these statements in which he exonerated or exculpated himself are false.

If you find that the defendant gave a false statement in order to divert suspicion from himself, you may, but are not required to infer that the defendant believed that he was guilty. You may not, however, infer on the basis of this alone, that the defendant is, in fact, guilty of the crime for which he is charged.

Whether or not the evidence as to a defendant's statements shows that the defendant believed that he was guilty, and the significance, if any, to be attached to any such evidence, are matters for you, the jury to decide.

#### VII.

##### Similar Acts

The government has offered evidence tending to show that on a different occasion the defendant engaged in conduct similar to the charges in the indictment.

In that connection, let me remind you that the defendant is not on trial for committing this act not alleged in the indictment. Accordingly, you may not consider this evidence of the similar act as a substitute for proof that the defendant committed the crime charged. Nor may you consider this evidence as proof that the defendant has a criminal personality or bad character. The evidence of the other, similar act was admitted for a much more limited purpose and you may consider it only for that limited purpose.

If you determine that the defendant committed the acts charged in the indictment and the similar acts as well, then you may, but you need not draw an inference that in doing the acts charged in the indictment, the defendant acted knowingly and intentionally and not because of some mistake, accident or other innocent reasons.

Evidence of similar acts may not be considered by you for any other purpose. Specifically, you may not use this evidence to conclude that because the defendant committed the other act he must also have committed the acts charged in the indictment.

#### VIII.

#### KNOWLEDGE, WILLFULNESS, INTENT, MALICE

Knowledge, willfulness (or malice) and intent involve the state of a person's mind. It has often been said to juries that the state of one's mind is a fact as much as the state of his digestion. Accordingly, this is a fact you are called upon to decide.

Medical science has not yet devised an instrument which can

record what was in one's mind in the distant past. Rarely is direct proof available to establish the state of one's mind. This may be inferred from what he says or does: his words, his actions, and his conduct, as of the time of the occurrence of certain events.

The intent with which an act is done is often more clearly and conclusively shown by the act itself, or by a series of acts, than by words or explanations of the act uttered long after its occurrence. Accordingly, intent, willfulness (or malice) and knowledge are usually established by surrounding facts and circumstances as of the time the acts in question occurred, or the events took place, and the reasonable inferences to be drawn from them.

#### IX.

#### USING MOTIVE FOR INTENT

Proof of motive is not a necessary element of the crime with which the defendants are charged.

Proof of motive does not establish guilt, nor does want of proof of motive establish that a defendant is innocent.

If the guilt of a defendant is shown beyond a reasonable doubt, it is immaterial what the motive for the crime may be or whether any motive be shown, but the presence or absence of motive is a circumstance which you may consider as bearing on the intent of a defendant.

**X.**

**CROSS-EXAMINATION OF WITNESS ON DEFENDANT'S CHARACTER**

The prosecution asked certain questions on cross-examination of the defendant's character witness about specific acts supposedly committed by the defendant. I caution you that the prosecution was allowed to ask these questions only to help you decide whether the witness was accurate in forming his opinion or in describing the reputation of the defendant's character. You may not assume that the acts described in these questions are true, nor may you consider them as evidence that the defendant committed the crime for which he is charged., You may therefore consider the questions only in deciding what weight, if any, should be given to the testimony of the character witness and for no other purpose. You should not consider such questions as any proof of the conduct stated in the question.

**XI.**

**IMPEACHMENT OF REPUTATION TESTIMONY**

You have heard evidence that one of the witnesses who testified has the reputation of being an untruthful person. Since you are the sole judges of the facts and the credibility of witnesses, you may consider this evidence in deciding whether or not to believe the witness whose reputation for truthfulness has been questioned, giving such reputation evidence whatever weight you deem appropriate.

**XII.**

**OPINION AS CHARACTER OF WITNESS TO IMPEACH  
ANOTHER WITNESS' CREDIBILITY**

You have heard [name of witness] testify that in his opinion [name of other witness], one of the other witnesses who testified, is an untruthful person. Since you are the sole judges of the facts and the credibility of witnesses, you may consider such evidence in deciding whether or not to believe the witness whose character for truthfulness has been questioned, giving such character evidence whatever weight you deem appropriate.

**XIII.**

**ADMISSION OF DEFENDANT**

There has been evidence that the defendant made certain statements in which the government claims he admitted certain facts charged in the indictment.

In deciding what weight to give the defendant's statements, you should first examine with great care whether each statement was made and whether, in fact, it was voluntarily and understandingly made. I instruct you that you are to give the statements such weight as you feel they deserve in light of all the evidence.

**Aiding and Abetting**

The indictment charges the defendant with aiding and abetting [describe principal offense].

The aiding and abetting statute, section 2(a) of Title 18 of the United States Code provides that:

Whoever commits an offense against the United States or aids

or abets or counsels, commands or induces, or procures its commission, is punishable as a principal.

Under the aiding and abetting statute, it is not necessary for the government to show that a defendant himself physically committed the crime with which he is charged in order for you to find the defendant guilty.

A person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself.

Accordingly, you may find a defendant guilty of the offense charged if you find beyond a reasonable doubt that the government has proved that another person actually committed the offense with which the defendant is charged, and that the defendant aided or abetted that person in the commission of the offense.

As you can see, the first requirement is that you find that another person has committed the crime charged. Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of the crime.

In order to aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associate himself in some way with the crime, and that he willfully and knowingly seek by some act to help make the crime succeed.

Participation in a crime is willful if action is taken voluntarily and intentionally, or, in the case of a failure to act,

with the specific intent to fail to do something the law requires to be done; that is to say, with a bad purpose either to disobey or to disregard the law.

The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. An aider and abettor must have some interest in the criminal venture.

To determine whether a defendant aided or abetted the commission of the crime with which he is charged, ask yourself these questions:

Did he participate in the crime charged as something he wished to bring about?

Did he associate himself with the criminal venture knowingly and willfully?

Did he seek by his actions to make the criminal venture succeed?

If he did, then the defendant is an aider and abettor, and therefore guilty of the offense.

If, on the other hand, your answers to this series of questions are "no," then the defendant is not an aider and abettor, and you must find him not guilty.

#### Conspiracy To Defraud the United States

The defendant is charged in the indictment with conspiracy to defraud the United States.

The relevant statute on this subject is 18 U.S.C. § 371. It provides:

It two or more persons conspire...to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each [is guilty of a crime].

In the case, the defendant is accused of having been a member of a conspiracy to defraud the United States government. A conspiracy is a kind of criminal partnership—a combination or agreement of two or more persons who join together to accomplish some unlawful purpose.

Congress has deemed it appropriate to make a conspiracy, standing alone, a separate crime, even if it is not successful. This is because collective criminal activity poses a greater potential threat to the public's safety and welfare than individual conduct and increases both the likelihood of success of a particular criminal venture.

In this regard, the charge of conspiracy to defraud the government does not mean that one of the illegal objects must be to cause the government to suffer a loss of money or property as a consequence of the conspiracy. It would also be a conspiracy to defraud if one of the objects was to obstruct, interfere, impair, impede or defeat the legitimate functioning of the government through fraudulent or dishonest means, as I will define these terms.

#### Guilt of Substantive Offense

There is another method of which you may evaluate the possible

guilt of the defendant for the substantive charge in the indictment even if you do not find that the government has satisfied its burden of proof with respect to each element of the substantive crime.

If, in light of my instructions, you find, beyond a reasonable doubt, that the defendant was a member of the conspiracy charged in count \_\_\_\_ of the indictment, and thus, guilty on the conspiracy count, then you may also, but you are not required to, find him guilty of the substantive crime charged against him in count \_\_\_\_, provided you find, beyond a reasonable doubt, each of the following elements:

First, that the crime charged in the substantive count was committed;

Second, that the person or persons you find actually committed the crime were members of the conspiracy you found existed;

Third, that the substantive crime was committed pursuant to the common plan and understanding you found to exist among the conspirators;

Fourth, that the defendant was a member of that conspiracy at the time the substantive crime was committed;

Fifth, that the defendant could have reasonably foreseen that the substantive crime might be committed by his co-conspirators.

If you find all five of these elements to exist beyond a reasonable doubt, then you may find the defendant guilty of the substantive crime charged against him, even though he did not personally participate in the acts constituting the crime or did

not have actual knowledge of it.

The reason for this rule is simply that a co-conspirator who commits a substantive crime pursuant to a conspiracy is deemed to be the agent of the other conspirators. Therefore, all of the co-conspirators must bear criminal responsibility for the commission of the substantive crimes.

If, however, you are not satisfied as to the existence of any of these five elements, then you may not find the defendant guilty of the substantive crime, unless the government proves, beyond a reasonable doubt, that the defendant personally committed, or aided and abetted the commission of, the substantive crime charged.

Definition of the Crime

1. Count One of the indictment accuses the defendants of removing archaeological resources valued at more than \$500.00 from Shiloh National Military Park, without a permit, in violation of federal law. For you to find the defendant guilty of this crime, you must be convinced that the government had proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendants did knowingly excavate, remove, damage and otherwise alter and deface archaeological resources valued at more than \$500.00.

(B) Second, that these resources were located on designated historic and public lands in Shiloh National Military Park.

(C) Third that Shiloh National Military Park is a national enclave and I instruct you that Shiloh National Military

Park is a designated historic and public land, a national enclave.

(D) Fourth that the offense occurred on Shiloh National Military Park.

(E) Fifth, that the defendants did not have a permit to excavate, remove, damage or otherwise alter and deface archaeological resources.

2. If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Definition of the Crime

1. Count Two of the indictment accuses the defendants of injuring United States property, that is the site of a Civil War Battlefield, Shiloh National Military Park and causing damage in excess of \$100.00 in violation of the federal law. For you to find the defendant guilty of this crime, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendants wilfully injured property of the United States.

(B) Second, that Shiloh National Military Park is property of the United States and I instruct you that it is.

(C) Third, that the injured property was on federal grounds.

(D) Fourth, that it caused damage in excess of \$100.00

to the property.

2. If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Respectfully submitted,

ED BRYANT  
United States Attorney

By:

\_\_\_\_\_  
Cam Towers Jones  
Assistant United States Attorney

# SAMPLE INSTRUCTIONS

## GOVERNMENT'S REQUESTED INSTRUCTION NO.

Section 470ee of Title 16, United States Code, provides in part that:

No person may excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands . . . unless such activity is pursuant to a permit.

Any person who knowingly violates, or counsels, procures, solicits or employs any other person, to violate [the foregoing prohibitions]

shall be guilty of an offense against the laws of the United States.

16 U.S.C. § 470ee

GOVERNMENT'S REQUESTED INSTRUCTION NO.

Four essential elements are required to be proved in order to establish the offense charged in Count I of the indictment:

First: That the defendant at the time charged on the indictment did knowingly excavate, damage, alter, or deface an archaeological resource;

Second: that the archaeological resource was located on public lands;

Third: that the archaeological value, or the cost of repair and restoration of the archaeological resources exceeds the sum of ~~55,000.00.~~

*Permits* → <sup>\$25.00.</sup> Fourth: that the defendant acted without a permit.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged. The law never imposes upon a defendant the burden or duty of calling any witnesses or producing any evidence.

1 DEVITT AND BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS  
§ 13.04. (3d ed. 1977) (modified).

16 U.S.C. § 470ee

GOVERNMENT'S REQUESTED INSTRUCTION NO.

As used in these instructions, "archaeological resource" means any material remains of human life or activities which are at least 100 years of age and which are of archaeological interests.

"Of archaeological interest" means capable of providing scientific or humanistic understanding of past human behavior, culture adaptation, and related topics through the application of scientific or scholarly technics such as controlled observation, contextual measurement, controlled collection, analysis, interpretation and explanation.

"Material remains" means physical evidence of human habitation, occupation, use, or activity, including the site, location or context in which such evidence is situated.

If at least a 100 years of age, surface or subsurface structure, shelters, facilities or features, whole or fragmentary tools, implements, containers, weapons and weapon projectiles, clothing, and ornaments including pottery and other ceramics, cordage, basketry and other weaving, bone, shell, metal, wood, hide, feathers, organic waste, human remains, rock carvings, rock paintings, rock shelters and caves or portions thereof containing any of the above materials shall be considered archaeological resources of archaeological interests.

As used in these instructions "public lands" means lands which are owned and administered by the United States as part of the National Parks System, the National Wildlife Refuge System, the National Forest System, or the Bureau of Land Management.

36 CFR 296

GOVERNMENT'S REQUESTED INSTRUCTION NO.

For purposes of these instructions the "archaeological value" of any archaeological resource shall be appraised in terms of the cost of the retrieval of the scientific information which would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential.

For purposes of these instructions the "cost of restoration and repair" of the archaeological resources damaged as a result of a violation shall be the sum of the cost already incurred for emergency restoration or repair work, plus those costs projected to be necessary to complete restoration and repair, which may include, but need not be limited to, the costs of the reconstruction of the archaeological resource, stabilization of the archaeological resource, ground contour reconstruction and surface stabilization, research necessary to carry out reconstruction or stabilization, physical barriers or other protective devices necessitated by the disturbance to protect the archaeological resource from further disturbance, examination and analysis of the archaeological resource including recording remaining archaeological information, where necessitated by the disturbance, in order to salvage remaining values which cannot be otherwise conserved, and preparation of reports relating to any of the above activities.

36 CFR 296.14

**GOVERNMENT'S REQUESTED INSTRUCTION NO.**

After an appropriate application a permit to conduct archaeological excavation can be issued by the head of the appropriate agency of the United States having primary management authority over public lands. Permits can be issued to appropriately qualified persons or associations.

**36 C.F.R. 296.5-296.9**

GOVERNMENT'S REQUESTED INSTRUCTION NO.

It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of law. The jury may infer that every person knows what the law forbids and what the law requires to be done.

Further, it is not necessary for the government to prove that the defendant knew he was on public lands, only that he acted knowingly.

1 DEVITT AND BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS  
§ 14.10. (3d ed. 1977) (Modified).

United States. Speir, 564 F.2d 1934 (10th Cir. 1977); United States v. Feola, 420 U.S. 671 (1975).

**GOVERNMENT'S REQUESTED INSTRUCTION NO.**

**Section 1361 of Title 18 of the United States Code provides  
in part that:**

**Whoever wilfully injures or commits any  
degradation against any property of the  
United States, or of any department or  
agency thereof . . . [and causes damage  
to such property in excess of the sum of  
\$100]....**

**shall be guilty of an offense against the laws of the United  
States.**

**GOVERNMENT'S REQUESTED INSTRUCTION NO.**

Three essential elements are required to be proved in order to establish the offense charged in Count II of the indictment:

First: that the defendant at the time charged in the indictment injured or destroyed ruins or artifacts which were the property of the United States;

Second: that the damage to such property exceeded the sum of \$100; and

Third: that he acted wilfully.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged. The law never imposes upon a defendant the burden or duty of calling any witnesses or producing any evidence.

1 DEVITT AND BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS  
§ 13.04 (3d ed. 1977).

18 U.S.C. § 1361

**GOVERNMENT'S REQUESTED INSTRUCTION NO.**

**An act is done "willfully" if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.**

**1 DEVITT AND BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS  
§ 14.06. (3d ed. 1977).**

**GOVERNMENT'S REQUESTED INSTRUCTION NO.**

**You are instructed that Indian ruins and artifacts located on public lands are the property of the United States Government.**

**U.S. v. Jones, 607 F.2d (9th Cir. 1979).**

**GOVERNMENT'S REQUESTED INSTRUCTION NO.**

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.

1 DEVITT AND BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS  
§ 14.13. (3d ed. 1977) (modified).

GOVERNMENT'S REQUESTED INSTRUCTION NO.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses". Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

.You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

1 DEVITT AND BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS  
§ 15.22. (3d ed. 1977).