BEFORE THE COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON FISHERIES, WILDLIFE, OCEANS AND INSULAR AFFAIRS
OF THE U.S. HOUSE OF REPRESENTATIVES

OVERSIGHT HEARING ON THE LACEY ACT:
"WHY SHOULD U.S. CITIZENS HAVE TO COMPLY WITH FOREIGN LAWS?"
JULY 17, 2013

TESTIMONY OF PAUL D. KAMENAR, ESQ.

Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee:

My name is Paul D. Kamenar, a Washington, D.C. lawyer and legal public policy advisor with over thirty-five years experience litigating federal cases in the U.S. Supreme Court and lower federal courts, including cases involving abusive criminal enforcement of environmental laws such as the Clean Water Act, Endangered Species Act, and the Lacey Act. I am also a Senior Fellow of the Administrative Conference of the United States and Member of its Judicial Review Committee. I guest lecture at the U.S. Naval Academy on National Security Law, which includes a discussion of how certain environmental laws have hampered military training exercises. I was also a Clinical Professor of Law at George Mason University Law School and Adjunct Professor at Georgetown University Law Center where I taught a separation of powers seminar.

As the former Senior Executive Counsel of the Washington Legal Foundation, I litigated constitutional and regulatory cases, testified before Congress on environmental enforcement and oversight, and participated in symposia and conferences on overcriminalization. Of relevance to this hearing, I was counsel in *McKinney v. U.S. Dep't of Treasury*, 799 F.2d 1544 (Fed. Cir. 1986) representing Members of Congress and the International Longshoremen's Union to stop the illegal importation of goods from the former Soviet Union, including lumber, made by forced labor in violation of Section 307 of the Smoot-Hawley Tariff Act. Of more particular relevance, I was counsel to three American citizens who were convicted of violating the Lacey Act for importing frozen lobster tails from Honduras and sentenced to prison for over eight years and for whom I drafted and filed their petition for writ of certiorari to the Supreme Court. *McNab/Blandford v. United States*, 324 F.3d 1266 (11th Cir. 2003), *cert. denied,* 540 U.S. 1177 (2004).

I am testifying today in my personal capacity and not on behalf of any other person or organization. While I fully subscribe to the views of the other witnesses who are critical of the Lacey Act's overly broad and unconstitutional reach with respect to the enforcement of all foreign laws and regulations regulating their wildlife and plants, I will focus my testimony on the *McNab* case as an example of just how the Lacey Act's reference to foreign law has been abused and misinterpreted by the courts.

Foreign Law Enforcement under the Lacey Act: *United States v. McNab*

David McNab was a Honduran fisherman who owned and operated fishing vessels that caught spiny lobsters up to 350 miles off the coast of Honduras. After his catch was inspected at Roatan Island, Honduras, he would ship the frozen spiny lobster tails in clear transparent plastic bags to seafood importers Robert Blandford and Abner Schoenwetter in the United States where the shipments were subjected to inspection and cleared by U.S. Customs and the Food and Drug Administration. The lobsters were then sold to seafood dealers, including Diane Huang, for further processing and then resold to restaurants such as Red Lobster. These shipments were made over the years with no question as to their lawfulness.

On February 5, 1999, after receiving an anonymous facsimile that the shipment coming in that day may contain allegedly "undersized lobster tails" (i.e., those that were under four ounces), armed agents from the National Marine Fishery Services (NMFS) seized the vessel. Blandford, Schoenwetter, and McNab were not advised why the vessel was being seized. Several weeks later, the lobster tails were transferred from the ship to a facility in Florida. Over the next *six months*, NMFS agents traveled back and forth to Honduras to determine what if any Honduran laws or regulations might have been violated. They concluded that three Honduran regulations or laws may have been violated: 1) a regulation limiting harvesting of spiny lobsters whose tails are less than 5.5 inches (or under 4 ounces); 2) a regulation detailing how the seafood is to be packaged, namely, in cardboard boxes; and 3) a provision that prohibits capturing egg-bearing female lobsters. NMFS agents finally began their inspection of the shipment.

Armed with rulers, they determined that only three percent of the catch was undersized according to the Honduran size regulation -- a very low percentage that would not be unusual in catching and processing 70,000 pounds of lobster tails. While the NMFS expected the importers to be aware of this foreign regulation, apparently the United States government was not. Indeed, in their weekly public posting of all frozen seafood prices to the industry, the NMFS listed Spiny Lobster Tails from Honduras as selling for $8.75 for those weighing two ounces; $9.95 for those weighing three ounces, and $12.25 for those weighing four ounces. A copy of the price list is attached hereto. Thus, not only was it against the financial interest of the U.S. seafood dealers to import smaller lobster tails, but also the federal government even had an official price list for them.

Similarly, the NMFS determined that a small percentage of the catch was egg-bearing, allegedly in violation of another Honduran law. However, the entire catch of 70,000 pounds of spiny lobster – a species which was neither endangered nor threatened -- were shipped in transparent plastic bags instead of cardboard boxes, and the entire shipment thus became "illegal" and subject to forfeiture. Not satisfied with the substantial forfeiture and severe civil penalties available, and despite the fact that the importers were advised that NMFS was only trying to build a civil case against Mr. McNab, federal prosecutors filed felony criminal charges against McNab, Blandford, Schoenwetter, and Huang. As Mr. Schoenwetter testified a few years ago on the topic of overcriminalization before the House Subcommittee on Crime, then Chaired by Congressman Bobby Scott, armed agents from the FBI, IRS, and NMFS searched Mr. Schoenwetter's home in the early morning, herding his wife, mother-in-law, and his young daughter in the living room in their night clothes, ordering them to be quiet. A few days later

armed agents returned at 6:00 a.m. to arrest Mr. Schoenwetter. None of the defendants had ever before been charged with any offense, but were hard-working small businessmen trying to make a living.

Smuggling and Money Laundering Charges

The U.S. defendants were charged with violating the Lacey Act for importing frozen lobster tails in violation *not* of any U.S. law or regulation, or any State law or regulation, but of the Honduran regulations regarding size and packaging. As will be discussed, it was this technical packaging violation that dictated the draconian sentence of over eight years in prison. The U.S. defendants were not charged with violating the egg-bearing provision. Not satisfied with invoking the Lacey Act's felony provisions which provide a maximum punishment of five years for the worst violation, overzealous Justice Department prosecutors started to pile on with additional felony counts of smuggling and money laundering which, if sustained, would add more prison time to be served by these hardworking citizens.

One might be forgiven if one were to ask how could the shipment of these lobster tails in clear transparent plastic bags that went through Customs and FDA inspection constitute smuggling. After all, one would normally consider a smuggling scenario where illegal or endangered wildlife or parts are concealed in luggage or similar containers. Indeed, the trial judge was puzzled as to how the defendants' conduct constitutes smuggling. But for the federal prosecutors, making a smuggling case was like shooting fish in a barrel. After all, under 18 U.S.C. 545, anyone who brings into the United States merchandise "contrary to law" is guilty of smuggling, subject to a prison term of up to 20 years. So if the lobster tails were shipped in opaque cardboard boxes which would have to be pried open to see what was inside, then that would not constitute smuggling; however, if they were transported in clear transparent plastic bags and inspected by Customs and the FDA, then, according to the Justice Department, that constitutes smuggling. Under this definition, *any* violation of the Lacey Act's foreign law provision, even if it were an administrative, civil or misdemeanor violation, can easily be prosecuted as a felony smuggling offense since the seafood, wildlife, or plant was imported "contrary to law."

The prosecutors were still not finished. Did the importers pay for this seafood? Of course they did. They had invoices, cancelled checks, and bills of lading that were turned over to NMFS showing that they paid for the seafood as they have been for several years in the normal course of business. So now the prosecutors added money laundering charges. One would normally consider money laundering as "laundering" cash proceeds from drug deals through an offshore bank and the like. Even the trial judge also was puzzled as to how this offense could be considered money laundering. Yet the money laundering statute, 18 U.S.C. 1957 and 1956(h), is written in such a way that the conversion of the sale of unlawful goods -- here, the lobsters "illegally" packed in plastic bags -- constitutes felony money laundering charges. Again, the money laundering provision used this way can be used in almost any Lacey Act violation where goods are sold. And the Justice Department always adds a conspiracy count for good measure in cases where two or more violators are involved. Accordingly, those who characterize the McNab defendants as being notorious "smugglers" and "money launderers" as well as Lacey Act violators are being disingenuous and misleading.

As unfair as the heavy-handed prosecution was, it was made all the more troubling in that questions were raised at trial requiring a separate hearing as to whether the Honduran regulations at issue were even valid under Honduran law. The defendants' expert witness testified that the cardboard container regulation was invalid inasmuch as the enabling legislation giving rise to that regulation was repealed in 1995; the size regulation was procedurally defective in its promulgation; and the egg-bearing provision was repealed with retroactive effect. Nevertheless, the trial court accepted the testimony (later recanted) of a mid-level legal advisor to the Honduran Agriculture Department that the laws were valid.

All the defendants were convicted, and due to the value of the entire "illegal" shipment packed in plastic bags, the Court applied the then mandatory Sentencing Guidelines which were based on the total gross value of the "smuggled" goods, not the net profits. The Court imposed draconian sentences of 97 months (eight years and one month) on McNab, Blandford, and Schoenwetter and 24 months on Huang. That sentence greatly exceeded the punishment for more serious crimes. *See, e.g., United States v. McPhee*, 336 F.3d 1269 (11 Cir. 2003) (57-month sentence for intent to distribute 100 kilograms of marijuana aboard a vessel).

Although the maximum sentence under the Lacey Act was five years, to meet the 97-month sentence, the Court was forced to make the sentence of some charges consecutive with others rather than concurrent as is usually the case. In short, the statutory maximum became the mandatory minimum, and was especially excessive because parole has been eliminated in the federal system. Keep in mind that what drove these excessive sentences were goods that were not considered contraband *per se*, but what has been referred to as "derivative contraband," namely, violations of procedurally rules regulating shipping or transporting. McNab was immediately incarcerated while the American defendants were allowed on bail pending appeal.

During the appeal, McNab challenged the validity of the size limit law in the Honduran courts and prevailed. Nevertheless, the federal district court rejected any post-conviction challenge to the law. On appeal to the Eleventh Circuit, the Honduran Government and its agencies filed an amicus brief noting that all three of the regulations were either void or of no legal effect. In short, none of the defendants could have been prosecuted in Honduras for violating these regulations. As noted, the government's star witness at trial from Honduras recanted her testimony.

In a 2-1 opinion, the Eleventh Circuit upheld the convictions, refusing to give any deference to the official position of the Honduran government as to the validity of their own laws but deferred to federal prosecutors as to the meaning of the foreign law. As Circuit Judge Fay remarked in his strong dissent, "what was thought to be a crime turns out not to be a crime under Honduran law" and that the convictions should be reversed. That would be the outcome under our system if a defendant were convicted of a law found defective on appeal. See *United States v. Goodner Bros. Aircraft*, 966 F.2d 380 (8th Cir. 1992). The Circuit Court also rejected the argument with little analysis that even if the regulations were valid, the Lacey Act only makes it

unlawful to import goods in violation of "foreign law," not a country's regulations, edicts, or decrees, of which there are thousands.

Petition for Writ of Certiorari
Judicial Deference to Foreign Governments

In their petition for writ of certiorari, the defendants argued that the Supreme Court should hear the case because the defendants' Due Process rights were violated since they were not tried on the basis of a valid law but rather on ones that were void or defective Honduran regulations that were incorporated by reference in the Lacey Act. Moreover, due to the nature of our global economy (and now, the expansive reach of the Lacey Act Amendments of 2008 to include plants and plant products), this case presented an exceptionally important question of the level of deference the courts should afford the official views of a foreign government in determining the meaning of their own laws. Indeed, the decision of the Eleventh Circuit conflicted with the decisions of the Supreme Court itself and other circuits where "substantial deference" is accorded a foreign government's views of its own laws in other contexts, such as tax laws and the like. Indeed, ignoring the foreign country's views of its own laws undermines the Lacey Act which its proponents claimed in 1981 as aiding "foreign nations in enforcing their own wildlife laws." 127 Cong. Rec. 4737 (1981) (remarks of Senator Chafee).

In short, while it is grossly unfair and constitutionally suspect to require U.S. citizens to comply with foreign law by incorporating those laws wholesale by reference in the Lacey Act, at a minimum, the interpretation of those laws should be within the province of the foreign nation, not federal prosecutors, and substantial deference should be provided to that interpretation.

"Foreign Law" Does Not Include Foreign Regulations

In addition -- and of particular relevance to this hearing -- the American defendants sought review in the Supreme Court of the Eleventh Circuit's facile conclusion that "foreign law" includes the myriad of foreign regulations and the like, including the (invalid) ones from Honduras invoked by the prosecutors in the *McNab* case. With scant analysis of the text and legislative history of the Lacey Act, the Eleventh Circuit followed the equally flawed decisions of the Ninth Circuit in concluding that "foreign law" also constitutes "foreign regulations" and similar provisions. See *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824 (9th Cir. 1991) and *United States v. Lee*, 937 F,.2d 1388, 1391-92 (9th Cir. 1991).

Both the Eleventh Circuit and Ninth Circuit ignored fundamental rules of statutory construction by disregarding the language used by Congress regarding the applicability of foreign law. The Lacey Act expressly prohibits the importation of wildlife that violates any "law, treaty, or *regulation*" of the United States" (16 U.S.C. 3372(a)(1)); any "law or *regulation* of any State"(16 U.S.C. 3372 (a)(2)(A)); and "any tribal law" (16 U.S.C. 3372(a)(1)) further defined as meaning "any [tribal] *regulation*…or other rule of conduct enforceable by any Indian tribe…." 16 U.S.C. 3371(a)(c). However, with respect to the term "foreign law," Congress did *not* include "regulation" to encompass that term. If Congress wanted to include foreign regulations, it could have easily done so. Indeed, it clearly decided not to do so in the 1981 amendments.

The pre-1981 version of the Lacey Act admittedly did proscribe the transportation of wildlife "in violation of any law or regulation of any State or foreign country" (formerly 18 U.S.C. 43(a)(2)). During the 1981 amendment process, however, when the original Lacey Act was actually repealed *in toto* along with the Black Bass Act, Congress considered and rejected an expansive definition of "foreign law" in the original Senate bill. *See* S. 736, 97th Cong., 1st Sess., 127 Cong. Rec. 4738 (March 19, 1981) ("`foreign law' means law *or regulations* of a foreign country….") (emphasis added). In the final version of the bill as passed by the Senate, this definition was replaced with the current version of "foreign law" without including "regulations." In short, Congress had the opportunity to adopt a broader definition of foreign law and did not do so. By both repealing the pre-1981 version of "foreign law or regulation" provision and rejecting the broad proposed definition, Congress meant what it said and said what it meant. It was impermissible for the Ninth and Eleventh Circuits to rewrite the law to suit their view of what "foreign law" should mean.

The Supreme Court unfortunately denied review and has not ruled on this important issue; consequently this expansive view of "foreign law" is only valid in the Ninth and Eleventh Circuits. At a minimum, it was incumbent on Congress in 2008 when it amended the law as it is today to make it clear in statutory language whether "foreign law" encompasses the myriad of foreign regulations and decrees, many of which are unknown to the American public and importers.

Even the Eleventh Circuit agreed that the meaning of "foreign law" is ambiguous with respect to whether it encompasses foreign regulations. But under Due Process and the Rule of Lenity, the language of a statute that is enforced criminally should be strictly construed in favor of the defendant. See *United States v. Universal C.I.T. Credit Corp*., 344 U.S.. 218, 221-22 (1952); *Dunn v. United States*, 442 U.S. 100, 112 (1979).

In short, Congress is the body constituted under Article I of the Constitution to make laws, not the courts or foreign governments. If Congress intended to incorporate foreign laws and regulations, then fairness requires that the enforcement of those foreign laws under the Lacey Act be treated as they would be in the foreign country, namely, administratively or civilly rather than criminally as many foreign regulations so provide. Moreover, in order to provide proper notice to the public and the regulated community, the enforcing agencies should have a database of all the *valid* foreign regulations, edicts, decrees, and the like that are applicable to the natural resource at issue.

Incorporating "Foreign Regulations" in the Lacey Act Is Inconsistent With the Congressional Review Act

In addition to the constitutionally suspect "foreign law" provision of the Lacey Act to include "foreign regulations," the incorporation of "foreign regulations" into a domestic law without specifying which foreign regulations are required to be obeyed violates the letter and spirit of the Congressional Review Act (CRA), 5 U.S.C. 801-888. The CRA requires each federal agency to send its covered final rules to the Comptroller General at the Government

Accountability Office (GAO) and to both houses of Congress "[b]efore [such rules] can take effect." 5 U.S.C. 801(a)(1)(A).

The CRA was enacted in 1996 to give Congress the power to disapprove agencies' final rules by enacting a joint resolution of disapproval. Senator Don Nickles, a co-sponsor of the legislation, noted, "as more. . . of Congress' legislative functions have been delegated to federal regulatory agencies . . . Congress has effectively abdicated its constitutional role as the national legislature. . . . This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority…." Joint Statement of House and Senate Sponsors, 142 Cong. Rec. S3683 at S3686 (daily ed. April 18, 1996). While a limited category of rules are exempt from CRA's coverage, other rules, such as those governing "foreign affairs" which are otherwise exempt from notice and comment under the Administrative Procedure Act, are most notably *not* excluded from coverage under the CRA. Accordingly, a strong argument can be made that to the extent "foreign regulations" are incorporated in the Lacey Act, those "regulations" are subject to the CRA and must be submitted to Congress before they may take effect.

Conclusion

The Lacey Act violates the Rule of Law and gives prosecutors too much enforcement power by incorporating "foreign law" and unspecified "foreign regulations" into the law's reach, especially with respect to criminal prosecutions where an individual's liberty is at stake. The prosecution in the *McNab* case illustrates how the Lacey Act can be abused and how easy it is for the Justice Department to include smuggling and money laundering felony charges where more reasonable civil and administrative remedies are available and which would better serve the interests of justice and the environment.

I look forward to answering any questions the Committee may have. Thank you.