

## **Statement of Senator Rand Paul**

### **U.S. House of Representatives Committee on Natural Resources Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs Testimony on the Freedom from Over-Criminalization and Unjust Seizures Act of 2012 (FOCUS Act) May 8, 2012**

Chairman Fleming, Ranking Member Sablan, and distinguished Members of the Committee on Natural Resources, I am honored to be here today to urge the House and Senate to move forward on the Freedom from Over-Criminalization and Unjust Seizures Act of 2012—the FOCUS Act (S. 2062 & H.R. 1471).

Congressman Broun and I introduced companion bills in the Senate and in the House because of our shared concern regarding a dangerous law called the Lacey Act. The FOCUS Act makes significant revisions to the Lacey Act, revisions that we believe are necessary to prevent Americans from having their businesses raided by armed federal agents, their property seized, and even being sent to federal prison.

I refer to the Lacey Act as “dangerous” because of the ways in which it has already wreaked havoc in the lives of many innocent Americans. The Lacey Act serves as a high-profile and frightening example of overcriminalization. Victims include Abner Schoenwetter and David McNab, who spent years in federal prison for “violating” Honduran fishing regulations that the Honduran government itself argued were invalid.

Most recently, just this past August, Henry Juskiewicz, the Chairman and CEO of Gibson Guitar Corporation, had his company raided by armed federal agents. A half million dollars worth of Mr. Juskiewicz’s property was seized, along with guitars and computer hard drives. His factory was shut down for a day, and his employees were ordered to go home. All this was done to him because he allegedly violated the Lacey Act, yet the Department of Justice has yet to file any formal charges against him.

In my testimony today, I will first provide a brief background regarding the history of the Lacey Act. I will then discuss the ways in which I believe this law violates the original intent of the Constitution, and will summarize the revisions the FOCUS Act makes to the Lacey Act. I will conclude with a discussion of the manner in which the FOCUS Act relates to my overall concern with the ever-growing threat of overcriminalization.

## I. Background

The Lacey Act is a conservation law that attempts to prohibit trafficking in “illegal” wildlife, fish and plants. The original law was passed in 1900 for the purpose of protecting against interstate poaching.<sup>1</sup> Congress later amended and expanded the Lacey Act to make it a crime to import or take any wildlife, fish or plants “in violation of any foreign law.”<sup>2</sup> Since its passage in 1900, subsequent amendments (in 1935, 1969, 1981, 1988, and most recently, 2008) have produced what today is an extremely broad and vague law that contains harsh criminal penalties.

As Paul Larkin, Senior Legal Fellow at the Heritage Foundation explains, “[t]he Lacey Act would not raise concern if the only penalty were a civil fine, but the law authorizes up to one year’s imprisonment for every violation of the act. A one-year term of confinement may not seem onerous (unless, of course, you have to serve it), but a combination of one-year sentences could add up quickly. For example, if each fish taken in violation of the act were to constitute a separate offense, a fisherman could wind up with a three-or four-figure term of imprisonment just by bringing aboard one net’s worth of fish.”<sup>3</sup>

Notably, the original Lacey Act of 1900 contained a penalty “not exceeding two hundred dollars,” and there was no provision imposing jail or prison time.<sup>4</sup> When the Lacey Act was significantly amended in 1981—an amendment that expanded the potential penalties to allow for felony criminal convictions—a representative of the National Rifle Association specifically voiced civil liberties concerns with the changes, stating that his “first concern [wa]s with the broad expansion of criminal liability.”<sup>5</sup>

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<sup>1</sup> Act of May 25, 1900, Ch. 553, 31 Stat. 188 (codified as amended at 16 U.S.C. §§ 3371-78).

<sup>2</sup> 16 U.S.C. § 3371(d), § 3372(a)(2)(A) & (B), § 3372(a)(3)(A), and § 3373(d).

<sup>3</sup> Paul J. Larkin, Jr., *Defanging the Lacey Act: The Freedom from Over-Criminalization and Unjust Seizures Act of 2012*, The Heritage Foundation Center for Legal & Judicial Studies, No. 78, at 2 (March 16, 2012).

<sup>4</sup> Act of May 25, 1900, Ch. 553, 31 Stat. 188 (codified as amended at 16 U.S.C. §§ 3371-78).

<sup>5</sup> *Proposed Amendments to the Lacey Act of 1981*, 97th Cong. 227 (March 18, 1981) (testimony of Neal Knox).

## II. The Lacey Act is Unconstitutional

I believe that the Lacey Act in its current form violates our Constitution in a couple significant ways. First, its broad and unspecific delegation of congressional power to foreign governments violates Article I of the Constitution, which vests all legislative powers in the United States Congress alone. By making it a federal offense to import fish, wildlife, or plants “in violation of any foreign law,” Congress essentially delegates law-making authority to other nations.<sup>6</sup>

Second, the Lacey Act is unconstitutionally vague, and fails to satisfy basic due process requirements of fair notice. As the Heritage Foundation notes, the Lacey Act in fact “violates one of the fundamental tenets of Anglo-American common law: that ‘men of common intelligence’ must be able to understand what a law means . . . The criminal law must be clear not to the average lawyer, but to the average *person*. Even if there were lawyers who could readily answer intricate questions of foreign law—and do so for free—the criminal law is held to a higher standard.”<sup>7</sup>

Consider the practical effect of having a law such as the Lacey Act on the books that makes it a federal crime to violate any fish, wildlife, or plant law or regulation of any country in the world:

[N]o one should be held accountable under this nation’s law for violating a foreign nation’s law. Laws come in all forms (e.g., statutes vs. regulations); in all shapes and sizes (e.g., the Sherman Act vs. the Clean Air Act); and in all degrees of comprehensibility (e.g., the law of homicide vs. the Resource Conservation and Recovery Act). Different bodies have authority to promulgate laws (e.g., legislatures, courts, and agencies); to interpret them (e.g., the President or an agency’s general counsel); and to enforce them (e.g., city, state, and federal law enforcement officers and prosecutors). And that is just in America.

Foreign nations may have very different allocations of governmental power, bureaucracies, and enforcement personnel. Some will speak and write in English; some will not. Some will make their decisions public; some will not. Some will have one entity that can speak authoritatively

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<sup>6</sup> Although this argument has been rejected by various circuit courts, it has never been squarely presented before the U.S. Supreme Court. *See, e.g., United States v. Lee*, 937 F.2d 1388, 1393-94 (9th Cir.1991) (rejecting a delegation challenge to the Lacey Act).

<sup>7</sup> Larkin, *supra* note 3, at 4.

about its own laws; some will not. And different components of foreign governments may change their interpretations of their own laws over time, perhaps nullifying the effect of a prior interpretation, or perhaps not.

It is sheer lunacy to assume that the average citizen can keep track of such laws, let alone do so by him-or herself without a supporting cast of lawyers—that is, assuming that the average citizen could find a lawyer knowledgeable about the intricacies of a particular foreign nation’s law.<sup>8</sup>

A particularly tragic real-life example of the manner in which the Lacey Act violates basic constitutional requirements of due process and fair notice occurred with the convictions and imprisonment of Abner Schoenwetter and David McNab. Schoenwetter and McNab were convicted and sentenced to eight years in federal prison for violating Honduran regulations regarding lobster importation. The regulation required that the lobsters be packed in plastic bags, but Schoenwetter and McNab instead packed them in boxes. On appeal, the Honduran government itself filed a brief on Schoenwetter and McNab’s behalf, arguing that the regulation never even had the force of law in Honduras, yet the circuit court refused to overturn the convictions.<sup>9</sup>

There are violent criminals who spend less time in prison than did these two innocent men.

The FOCUS Act would alter the Lacey Act by removing all references to “foreign law.” It would also remove the Lacey Act’s criminal penalties and substitute a reasonable civil penalty system. Lacey Act violations with a market value of less than \$350.00 would be subject to a maximum penalty of \$10,000.00, and other violations would be subject to a penalty of up to \$200,000.00. These changes would remove the constitutional flaws inherent in the Lacey Act in its current form.

### **III. The Problem of Over-Criminalization**

The Lacey Act is but one example of the ever-growing problem of overcriminalization that we face in this country. Criminal law is increasingly being used as a tool by our government bureaucracies to punish and control honest businessmen

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<sup>8</sup> Larkin, *supra* note 3, at 4.

<sup>9</sup> See *United States v. McNab*, 331 F.3d 1228, 1233, 1239-47 (11th Cir. 2003). The *McNab* case is discussed extensively in the book, *ONE NATION UNDER ARREST: HOW CRAZY LAWS, ROGUE PROSECUTORS, AND ACTIVITS JUDGES THREATEN YOUR LIBERTY* (2010) (Paul Rosenzweig & Brian W. Walsh, eds.).

attempting to make a living. Historically, the criminal law was intended to punish only the most heinous offenses that were known and understood by all people to be inherently evil or wrongful, offenses such as murder, rape, theft, arson, etc. Yet today, the criminal law is constantly used to punish behavior such as fishing without a permit, packaging a product incorrectly, or shipping something with an “improper” label.

The plain language of our Constitution specifies a very limited number of federal crimes. But we have now moved so far away from the original intent of our Constitution that we don’t even know or have a complete list of all the federal criminal laws on the books. There are over 4,450 federal statutory crimes scattered throughout the U.S. Code. And it is estimated that there are tens of thousands more crimes that exist among all our federal regulations. But no one—not even criminal law professors or criminal lawyers—actually knows the exact number with certainty.<sup>10</sup>

In addition to not knowing the exact number of federal crimes, another serious problem is that many of the criminal statutes that have been passed by Congress in recent years lack adequate *mens rea* requirements. In other words, Congress passes laws that either completely lack—or have an extremely weak—“guilty mind” requirement, which means that someone charged under the statute could be convicted of a federal offense when he or she simply made an honest mistake, or did not possess the criminal culpability traditionally necessary for a criminal conviction.

The Lacey Act is a frightening example of this trend of overcriminalization. I urge my colleagues to support Congressman Broun and me in our efforts to pass the FOCUS Act. As Justice Scalia recently stated, “We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws . . . In the field of criminal law, at least, it is time to call a halt.”<sup>11</sup>

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<sup>10</sup> See generally John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation L. Memo. No. 26, June 16, 2008; CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION, *THE FEDERALIZATION OF CRIMINAL LAW* (1998). For an excellent and thorough analysis of the serious problems posed to our nation by the proliferation of criminal laws at the federal level, and the lack of adequate *mens rea* requirements in the majority of these laws, see BRIAN W. WALSH AND TIFFANY M. JOSLYN, *THE HERITAGE FOUNDATION AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW* (2010).

<sup>11</sup> *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).