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

TESTIMONY BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES SUBCOMMITTEE ON FISHERIES, WILDLIFE, OCEANS, AND INSULAR AFFAIRS

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

My name is Paul J. Larkin, Jr. I am a Senior Legal Research Fellow at The Heritage Foundation. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

Thank you for the opportunity to testify about the criminal enforcement provisions of the Lacey Act. In my opinion, the Act unreasonably demands that a person who imports flora or fauna from a foreign nation know every law of every foreign country—in whatever form that law may take, in whatever language that law may be written, however obscure that law may be—on pain of criminal liability. That requirement is unreasonable as a matter of criminal justice policy and impermissible as a matter of constitutional law.

I. THE LACEY ACT UNREASONABLY REQUIRES PARTIES TO KNOW FOREIGN LAW ON PAIN OF CRIMINAL LIABILITY

The reach of the Lacey Act is remarkably broad. The act refers simply to conduct done in violation of foreign "law." The act does not limit the particular foreign laws that can trigger domestic criminal liability, specify what elements those laws must contain in order to justify criminal punishment, or even identify what category of actions is necessary and sufficient to constitute the criminal acts and intent historically deemed necessary to define illegal conduct. The Lacey Act also does not restrict in any manner a foreign government's power to select the constitutional provisions, statutes, regulations, judicial decisions, interpretive documents, or other legal edicts creating the relevant "law" that serves as a predicate for a federal crime. Furthermore, there is no limitation on the foreign nations whose laws are incorporated into domestic law. Countries with a civil law background count just as much as nations, like Great Britain, from whence our common law arose. Finally, there is not even a requirement that the foreign law, in whatever land and in whatever form it appears, be written in English; the Lacey Act embraces laws written in a foreign language. A foreign nation may define that "law" however it wishes and may vest definitional power in any body it chooses, either within or outside of the government.[1]

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[1] *See* 16 U.S.C. § 3372(a)(2)(A) & (B)(i)-(iii) (2006) ("It is unlawful for any person * * * to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce (a) any fish or wildlife taken, possessed, transported, or sold * * * in violation of any foreign law; (b) any plant * * * (i) taken, possessed, transported, or sold in violation of any law or regulation of * * * any foreign law, that protects plants or that regulates—(I) the theft of plants; (II) the taking of plants from a park, forest reserve, or other officially protected area; (III) the taking of plants from an officially designated area; or (IV) the taking of plants without, or contrary to, required authorization; (ii) taken, possessed, transported, or sold without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regula-

A. THE DUE PROCESS CLAUSE REQUIRES THAT THE CRIMINAL LAW BE READILY UNDERSTANDABLE BY THE AVERAGE PERSON

The criminal law seeks to reconcile two ancient propositions.[2] One is that everyone is presumed to know the criminal law.[3] That proposition makes sense for so-called "street crimes," because everyone knows that it is unlawful to murder, rob, rape, or swindle others. That proposition, however, no longer makes sense as a general rule, given the size of contemporary federal and state criminal codes. The other proposition is that the average person must be able to find, read, and understand the criminal law.[4] Accessibility and clarity are not just matters of good criminal justice policy; they are constitutional commands.

One of the most elementary requirements of criminal and constitutional law is that the government must offer the public adequate notice of what the law forbids before a person can be held liable for violating a criminal statute.[5] The Latin phrases "*Nullum crimen sine lege*" ("There is no crime absent a written law.") and "*Nulla poena sine lege*" ("There is no penalty absent a written law.") stand for the settled propositions that there can be no crime or criminal punishment without a positive law, which means that no one can be punished for doing something that was not prohibited by law at the time that he or she acted.[6] Moreover, unlike the laws of Caligula, which were published in a location making them inaccessible,[7] criminal laws must

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tion of any State or any foreign law; or (iii) taken, possessed, transported, or sold in violation of any limitation * * * under any foreign law, governing the export or transshipment of plants * * *."). The federal courts have construed the act to include not merely foreign statutes, but also other forms of law, even ones that impose only civil sanctions. *See*, *e.g*., United States v. McNabb, 331 F.3d 1228, 1239 (11th Cir. 2003) ("Regulations and other such legally binding provisions that foreign governments may promulgate to protect wildlife are encompassed by the phrase 'any foreign law' in the Lacey Act."); United States v. Mitchell, 985 F.2d 1275, 1280-83 (4th Cir. 1993) (Pakistani government orders); United States v. One Afghan. . . Mounted Sheep, 964 F.2d 474 (5th Cir. 1992) (same); United States v. Lee, 937 F.2d 1388, 1391-92 (9th Cir. 1991) (foreign regulations); United States v. 594,464 Pounds of Salmon, 871 F.2d 824, 825 & n.2, 828-29 (9th Cir. 1989) (a Taiwanese board's "announcement" that was not technically a "regulation" and imposed only a civil penalty).

[2] *See* Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725 (2012).

[3] *See*, *e.g*., Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833) ("It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally * * *."); OLIVER WENDELL HOLMES, THE COMMON LAW 40–41 (1881) (Reprint 2009); WAYNE R. LAFAVE, CRIMINAL LAW § 5.6, at 305–18 (5th ed. 2010).

[4] *See, e.g.*, FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012) (collecting cases); Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (discussing the historical development of the void-for-vagueness doctrine).

[5] *See, e.g.*, Rogers v. Tennessee, 532 U.S. 451, 459 (2001) ("core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct") (emphasis deleted).

[6] *See* Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165, 178 (1937).

[7] *See* Screws v. United States, 325 U.S. 91, 96 (1945) (plurality opinion) ("To enforce such a [vague] statute would be like sanctioning the practice of Caligula, who 'published the law, but it was written in a

be available to the public so that they can be found and read.[8] Finally, a statute that is unduly vague, so indefinite that the average person is forced to guess at its meaning, cannot serve as the basis for a criminal charge. The "void-for-vagueness" doctrine, embodied in the Fifth Amendment Due Process Clause, enforces the principal that no one may be held liable under a criminal law that the average person cannot understand.[9] Those principles are essential to the very concept of "law" and are enshrined in what we know as "due process of law."

The void-for-vagueness doctrine is particularly relevant to the Lacey Act. The Supreme Court has made it clear that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[10] The Court also has devised a minimum standard of clarity. "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[11] Accordingly, "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."[12] Note the terms that the Court used to describe who must be able to understand what a criminal statute means: "all," "men of common intelligence," and "a person of ordinary intelligence"—not lawyers, law professors, or judges.

All that is settled law. What is controversial, however, is whether the two propositions that I mentioned at the outset can be reconciled when criminal liability rests on a violation of foreign law. In my opinion, they cannot.

B. It is Unreasonable to Require Parties to Know Foreign Law

Courts and commentators have justified the presumption that everyone knows the criminal law on several grounds. One is the proposition that everyone knows the laws in the locale in which he or she resides.[13] Another rationale is the fear that a contrary rule would eviscerate the ability of the law to police the public's conduct.[14] Those defenses made sense at common law, because the few criminal laws that existed at the time reflected contemporary mores, and violations were recognized as morally blameworthy.[15] Today, however, the proposition that everyone

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very small hand, and posted up in a corner, so that no one could make a copy of it.'"); Livingston Hall & Selig J. Seligman, *Mistake of Law and* Mens Rea, 8 U. CHI. L. REV. 641, 650 n.39 (1940) ("[W]here the law was not available to the community, the principle of 'nulla poena sine lege' comes into play.").

[8] That rule does not rest on the fiction that people will read the penal code before acting. Instead, the law requires that, were someone to make that effort, the criminal statutes must be written with sufficient clarity that a reader could understand them. *See* McBoyle v. United States, 283 U.S. 25, 27 (1931).

[9] *See* Meese & Larkin, *supra* note 2, at 760-61.

[10] Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (footnote omitted).

[11] United States v. Harriss, 347 U.S. 612, 617 (1954).

[12] Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

[13] *See*, *e.g.*, Cheek v. United States, 498 U.S. 192, 199 (1991) (the rule that ignorance of the law is no defense is "[b]ased on the notion that the law is definite and knowable").

[14] *See*, *e.g.*, HOLMES, *supra* note 3, at 41.

[15] *See* Hall & Seligman, *supra* note 7, at 644 ("[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as 'custom.'"); JOHN SALMOND, JURISPRUDENCE

knows the law is not just a fiction[16] or a "legal cliché"[17]; it is an absurdity. The criminal law no longer merely expresses societal condemnation of inherently nefarious acts that everyone knows are wrong (*e.g.*, murder), so-called *malum in se* offenses. It also regulates the conduct of individuals by making it a crime to commit a variety of acts that are unlawful only because Congress has said so, crimes known as *malum prohibitum* offenses.[18] For more than a century, legislatures have used the criminal law to enforce regulatory régimes.[19] That is part of the explanation why there are more than 4,500 federal criminal statutes.[20] Many recent federal statutes create regulatory regimes and use the criminal law to implement those programs,[21] and there could be more than 300,000 relevant regulations.[22]

Given this reality, it is dishonest to presume that anyone, much less everyone, knows everything that the federal penal code outlaws today. The Lacey Act exacerbates the notice problem by making it a crime to violate a foreign law, whether that foreign law is criminal, civil, or regulatory. That requirement makes unreasonable demands of the average person. If the average person cannot keep track of regulatory offenses defined by American law, they certainly cannot keep track of regulatory offenses defined by hundreds of foreign nations. Not even lawyers have that knowledge. In fact, as the distinguished academic and late Harvard Law School professor William Stuntz put it: "Ordinary people do not have the time or training to learn the contents of criminal codes; indeed, even criminal law professors rarely know much about what conduct is and isn't criminal in their jurisdictions."[23]

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426 (8th ed. 1930) ("The common law is in great part nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right.").

[16] Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L. REV. 1, 14 (1957).

[17] Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009).

[18] *See* LAFAVE, *supra* note 3, § 1.3(f), at 14–15 (defining *malum in se* and *malum prohibitum* offenses).

[19] *See* Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 37 (1997) ("Legislatures, concerned about the perceived weakness of administrative regimes, have put criminal sanctions behind administrative regulations governing everything from interstate trucking to the distribution of food stamps to the regulation of the environment."); *see also, e.g.*, LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 282-83 (1993); Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 595 (1958); Sanford Kadish, *Some Observations on the Use of Criminal Sanctions in the Enforcement of Economic Regulations*, 30 U. CHI. L. REV. 423, 424–25 (1963); Francis Bowles Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 63–67 (1933).

[20] *See*, *e.g.*, JOHN BAKER, JR., HERITAGE FOUND. LEGAL MEMORANDUM NO. 26, REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES (June 16, 2008), available at http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes.

[21] *See* Meese & Larkin, *supra* note 2, at 739-44.

[22] ONE NATION, UNDER ARREST xv–xvi (Paul Rosenzweig ed., 2d ed. 2013).

[23] William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871 (2000); *see also*, *e.g.*, Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102 (2013) ("[A]ny reasonable observer would have to conclude that actual knowledge of all applicable criminal laws and regulations is impossible, especially when those regulations frequently depart from any intuitive sense of what 'ought' to be legal or illegal. Perhaps placing citizens at risk in this

Most people learn the criminal code through an informal process. Religious precepts, morals, customs, traditions, and laws are the glue that holds society together and keep it from becoming the war of all against all. We learn them from family members, friends, schoolmates, co-workers, the news media, and others, at home, church, school, work, and play. Not surprisingly, what people learn in this nation are the rules, policies, and mores *of this nation*. Just as the French, Argentineans, Laotians, and Senegalese learn the rules demanded of them in their own countries, in this country what children, adolescents, and adults learn are the laws and mores of America.

There is no empirical basis for assuming that Americans will know not only all domestic criminal, civil, and regulatory laws, policies, and customs, but also the laws, policies, and customs *in a foreign land*. Yes, Americans will know that it is illegal to murder, rape, rob, burgle, and swindle foreign citizens, but few, if any, will be conversant with the intricacies of a foreign nation's regulatory code. The Lacey Act, however, imposes criminal liability for violations of such laws.

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 create laws (*e.g.*, legislatures vs. 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. Including the laws of nearly 200 foreign nations just makes a bad situation worse.

That is not all. There are additional difficulties that an American must confront in complying with foreign regulatory law. Some foreign laws may have English translations; some will not. Some foreign statutes may be codified in the same manner as the United States Code; some will not. Some foreign regulations may be collected into their equivalent of our Code of Federal Regulations; some will not. Some foreign statutes and regulations may have commentary that is publicly available in the same manner as our congressional committee reports and Federal Register notices; some will not. Some foreign officials and judges will make their decisions public and in English; some will not. Foreign nations also may have very different allocations of governmental power, bureaucracies, and enforcement personnel. Some countries will have one entity—and not necessarily a court—that can speak authoritatively about its own laws; some will not. And different components of foreign nations may alter their interpretations of their laws over time, perhaps nullifying the effect of a prior interpretation, or perhaps not.

It is unreasonable to assume that the average American citizen can keep track of foreign laws and regulations, as well as the (potentially multifarious) official government interpretations of them, let alone do so by himself or herself without a supporting cast of lawyers—that is, assuming that the average citizen could find or afford a lawyer knowledgeable about the intricacies of a particular foreign nation's laws. The vast majority of domestic lawyers and judges are not familiar with foreign law, let alone qualified as experts.

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regard constitutes a due process violation; expecting people to do (or know) the impossible certainly sounds like one.").

C. It is Unconstitutional to Hold Parties Criminally Liable for Violating Foreign Law

In any event, the relevant due process standard is not whether the average lawyer knows the criminal law. The Supreme Court has made it clear on numerous occasions that 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 would be willing to do so for free—the criminal law is held to a higher standard. Unless men and women "of common intelligence" can understand what a law means, that law might as well not exist—and, under our Constitution, no one can be convicted for violating it.[24]

A 2012 paper published by the Union of Concerned Scientists identifies some of the problems that men and women "of common intelligence" must face. That paper stated that foreign nations may have "complex systems for legal timber extraction [that] motivate working around them," and timber companies "operate in countries that often have conflicting and inconsistent laws* * *."[25] Those statements are tantamount to a confession that the Lacey Act should not—and cannot—be enforced via the criminal law. A person cannot be convicted in this country for an alleged violation of "complex," "conflicting[,] and inconsistent" laws in the U.S. Code. If so, there is no persuasive reason to hold a person criminally liable for violating complex, conflicting, and inconsistent law in a foreign code. The Union of Concerned Scientists paper does not explain why Americans should be subject to a lower threshold of criminal liability for violating a foreign law than a domestic law, and no sound justification leaps to mind.

The concept that the public should be able to understand the criminal law is the moral foundation for the proposition that "Ignorance of the law is no excuse." Take away the practical ability to understand the criminal law and you take away the moral justification for using it to punish offenders. Take away the moral justification, and you take away the legitimacy of our criminal justice system.

This is not an abstract problem. Consider the case of *United States v. McNab*.[26] Abner Schoenwetter and several others were convicted of several offenses in connection with their importation of Caribbean spiny lobsters from Honduras. The federal government charged Schoenwetter and the others with violating the Lacey Act by importing Honduran lobsters in violation

[24] *See*, *e.g*., United States v. Harriss, 347 U.S. 612, 617 (1954); *supra* p. 3.

[25] Patricia Elias, Logging and the Law: How the U.S. Lacey Act Helps Reduce Illegal Logging in the Tropics 5 (Apr. 2012), available at http://www.ucsusa.org/assets/documents/global_warming/illegal-logging-and-lacey-act.pdf. In 2008, Congress added plants to the category of potentially illegal imports. Acting at the behest of a coalition of environmental organizations and the domestic timber industry, Congress amended the act as part of a far larger farm policy bill, the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110–234, 122 Stat. 923 (2008), in order to include plants taken or processed and imported in violation of a foreign nation's law. *See* Francis G. Tanzcos Note, *A New Crime—Possession of Wood: Remedying the Due Care Double Standard of the Revised Lacey Act*, 42 Rutgers L.J. 549 (2011). The rationale was the desire to protect foreign ecosystems and the domestic timber industry by targeting an alleged billion-dollar black market in foreign logging. *See* H.R. Rep. No. 110-627, 110th Cong. (2008); Kristina Alexander, Cong. Res. Serv., The Lacey Act: Protecting the Environment by Restricting Trade 2, 6 (Apr. 12, 2012); Tanzcos, *supra*, at 549-50 & n.4.

[26] 331 F.3d 1228 (11th Cir 2003).

of Honduran law: The lobsters were too small to be taken under Honduran law; some contained eggs and so could not be exported; and the lobsters were packed in boxes rather than in plastic as required by Honduran law. The jury convicted the defendants, and both the district court and the U.S. Court of Appeals for the Eleventh Circuit upheld the convictions. The district court relied on the opinions of officials in the Honduran agriculture department that the *McNab* defendants violated Honduran law. The appellate court, however, refused to give any weight to the opinions of a Honduran court, the Honduran embassy, and the Honduran Attorney General that the regulations in question were invalid under Honduran law and could not serve as predicate violations under the Lacey Act. The result was that Schoenwetter was sentenced to eight years in a federal prison—a term longer than what some violent criminals spend behind bars—for foreign regulatory offenses that, according to key Honduran officials, did not even violate foreign law. The *McNab* case illustrates why no one should be held accountable under this country's law for violating a foreign nation's law

The purpose of the criminal law should be to separate evil-minded and evil-doing offenders from people who are, at worst, negligent, and, at best, morally blameless. In most cases, the law is clear, but the facts are in dispute. But if you add complex, conflicting, and inconsistent foreign laws into the mix, both the facts and the law are in dispute. There is no way to separate the morally blameworthy from the morally blameless in a stew like that.[27]

II. THE CONSTITUTION PROHIBITS THE DELEGATION OF SUBSTANTIVE LAWMAKING AUTHORITY TO FOREIGN NATIONS

The Lacey Act makes the operative element of a domestic federal crime a blank space that any and every foreign nation can fill in as it chooses. As explained above and as illustrated by the *McNab* case, the Lacey Act's delegation of substantive criminal lawmaking authority to a foreign government renders the act subject to challenge under the void-for-vagueness doctrine. That alone is sufficient to condemn the Lacey Act on prudential and constitutional grounds.

But there are three additional, related constitutional problems with the Lacey Act delegation. First, the act defines no "intelligible principle" for a foreign government or a federal court to use in deciding what laws should trigger a criminal prosecution, in violation of the Article I delegation doctrine. Second, the act delegates federal lawmaking power to a party who has not been appointed in compliance with the Article II Appointments Clause. And third, the Fifth Amendment Due Process Clause forbids delegation of substantive lawmaking power to foreign officials. Together, Article I, Article II, and the Due Process Clause reveal that Congress cannot delegate standardless, substantive lawmaking authority to a party that is neither legally nor politically accountable for its actions to supervisory federal officials or to the public.

[27] Some Lacey Act violations are felonies; others, misdemeanors. It is no argument that Lacey Act violations are simply misdemeanors and therefore do not create a serious risk of long-term imprisonment. Individual misdemeanor sentences can add up quickly. The federal government can charge each Lacey Act violation as a separate offense, and a judge can impose a separate one-year sentence for each conviction. Consider a company, like Gibson Guitar, that imports dozens, scores, or hundreds of guitar frets made from wood grown overseas. The government doubtless could find some foreign law that Gibson or an intermediary has violated or some required form that has not been properly filled out or filed. The government then could charge Gibson Guitar with a separate violation for each guitar fret. Or consider a fisherman, like Abner Schoenwetter, who hauls in a net full of lobsters. If he takes in 500 lobsters at one time, he exposes himself to 500 years' imprisonment per haul.

A. THE ARTICLE I BICAMERALISM AND PRESENTMENT REQUIREMENTS

The Framers required that, in order to create a "Law," each chamber of Congress pass the identical bill and the President must sign it (or both houses repass it by a two-thirds vote following a veto).[28] The bicameralism and presentment requirements force the Senate, the House of Representatives, and the President to take a public position on what they find necessary to regulate society and on the conduct that they find it reasonable to outlaw, encourage, support, or protect. The requirement that Congress and the President collaborate to pass a "Law" also enables the electorate to decide whether Senators, Representatives, and the President should remain in office or be turned out every two, four, or six years. The Article I lawmaking procedure therefore not only offers the opportunity for reasoned consideration and debate over the merits of proposed legislation, but also—and perhaps more importantly—provides voters with a basis for holding elected federal officials politically accountable for the decisions they make.

At the same time, the Supreme Court has permitted Congress to delegate to federal administrative agencies the ability to adopt implementing rules and regulations that have the force and effect of law. With only two exceptions now almost 80 years old,[29] the Supreme Court has upheld over an Article I challenge every act of Congress delegating authority to a federal agency to implement a statute through rules.[30] In each case, the Court upheld the delegation on the ground that Congress had identified an "'intelligible principle'" for the agency to use in determining how to exercise its delegated but limited authority.[31]

The Lacey Act, however, contains no principle of any kind limiting the "law" a foreign nation may adopt that triggers the act. The act does not specify what foreign laws trigger criminal liability, does not limit a foreign nation's ability to make that decision, does not identify any factors that a federal court should consider in deciding what is a foreign "law," and does not even say how a federal court should go about selecting among conflicting interpretations of foreign law offered by different foreign agencies.

The Lacey Act simply incorporates whatever "law" a foreign nation has adopted and whatever interpretation that nation may place on its "law."[32] The act offers "literally no guidance for the exercise of discretion" by a foreign nation or a federal court.[33] Even under the most charitable reading of the Supreme Court's cases, the Lacey Act violates Article I.

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[28] *See* INS v. Chadha, 462 U.S. 919 (1983); *cf.* Clinton v. City of New York, 542 U.S. 417 (1988) (Article I requires the same process in order to repeal or amend an existing law).

[29] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[30] *See*, *e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); Mistretta v. United States, 489 U.S. 361 (1989); Yakus v. United States, 321 U.S. 414 (1944); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); United States v. Grimaud, 220 U.S. 506 (1911); *see also* INS v. Chadha, 462 U.S. 919, 953 n.16 (1983) (distinguishing administrative rulemaking from the Article I lawmaking process because agencies "cannot reach beyond the limits of the statute" creating them").

[31] *See*, *e.g.*, *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton*, 276 U.S. at 409).

[32] *See* Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 105 (2008) ("dynamic incorporation does delegate lawmaking authority").

[33] *See*, *e.g.*, *Whitman*, 531 U.S. at 474.

Several circuit courts have rejected Article I nondelegation challenges to the Lacey Act.[34] Their rationales for rejecting that argument, however, are utterly unpersuasive.

The Third Circuit concluded that the Lacey Act treats the violation of a foreign law as "simply a fact entering into the description of the contraband article."[35] The text of the Lacey Act, however, makes proof that a defendant violated foreign law an essential element of an offense by making it a crime to import flora or fauna in violation of any foreign law. The most natural reading of the text is that a violation of a foreign law is a predicate for a violation of the act.

The Ninth Circuit determined that a foreign law violation is not an element of the offense, but is simply a matter for the government to consider in its exercise of prosecutorial discretion.[36] Nothing in the text of the Lacey Act, however, remotely hints that the statute is designed to identify instances in which the government may or should exercise prosecutorial discretion. The term "discretion" can be found nowhere in the Lacey Act, and for good reason. It has been settled law for more than a century that the government enjoys discretion over prosecutorial decisions,[37] so it makes no sense to read the Lacey Act as granting or reaffirming that principle.

The Eleventh Circuit held that Congress decided what should be made a crime.[38] But that only begins the analysis. Congress said nothing about the type of laws that are incorporated (civil vs. criminal) or the form that those laws may take (statutes vs. regulations vs. judicial decisions). Congress punted those decisions to foreign nations, empowering them to make every decision regarding what "law" incorporated by the Lacey Act. That is what Article I forbids.

B. THE ARTICLE II APPOINTMENTS CLAUSE

The Constitution contemplates that Congress may create executive departments and give the officials who staff those offices the power necessary to play their roles in a national govern-

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[34] *See, e.g.*, United States v. Lee, 937 F.2d 1388, 1393-94 (9th Cir. 1991); United States v. Rioseco, 845 F.2d 299 (11th Cir. 1988); United States v. 594,464 Pounds of Salmon, 871 F.2d 824, 829-30 & n.9 (9th Cir. 1989); United States v. Molt, 599 F.2d 1217, 1219 n.1 (3d Cir. 1979); *cf*. United States v. Bryant, 716 F.2d 1091, 1094-95 (6th Cir. 1983) (rejecting argument that the act impermissibly delegates federal lawmaking authority to the states); Rupert v. United States, 187 F. 87, 90-91 (8th Cir. 1910) (same).

[35] *See* United States v. Molt, 599 F.2d 1217, 1219 n.1 (3d Cir. 1979) ("The Act does not delegate legislative power to foreign governments, but simply limits the exclusion from the stream of foreign commerce to wildlife unlawfully taken abroad. The illegal taking is simply a fact entering into the description of the contraband article * * *.").

[36] *See* United States v. 594,464 Pounds of Salmon, 871 F.2d 824, 830 (9th Cir. 1989) ("[T]he Act does not call for the assimilation of foreign law into federal law. Rather, the Act merely provides that once a violation of a foreign law has occurred, that fact will be taken into account by the government official entrusted with enforcement.").

[37] *See* The Confiscation Cases, 74 U.S. (7 Wall.). 454, 457 (1868).

[38] *See* United States v. Rioseco, 845 F.2d 299, 302 (11th Cir. 1988) (citations omitted) ("Congress has made it a United States crime to take, to sell, or to transport wildlife taken in violation of any foreign law relating to wildlife. . . .Congress, itself, has set out the penalties for violation of these Lacey Act provisions. . . . Thus, Congress has delegated no power, but has itself set out its policies and has implemented them."); *accord* United States v. Guthrie, 50 F.3d 936 (11th Cir. 1995) (following *Rioseco*).

ment.[39] The Article II Appointments Clause is a critical element in the proper operation of government because it governs the selection of any person who exercises delegated federal authority.[40] By limiting the parties who may appoint federal officials, the Appointments Clause is a structural protection against the arbitrary exercise of federal power.[41] The clause guarantees that only parties who have been properly appointed and therefore (presumably) properly vetted can exercise such authority.[42] In addition, the clause ensures that any official exercising federal power can be removed for misconduct, incompetence, or for other reasons.[43] Finally, the requirement that a specific individual be appointed consistently with Article II ensures that there always will be a person with authority to make a final agency determination that can be challenged in an Article III court.[44]

The Lacey Act, however, does not vest lawmaking authority in *a federal official*. Instead, the statute delegates that power to *a foreign nation*. That difference is critical. The Supreme Court's decisions rejecting Article I challenges to the delegation of federal authority involved a handoff of federal lawmaking power to officials in the executive branch who must be appointed to their positions in compliance with the Appointments Clause. Article II forbids Congress from vesting federal lawmaking power in any person not appointed in compliance with that provision. By definition that prohibition applies to foreign officials, who are selected in accordance with the laws of their own nations, not ours. The Lacey Act effectively hands a portion of the federal lawmaking power over to a foreign state that is unaccountable to any branch of the federal government or to the American public. In so doing the Lacey Act not only disrupts the carefully balanced federal scheme for allocating governmental authority, but also deprives the electorate of information vital to hold members of Congress and the President politically accountable for their actions and those of their appointees. As far as Article II of the Constitution is concerned, delegating federal government authority to a foreign official is not materially different from delegating lawmaking authority to a private party. Article II does not permit that type of delegation.

C. THE FIFTH AMENDMENT DUE PROCESS CLAUSE

The Due Process Clause also forbids the delegation of substantive lawmaking authority to a private party. The Supreme Court has resolved several cases in which a state or the federal government has delegated governmental authority of one type or another to just such parties. For

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[39] *See*, *e.g.*, U.S. CONST. art. II, § 2, cl. 1 (the Opinion Clause); *id*. cl. 2 (the Appointments Clause). For instance, Congress has the power to create "Post Offices and postal Roads," U.S. CONST. art. I, § 8, cl. 7, but the Framers did not expect that the President would deliver the mail.

[40] *See*, *e.g.*, Buckley v. Valeo, 424 U.S. 1, 126 (1976) ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause].").

[41] *See*, *e.g.*, Freytag v. Comm'r, 501 U.S. 868, 880 (1991) ("The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint.").

[42] *See*, *e.g.*, Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 483–84 & n.4 (1989) (Kennedy, J., concurring) (quoting THE FEDERALIST No. 76, at 455–56 (A. Hamilton) (Clinton Rossiter, ed., 1961)).

[43] *See*, *e.g.*, Free Enterprise Fund v. PCAOB, 130 S. Ct. 3138, 3146-47 (2010).

[44] The likely vehicle would be a lawsuit brought under the Administrative Procedure Act, 5 U.S.C. § 704 (2006). *See*, *e.g.*, Sackett v. EPA, 132 S. Ct. 1367, 1371-72 (2012).

example in *Eubank v. City of Richmond*[45] the municipality passed an ordinance, enforceable by a fine, authorizing parties who owned two-thirds of the property on any street to establish a building line barring further house construction past the line and requiring existing structures to be modified to conform to that line. The Supreme Court ruled that the ordinance violated the Due Process Clause because it created no standard for the property owners to use, permitting them to act for their self-interest or even arbitrarily.[46] In two later cases—*Washington ex rel. Seattle Title Trust Co. v. Roberge*,[47] and *Carter v. Carter Coal Co.*[48]—the Court relied on *Eubank* in ruling that those laws also unconstitutionally delegated standardless government authority to private parties.[49] *Eubank*, *Roberge*, and *Carter Coal* therefore stand for the proposition that it is impermissible to vest governmental authority in private parties who are neither legally nor politically accountable to other government officials or to the electorate.

In other private delegation cases—such as *Cusak v. Chicago*,[50] *New Motor Vehicle Bd. v. Fox Co.*,[51] and *Hawaii Housing Auth. v. Midkiff*[52]—the Supreme Court upheld the vesting of state authority in private parties. The laws at issue there, however, left final decisionmaking authority in the hands of a state official.[53] The Lacey Act, by contrast, leaves it entirely up to a for-

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[45] 226 U.S. 137 (1912).

[46] *Id*. at 140-44.

[47] 278 U.S. 116 (1928). In *Roberge*, a trustee of a home for the elderly poor sought to obtain a permit to enlarge the facility to allow additional parties to reside there. A Seattle zoning ordinance limited buildings in the relevant vicinity to single-family homes, public and certain private schools, churches, parks, and the like, but empowered the city to grant a zoning variance if at least one-half of the nearby property owners consented. *Id*. at 50-51 & n. 1. The city building superintendent denied the permit because the adjacent property owners had not consented to the variance, and the trustee sued. Relying on *Eubank*, the Court held that, while zoning ordinances are generally valid, the Seattle ordinance was unconstitutional as applied in those circumstances because it enabled the nearby property owners to deny a variance for their own, capricious reasons. *Id*. at 121-22.

[48] 298 U.S. 238 (1936). *Carter Coal* involved delegation challenge to the Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991 (1935). The act authorized local coal district boards to adopt a code fixing agreed-upon minimum and maximum prices for coal. The act also allowed producers of more than two-thirds of the annual tonnage of coal and a majority of mine workers to set industry-wide wage and hour agreements. Shareholders of other coal producers argued that the act unlawfully delegated federal power to private parties. Relying on *Eubank* and *Roberge* (and A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495 (1935), which held invalid a similar delegation of authority under the National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933)), the Supreme Court held that the act vested federal power in the hands of a party interested in the outcome of a business transaction. 298 U.S. at 311.

[49] *See also* City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976) (noting and distinguishing the *Eubank* and *Roberge* cases without criticizing them or suggesting that they no longer are good law).

[50] 242 U.S. 526 (1917).

[51] 439 U.S. 96 (1978).

[52] 467 U.S. 229 (1984).

[53] In *Cusak*, a Chicago ordinance prohibited the erection of billboards in residential communities without the consent of a majority of the residents on both sides of the relevant street. 242 U.S. at 527. The Court distinguished *Eubank* on the ground that the Richmond ordinance allowed a majority of local residents to impose a restriction, while the Chicago ordinance allowed a majority of local residents to lift an otherwise

eign nation to decide what it will deem a "law." The decisions in *Cusak*, *New Motor Vehicle Bd.*, and *Midkiff* therefore do not justify the delegation that the Lacey Act accomplishes.

III. Solutions For Those Problems

There are some solutions for those problems.[54]

A. Eliminate Domestic Criminal Liability for a Violation of Foreign Law

The first, best, and easiest to implement is to eliminate domestic criminal liability for a violation of a foreign law. If no one can be expected to or should be required to know foreign law, there is no need for a criminal statute exposing anyone to that liability. Tort and administrative remedies can and should be sufficient remedies.

B. Require the Government to Prove that a Person Acted "Willfully"

A second solution is to require the government to prove that the defendant acted "willfully." That requirement ensures that the criminal law reaches only evil-minded individuals, those who knew what foreign law prohibited and who intended to violate it nonetheless.

C. Adopt a Mistake of Law Defense

A third solution is to apply a mistake of law defense. A mistake of law defense would exonerate a person who reasonably believed that what he or she did was not a crime. Imposing criminal liability in those circumstances would unjustly punish a morally blameless individual.

D. Identify the Foreign Laws

Finally, Congress could identify and update as necessary the specific foreign "laws" that trigger criminal liability or could direct the Justice Department to do so.

Conclusion

The question for this hearing is not whether the federal government should assist foreign governments enforce their own domestic laws, whether logging occurs overseas in violation of some foreign law, or whether there are domestic economic benefits or worldwide environmental gains from limiting the importation of foreign timber and reducing deforestation. The relevant issue is whether it is prudent and constitutional for this nation to use the Lacey Act to attempt to accomplish those objectives via the criminal process. The answer is "No." The Lacey Act asks far too much of lawyers, law professors, and judges—let alone the average person. The open-ended, dynamic, standardless incorporation of foreign law enforced by criminal penalties is unsound as a matter of criminal justice policy and impermissible as a matter of constitutional law.

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valid prohibition. *Id*. at 527, 531. *New Motor* rejected a due process delegation challenge to a state law directing a state agency to delay vehicle franchise establishments and locations when an existing dealer objects. 439 U.S. at 108–09. Relying on *New Motor*, *Midkiff* rejected the argument that due process prohibits a state from allowing private parties to initiate the eminent domain condemnation process. 467 U.S. at 243 n.6.

[54] *See*, *e.g.*, Meese & Larkin, *supra* note 2, at 738-83; Paul J. Larkin, Jr., *A Mistake of Law Defense as a Remedy for Overcriminalization*, 26 A.B.A.J. Criminal Justice 10 (Spring 2013); Paul J. Larkin, Jr., "*The Injustice of Imposing Domestic Criminal Liability for a Violation of Foreign Law*," The Heritage Found., Legal Memo. No. 94 (June 12, 2013), available at http://thf_media.s3.amazonaws.com/2013/pdf/lm94.pdf (last visited June 13, 2013).