

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

**“Why Should U.S. Citizens Have to Comply with Foreign Laws?”**

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**For the U.S. Chamber of Commerce Institute for Legal Reform**

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My name is Reed D. Rubinstein and I am a partner in the Washington, D.C. office of Dinsmore & Shohl, LLP. For over twenty-five years, I have practiced environmental and administrative law, defending individuals and companies in federal civil and criminal enforcement matters. I also have served as the U.S. Chamber of Commerce’s Senior Counsel for Environment, Technology and Regulatory Affairs, and as an adjunct professor of environmental law at the Western New England School of Law.

I am testifying today on behalf of the U.S. Chamber’s Institute for Legal Reform (“ILR”) in support of Lacey Act reform. ILR promotes civil justice reform through legislative, political, judicial and educational activities at the national, state and local levels. The U.S. Chamber is the world’s largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region.

**I. SUMMARY**

ILR strongly supports the Lacey Act’s important fish, wildlife and plant conservation goals.<sup>1</sup> Those who import, use, consume, collect or benefit from “medicines” containing rhino horns, tiger bone or bear bile; shark fins, sea turtle eggs and “bush meat”; “religious articles” made from ivory obtained through the murderous poaching of elephants; or rare wood illegally cut from protected forests ought to be prosecuted. However, the Lacey Act needlessly subjects American citizens to criminal and civil jeopardy for “violations” of an impossibly broad range of foreign laws, regulations and enactments.<sup>2</sup> The statute’s broad and non-specific incorporation of foreign law is a prima facie threat to democratic principles;<sup>3</sup> functionally inconsistent with core republican values and basic due process; and contrary to all prudential principles of government transparency and accountability.<sup>4</sup>

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<sup>1</sup>18 U.S.C. §§42 – 43; 16 U.S.C. §3371 et seq.

<sup>2</sup> Indonesia, for example, has over nine hundred laws, regulations, and decrees that govern timber exploitation, transportation, and trade. Saltzman, *Establishing a “Due Care” Standard Under the Lacey Act Amendments of 2008*, 109 MICH. L. REV. FIRST IMPRESSIONS 1, 6 (2010). That foreign “laws” lack a direct nexus to fish, wildlife or plant conservation, or provide only for civil fines, or even are ruled invalid and retroactively repealed by the government that enacted them in the first instance, is of no moment. *See generally United States v. McNab*, 324 F.3d 1266, 1268 (11<sup>th</sup> Cir.) cert. denied 540 U.S. 1177 (2004); *United States v. Lee*, 937 F.2d 1388, 1393 (9<sup>th</sup> Cir.) cert. denied 502 U.S. 1076 (1992).

<sup>3</sup> Dorf, *Dynamic Incorporation of Foreign Law*, 157 Penn. L. Rev. 103, 115 (2008); Grossman, TESTIMONY BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, COMMITTEE OF THE JUDICIARY, UNITED STATES HOUSE OF REPRESENTATIVES (December 14,

The government's failure to both maintain a database of applicable foreign wildlife and plant laws and to articulate intelligible principles of "due care" to guide stakeholders has hampered Lacey Act compliance. Currently, the government charges American musicians, fishermen and florists with knowledge of all potentially applicable foreign "laws" and then requires them to guess, at the risk of their liberty and property, how much "due diligence" is needed in any given case.<sup>5</sup> Such a legal regime tramples ordinary notions of fair play, offends well-settled rules of law and should not be tolerated in a well-ordered, constitutional republic.<sup>6</sup>

As the Congressional Research Service points out, this troubling failure to distinguish between permissible and proscribed conduct also renders enforcement "challenging."<sup>7</sup> Lacking clear standards, government officials "might use information gained from foreign governments,

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2011) *available at* [http://www.heritage.org/research/testimony/2011/12/judicial-reliance-on-foreign-law#\\_ftn5](http://www.heritage.org/research/testimony/2011/12/judicial-reliance-on-foreign-law#_ftn5) (accessed July 8, 2013). As Grossman put it:

Important American interests may go unrepresented (to say the least) when, for example, we incorporate Indian trade-protection law into our criminal code...Why should we adopt laws that are not only difficult to ascertain and apply, but are also inconsistent with, or even contrary to, our preferences, values, and interests?

<sup>4</sup>See generally *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 88-89 (2005).

<sup>5</sup>See PowerPoint: Wayne D. Hettenbach, Senior Trial Attorney Environmental Crimes Section, U.S. Department of Justice, *The Lacey Act: Implications for Supply Chains*, *available at* [http://www.google.com/url?sa=t&rct=j&q=the%20lacey%20act%3A%20implications%20for%20supply%20chains&source=web&cd=1&ved=0CCoQFjAA&url=http%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fadministrative%2Flitigation%2Fmaterials%2F2013\\_jointcle%2Fthe\\_lacey\\_act\\_implications\\_supply\\_chains.authcheckdam.pdf&ei=MTPbUcWjC4\\_BywGY8oGgBA&usq=AFQjCNFs6zvWlQ7\\_3KVBDnIrQH1IFq17w](http://www.google.com/url?sa=t&rct=j&q=the%20lacey%20act%3A%20implications%20for%20supply%20chains&source=web&cd=1&ved=0CCoQFjAA&url=http%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fadministrative%2Flitigation%2Fmaterials%2F2013_jointcle%2Fthe_lacey_act_implications_supply_chains.authcheckdam.pdf&ei=MTPbUcWjC4_BywGY8oGgBA&usq=AFQjCNFs6zvWlQ7_3KVBDnIrQH1IFq17w) (accessed July 8, 2013); Testimony of Craig Foster, *Legal Timber Protection Act: Hearing on H.R. 1497 Before the Subcomm. on Fisheries, Wildlife and Oceans of the H. Comm. on Natural Resources*, 110<sup>th</sup> Cong. at 55 (2007)(discussing compliance barriers and explaining that "it is necessary to understand that long supply chain and the fact that there are many people along that supply chain...I cannot audit the entire supply chain...Criminal behavior is criminal behavior. All I can do is work with the best of my knowledge"); *United States v. 144,774 Pounds of Blue King Crab*, 410 F.3d 1131 (9<sup>th</sup> Cir. 2005).

<sup>6</sup>See *Morales*, 527 U.S. at 56 (citation omitted). As the Supreme Court held long ago:

That the terms of a penal statute...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.

*Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1925).

<sup>7</sup>CONG. RES. SERVICE, "The Lacey Act: Compliance Issues Related to Importing Plants and Plant Products" at 8 (May 10, 2013)(citations omitted).

nongovernmental organizations, private citizens, anonymous tips, declarations, industry, and border agents, among others....” This disorganized, ad hoc enforcement approach raises the troubling specter of Americans being prosecuted in U.S. courts for violations of foreign laws enacted, interpreted and “enforced” by corrupt, authoritarian regimes.<sup>8</sup>

Finally, although there is ample evidence that implementation of the 2008 Lacey Act amendments has proven to be expensive and unwieldy and ineffective,<sup>9</sup> there is no evidence that the amendments have actually reduced the illegal logging rate.<sup>10</sup> Although five years have passed since enactment, the USDA still cannot provide specific cost figures for the new requirements on legal plant imports or been able to “determine whether the Act has led to a reduction in the level of illegal logging and trafficking.”<sup>11</sup>

ILR believes that Congress needs to take a hard look at the Lacey Act to determine whether it has an appropriate threshold *mens rea* requirement; adequately defines both the *actus reus* (guilty act) and the *mens rea* of the offense in specific and unambiguous terms; clearly states whether the *mens rea* requirement applies to all the elements of the offense or, if not, which *mens rea* terms apply to which elements of the offense; sets proper limits on enforcement discretion; and incorporates the performance metrics required for meaningful oversight.<sup>12</sup> ILR further believes that Congress needs

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<sup>8</sup>As one commentator put it:

Consider, for example, the case of Bigleaf mahogany imports from Peru...Peruvian officials have...supplied false documentation for these products...Not only was timber being illegally harvested in Peru, but illegal timber was also being moved into Peru from neighboring countries to be laundered...Such “deeply entrenched patronage systems” are most often linked to political networks...Clearly, it is wrong to require U.S. importers to comply with a myriad of foreign laws when the governments enacting these laws not only fail to adhere to them, but seem to be at the very root of the problem.

Tanczos, *A New Crime: Possession of Wood – Remediating the Due Care Double Standard of the Revised Lacey Act*, 42 RUTGERS L. J. 549, 572 (2011); see also Henry Juskiewicz, *Repeal the Lacey Act? Hell No, Make It Stronger!* The Huffington Post Green Blog (Nov. 2, 2011) available at [http://www.huffingtonpost.com/henry-juskiewicz/gibson-guitars-lacey-act\\_b\\_1071770.html](http://www.huffingtonpost.com/henry-juskiewicz/gibson-guitars-lacey-act_b_1071770.html) (accessed July 14, 2013) (“The U.S. should also use the power of the marketplace to encourage sustainable harvesting practices **in countries whose forestry systems are rife with graft and corruption**”)(emphasis added).

<sup>9</sup> ANIMAL AND PLANT HEALTH INSPECTION SERVICE, U.S. DEP’T OF AGRIC., REPORT TO CONGRESS WITH RESPECT TO IMPLEMENTATION OF THE 2008 AMENDMENTS TO THE LACEY ACT at 10 (“15 percent of the electronic declarations...[and] 32 percent of the paper declarations appear to be missing...information”); 11-15 (describing implementation problems and errors); 17 (“About 46% of the electronic declarations are missing accurate information...This makes it impossible to accurately reconcile the cumulative value reported on electronic import declarations with the value reported for customs purposes”) (May, 2013).

<sup>10</sup>*Id.* at 25.

<sup>11</sup>*Id.*

<sup>12</sup>See generally Walsh & Joslyn, WITHOUT INTENT: HOW CONGRESS IS ERODING THE INTENT REQUIREMENT IN FEDERAL LAW 26 – 31 (2010) available at <http://www.nacdl.org/withoutintent/> (accessed July 8, 2013).

to correct the Lacey Act's unduly broad incorporation of foreign law, perhaps by specifically defining those foreign laws that are jeopardy "triggers." Congress should also clarify the "due care" defense so that Americans have fair notice of prohibited conduct. U.S. courts, enforcement agencies and citizens all would benefit from clear "rules of the road."<sup>13</sup> In any event, our Constitution and our legal traditions demand nothing less. Finally, Congress should address the "contraband" issue by ensuring that Civil Asset Forfeiture Relief Act ("CAFRA")-defined innocent owners<sup>14</sup> are not subject to Lacey Act forfeiture.

## II. DISCUSSION.

### A. The Lacey Act's Background.

Passed by Congress in 1900, the Lacey Act was the first federal wildlife protection law. In its initial iteration, the Act supported state game animal and bird protection efforts by prohibiting the interstate shipment of wildlife killed in violation of state or territorial law, requiring wildlife to be clearly marked when shipped in interstate commerce, banning the importation of certain animals (including English sparrows) that could harm U.S. crop production and authorizing the federal government to preserve and restore game bird populations.<sup>15</sup> Amendments in 1935 prohibited interstate commerce in wildlife captured or killed in violation of any federal or foreign law. Amendments in 1945 banned the importation of wildlife under "inhumane or unhealthful" conditions.<sup>16</sup> Amendments in 1981 diluted the *mens rea* requirement from "willfully" to "knowingly."<sup>17</sup> And, amendments in 2008 criminalized the import, export, transport, sale, receipt, acquisition or purchase of any plant or plant product taken, possessed, transported or sold in violation of any domestic or foreign law.<sup>18</sup>

Interestingly, the legislative history is bare of substantive discussion regarding the consequences of the statute's uniquely broad dynamic incorporation of foreign law into the U.S. Code.

### B. Lacey Act Structure

The Lacey Act uniquely subjects American citizens to domestic jeopardy for the violation of a foreign sovereign's enactments.<sup>19</sup> 16 U.S.C. § 3373 imposes strict civil and criminal liability for

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<sup>13</sup> See Juszkievicz, *supra* at note 8. Gibson CEO Juszkievicz suggests that limited government enforcement dollars are likely better devoted to fighting illegal logging and poaching by bad actors and not to fights with American companies that try hard to comply with the law. Therefore, he advocates creating a compliance system that allows businesses to know before they buy wood and other plant products whether or not they are in compliance. *Id.*

<sup>14</sup> 18 U.S.C. §§ 983(d)(2) - (3).

<sup>15</sup> U.S. Fish & Wildlife Service, "*Nation Marks Lacey Act Centennial, 100 Years of Federal Wildlife Law Enforcement*," available at <http://www.fws.gov/pacific/news/2000/2000-98.htm> (accessed July 12, 2012).

<sup>16</sup> *Id.*

<sup>17</sup> See Lacey Act Amendments of 1981, Pub. L. 97-79.

<sup>18</sup> 16 U.S.C. § 3372(a)(2).

<sup>19</sup> *McNab*, 324 F.3d at 1274 (Fay, J. dissenting) ("the Lacey Act, by its very terms, is dependent upon the laws of a foreign sovereign"). As a Justice Department official testified in 2007:

conduct “in violation of, or in a manner unlawful under, any underlying law” that is “prohibited” by the Act, subject only to a “due care” defense. Section 3372(a)(2) prohibits any person to “import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce” any fish or wildlife “taken, possessed, transported or sold in violation of...any foreign law,” and plants “taken, possessed, transported or sold in violation of...any foreign law” including laws governing the payment of appropriate royalties, taxes or stumpage fees and “the export or transshipment” thereof. Section § 3371(d) defines “law” to mean “laws, treaties, regulations or Indian tribal laws which regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants.”

Lacey Act civil liability and criminal penalties attach when “in the exercise of due care” a defendant “should know” that the fish, wildlife or plants were taken in violation of the underlying law.<sup>20</sup> The Lacey Act does not define “due care.” The legislative history states that “[d]ue care simply requires that a person facing a particular set of circumstances undertakes certain steps which a reasonable man would take to do his best to insure that he is not violating the law.”<sup>21</sup> No clarifying regulations have been issued by any enforcing federal agency.<sup>22</sup>

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One unique feature of the Lacey Act is that it allows the incorporation of foreign law as an underlying law or predicate offense that “triggers” a Lacey Act violation...The law or regulation must be of general applicability, but may be a local, provincial, or national law. The defendant need not be the one who violated the foreign law...However, the defendant must know or, in the exercise of due care, should know, about its [violation].

*See* TESTIMONY OF EILEEN SOBECK BEFORE THE SUBCOMMITTEE ON FISHERIES, WILDLIFE AND OCEANS, COMMITTEE ON NATURAL RESOURCES, U.S. HOUSE OF REPRESENTATIVES CONCERNING H.R. 1497 at 4 (Oct. 16, 2007) *available at* <http://naturalresources.house.gov/uploadedfiles/sobecktestimony10.16.07.pdf> (accessed July 14, 2013).

The Alien Tort Statute (“ATS”) is commonly cited along with the Lacey Act as the primary examples of federal statutes that incorporate foreign laws into the U.S. Code. The ATS gives federal courts jurisdiction over “any civil action by an alien, for a tort only, committed in violation of the law of nations.” 28 U.S.C. § 1350; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 723 – 24 (2004). However, U.S. courts have interpreted the ATS’s “law of nations” trigger far more narrowly than the Lacey Act’s “foreign law” trigger. *Compare Kiobel v. Royal Dutch Petroleum*, \_\_\_ U.S. \_\_\_ (2013); *Sosa*, 542 U.S. at 724 (the ATS was designed to permit adjudication of a narrow class of torts in violation of the law of nations that would have been recognized within the common law at the time of its enactment); *Lee*, 937 F.2d at 1391.

<sup>20</sup> *See* 16 U.S.C. § 3373.

<sup>21</sup> Lacey Act Amendments of 1981, S. Rep. No. 97–123, 97th Cong., 1st Sess. 10–12 (1981); 1981 U.S.C.C.A.N. 1758–59. The Committee explained:

[D]ue care means that degree of care which a reasonably prudent person would exercise under the same or similar circumstances. As a result, it is applied differently to different categories of persons with varying degrees of knowledge and responsibility. For example, zoo curator's [sic], as professionals, are expected to apply their knowledge to each purchase of wildlife. If they know that a reptile is Australian and that Australia does not allow export of that reptile without special permits, they would fail to exercise due care unless they

In 2010, the United States Department of Agriculture Animal and Plant Health Inspection Service identified “Tools to Demonstrate Due Care” in a PowerPoint presentation.<sup>23</sup> These included “asking questions,” “compliance plans,” “industry standards,” “records of efforts,” and, helpfully, “changes in above in response to practical experiences.”<sup>24</sup>

In a recent Justice Department presentation, the sum total of the “due care” discussion was a citation to the statutory language, a quote from the legislative history and a list of seven “Common Sense Red Flags.” The “red flags” included “Goods significantly below market rate”, “Unusual sales methods or practices...”, “News articles or internet information indicating a potential problem” and “Inability to get rational answers to questions”, among other things.<sup>25</sup>

### III. WHY CONGRESS SHOULD REFORM THE LACEY ACT.

The Lacey Act’s conservation goals are of critical importance to all Americans. However, the statute’s broad and non-specific incorporation of foreign law is a prima facie threat to democratic principles; functionally inconsistent with core republican values and accepted notions of basic due process; and contrary to all prudential principles of government transparency and accountability. Also, the government’s enforcement approach is constitutionally suspect and practically problematic. Reform is appropriate.

#### A. The Lacey Act’s Dynamic Incorporation Of Foreign Law Is Incompatible With Bedrock American Legal Norms.

The Lacey Act’s dynamic and broad incorporation of foreign law is simply incompatible with bedrock American legal and constitutional norms. Fundamentally, the Lacey Act’s incorporation poses a prima facie threat to democracy because it delegates decisions about American citizens’ conduct from the hands of the American people’s representatives to often unaccountable and corrupt persons who do not share our Constitutional values or respect our basic Anglo-American legal principles of government transparency and accountability. Congress should not and need not protect wildlife, fish and plants by outsourcing U.S. law to authoritarian or corrupt countries.

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checked for those permits. On the other hand, the airline company which shipped the reptile might not have the expertise to know that Australia does not normally allow that particular reptile to be exported. However, if an airline is notified of the problem and still transships the reptile, then it would probably fail to pass the due care test.

*Id.*

<sup>22</sup>Tanczos, *A New Crime: Possession of Wood – Remediating the Due Care Double Standard of the Revised Lacey Act*, 42 RUTGERS L. J. 549, 567 (2011).

<sup>23</sup> U.S. DEP’T OF AGRIC., LACEY ACT PRIMER 20 (April 2010) available at [http://www.aphis.usda.gov/plant\\_health/lacey\\_act/downloads/LaceyActPrimer.pdf](http://www.aphis.usda.gov/plant_health/lacey_act/downloads/LaceyActPrimer.pdf) (accessed July 9, 2013).

<sup>24</sup> *Id.*; EIA, *Setting the Story Straight - The U.S. Lacey Act: Separating Myth from Reality 2* (2010) available at <http://www.eia-global.org/PDF/Report--Mythbusters--forest--Jan10.pdf> (accessed July 9, 2013) (“‘Lacey compliance’ is not defined by any one document, checkbox, due diligence system or due care check-list, and do not expect the U.S. government to provide that”).

<sup>25</sup>Hettenbach, *supra* at note 6.

B. The Government's Refusal To Specify Applicable Foreign Laws Or To Set Clear Compliance Standards Is Constitutionally Problematic And Counterproductive.

The government's refusal both to create a database of applicable foreign laws and to set clear compliance standards raises profound constitutional concerns and frustrates the Lacey Act's conservation purpose. To begin with, "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."<sup>26</sup> The Gibson case, in which U.S. regulators rejected the Indian government's interpretation of Indian law, and the *McNab* decision, in which a U.S. court rejected the Honduran government's interpretation of Honduran law, demonstrate that Lacey Act enforcement is "ad hoc and subjective" because U.S. regulators apparently are free to interpret and apply foreign law as they see fit.<sup>27</sup>

The government's refusal to set "clear rules of the road" is equally troubling. First, as the Supreme Court held almost a century ago, "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."<sup>28</sup> A legal regime that requires citizens to guess about compliance, at the risk of their liberty and property, cannot be justified. Second, the government's refusal to provide compliance standards has hampered both Lacey Act compliance and enforcement.

C. The Lacey Act Is An Exemplar Of Over-Criminalization.

The Lacey Act is an exemplar of "over-criminalization." Over-criminalization results when Congressional enactments expand criminal liability through strict liability offenses that dispense with culpable mental states; vicarious liability for the acts of others without some evidence of personal advertence; grossly disproportionate penalties that bear no relation to the wrongfulness of the underlying crime, the harmfulness of its commission, or the blameworthiness of the criminal; and the broad delegation of criminal enforcement authority to bureaucrats. Such enactments corrode individual civil liberties.<sup>29</sup>

The Lacey Act does all of these things. It holds Americans vicariously liable for the violation of even the most technical foreign law, rule or local ordinance without evidence of personal advertence or intent. It penalizes without relation to the harm done by the "violator" to fish, wildlife or plant populations. It criminalizes obscure foreign requirements, including civil customs, transportation, and packaging rules and even local tax or royalty ordinances, and then delegates unlimited prosecutorial power to federal regulators. Perversely, the Lacey Act unleashes the coercive power of the federal government not against the corrupt and lawless foreign individuals, companies and governments that allow, encourage or conduct poaching, clear-cutting and environmental degradation, but rather against Americans who are innocent of wrong-doing, by any reasonable measure.

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<sup>26</sup>*Grayned*, 408 U.S. at 108 (citations omitted).

<sup>27</sup>See generally *Morales*, 527 U.S. at 41 (striking down an ordinance providing absolute discretion to police officers to determine prohibited "loitering").

<sup>28</sup>*Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1925).

<sup>29</sup>See Luna, *The Overcriminalization Phenomenon*, 54 AMERICAN UNIV. L. REV. 703, 715 (2005).

D. The Lacey Act's Structural Flaws Lead To Absurd And Unjust Results.

Through the Lacey Act, Congress requires Americans to know and then “properly” interpret the regulatory minutiae of fishery, wildlife and forest management, tax, customs, logging, commercial and real property “law” in places like Egypt, Indonesia, Vietnam, Peru and China.<sup>30</sup> Congress also now requires our citizens to “verify” that foreign actors in a supply chain that may span countries rife with legal inefficiency, imprecision and corruption appropriately “comply” with all of these laws.<sup>31</sup> Finally, Congress’s failure to cabin regulatory discretion has empowered U.S. regulators to “Monday Morning Quarterback” good faith interpretative and verification efforts, and then to raid and prosecute anyone whom the government decides has failed to measure up. This leads to absurd results.

On August 24, 2011, Gibson Guitar factories in Nashville and Memphis were raided by armed agents from the Department of Homeland Security and the U.S. Fish & Wildlife Service. The company was not accused of importing banned wood.<sup>32</sup> Rather, the raid apparently occurred because Gibson ran afoul of a technical Indian regulation governing the export of finished wood products, which was designed to protect Indian woodworkers from foreign competition.<sup>33</sup> To make matters worse, although the Indian government certified that the wood was properly and legally exported, the regulators substituted their own opinion to support their claims of a Lacey Act violation.<sup>34</sup>

On July 27, 2012, Gibson and the government settled all of their outstanding Lacey Act matters.<sup>35</sup> Notably, the focus of the settlement agreement was on Gibson’s alleged failure to conduct sufficient due diligence with respect to the purchase of wood originating in Madagascar. As to the Indian ebony and rosewood that led government agents to conduct an armed raid:

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<sup>30</sup>According to the government, “It is the responsibility of the importer to be aware of **any** foreign laws that may pertain to their merchandise prior to its importation into the United States.” See ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP’T OF AGRIC., LACEY ACT AMENDMENTS: COMPLETE LIST OF QUESTIONS AND ANSWERS 2 (Feb. 16, 2012) *available at* [http://www.aphis.usda.gov/plant\\_health/lacey\\_act/downloads/faq.pdf](http://www.aphis.usda.gov/plant_health/lacey_act/downloads/faq.pdf) (accessed July 14, 2013)(emphasis added).

<sup>31</sup> See 42 RUTGERS L. J. at 572 (citations omitted); see also Juskiewicz, *supra* at note 8 (“The U.S. should also use the power of the marketplace to encourage sustainable harvesting practices **in countries whose forestry systems are rife with graft and corruption**”)(emphasis added).

<sup>32</sup> See Affidavit of Special Agent John M. Rayfield in support of Search Warrant 11-MJ-1067 A, B, C, D at ¶¶ 15-18 (Aug. 18, 2011) *available at* <http://www.scribd.com/srcohiba/d/63869457-US-Government-s-Affidavit-in-Support-of-Search-Warrant-at-Gibson-Guitar-Factory> (accessed May 4, 2012).

<sup>33</sup> Juskiewicz, *supra* at note 8.

<sup>34</sup> Apparently, Gibson was advised by the U.S. government that if it finished its guitar fingerboards using Indian labor rather than Tennessee craftsman, the Lacey Act issue would not exist. *Id.*

<sup>35</sup>Letter from Jerry E. Martin to Donald A. Carr dated July 27, 2012 *available at* <http://www2.gibson.com/News-Lifestyle/Features/en-us/Gibson-Comments-on-Department-of-Justice-Settlement.aspx> (accessed July 14, 2013).



The Government and Gibson...agree that certain questions and inconsistencies now exist regarding the tariff classification of ebony and rosewood fingerboard blanks...Accordingly, the Government will not undertake enforcement actions related to Gibson's future orders...or imports of ebony and rosewood...from India, unless and until the Government of India provides specific clarification that ebony and rosewood fingerboard blanks are express prohibited by laws related to Indian Foreign Trade Policy.<sup>36</sup>

Oddly, this final disposition of Gibson's Indian ebony and rosewood was not mentioned in the government's celebratory press release announcing the settlement.<sup>37</sup>

E. The "Contraband" Problem Should Be Corrected.

In 2008, Congress amended Lacey by adding 16 U.S.C. § 3374(d). This section states that Lacey Act forfeitures of fish, wildlife or plants are subject to CAFRA,<sup>38</sup> which states (in relevant part) that an innocent owner's interest in property shall not be forfeited under any civil forfeiture statute.<sup>39</sup> Congress enacted § 3374(d) to address compliance problems caused by the 2008 liability expansion<sup>40</sup> and to cure a Ninth Circuit ruling holding that all fish, wildlife or plants seized under the Lacey Act are "contraband" to which CAFRA's innocent owner defense does not apply.<sup>41</sup>

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<sup>36</sup>*Id.* at 3.

<sup>37</sup>U.S. DEPT OF JUSTICE OFFICE OF PUBLIC AFFAIRS, "Gibson Guitar Corp. Agrees to Resolve Investigation into Lacey Act Violations" (Aug. 6, 2012) *available at* <http://www.justice.gov/opa/pr/2012/August/12-enrd-976.html> (accessed July 9, 2013).

<sup>38</sup>18 U.S.C. § 981 et seq. In 2000, Congress enacted CAFRA and created the "innocent owner" affirmative defense to cure the government's "abuses of fundamental fairness" and to ensure that property owners obtain adequate due process in civil forfeiture cases. *See generally* Moores, *Reforming The Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 782 – 83 (2009)(citations omitted).

<sup>39</sup> 18 U.S.C. § 983(d)(1). Sections 983(d)(2) and (3) set the criteria for proof of innocence.

<sup>40</sup> As the House Report on H.R. 1497 (subsequently enacted as § 8204 of the Food, Conservation and Energy Act of 2008, Pub. L. 110-246) states:

Under Lacey, the entire supply chain handling imported plant material is held responsible for illegal acts of which they would have no reasonable expectation to know the violation much less know the underlying laws that exist in all foreign countries. Amending the Lacey Act to include reaffirmation of CAFRA provides important forfeiture liability protection for "innocent owners"...Recent case law had effectively exempted Lacey Act forfeitures from the "innocent owner" defense... [so] the specificity of language in H.R. 1497 and specific reference to CAFRA subsequent to the [*Blue King Crab*] case are intended to clearly show that it is Congress' intent to provide "innocent owner" [sic] in forfeiture proceedings under the Lacey Act.

HOUSE REP. 110-882, at 20-21; *see also* 42 RUTGERS L. REV. at 576 – 78 (discussing the "missing" innocent owner exception)(citations omitted).

<sup>41</sup> 18 U.S.C. § 983(d)(4) states "Notwithstanding any provision of this subsection, no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess." The Ninth Circuit ruled that all property seized under Lacey was by definition

The government denies that Lacey Act seizures are subject to CAFRA.<sup>42</sup> This is puzzling, because to do this the government renders § 3374(d) superfluous.<sup>43</sup> Furthermore, there is no evidence that punishing objectively blameless persons who act with due care better protects fish, wildlife and plants. In a case where an importer reasonably cannot have knowledge of illegality, the government's position directly counters fundamental U.S. legal norms, § 3374(d) and CAFRA itself.<sup>44</sup>

#### F. Lacey Act Performance Metrics Are Needed.

Although there is ample evidence that implementation of the 2008 Lacey Act amendments has proven to be expensive and unwieldy and ineffective, there is no evidence that the amendments have actually reduced the illegal logging rate. As a recent Congressional Research Service Report points out, although five years have passed since Congress enacted the 2008 Lacey Act amendments, the USDA still cannot provide specific cost figures for the new requirements on legal plant imports or “determine whether the Act has led to a reduction in the level of illegal logging and trafficking.”<sup>45</sup> Without appropriate performance metrics, Congress cannot evaluate the wisdom of the 2008 Lacey Act amendments or oversee the conduct of the agencies and bureaucrats it has empowered.

#### IV. CONCLUSION.

The Lacey Act's fish, wildlife and plant conservation goals deserve strong Congressional support. Nevertheless, Lacey Act reform is needed and ILR urges Congress to move forward with this important work.<sup>46</sup> Specifically:

- Congress needs to take a hard look and determine whether the Lacey Act: (1) has an appropriate *mens rea* requirement as a threshold matter; (2) adequately defines both the *actus reus* (guilty act) and the *mens rea* of the offense in specific and unambiguous terms; (3) clearly states whether the *mens rea* requirement applies to all the elements of the offense or, if not, which *mens rea* terms apply to which elements of the offense; (4) sets proper limits on enforcement discretion; and (5) incorporates the performance metrics required for meaningful oversight.

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“illegal to possess” and that the innocent owner affirmative defense to forfeiture therefore should be stricken. *Blue King Crab*, 410 F.3d at 1135 - 36.

<sup>42</sup>See Hettenbach, *supra* at note 5 citing *United States v. 1866.75 Board Feet and 11 Doors, More or Less.*, 587 F.Supp.2d 740 (E.D. Va. 2008)(no innocent owner defense to forfeiture).

<sup>43</sup>The government's position contradicts the basic canon of statutory interpretation that Congress does not enact superfluous provisions. See, e.g., *Bailey v. United States*, 516 U.S. 137, 146 (1995)(citations omitted).

<sup>44</sup>42 RUTGERS L. REV. at 578 (citations omitted); 51 ARIZ. L. REV. 782 – 83 (citations omitted).

<sup>45</sup>See *supra* notes 7, 9 - 11.

<sup>46</sup>Bipartisan actions in the 112<sup>th</sup> Congress, including the FOCUS Act (H.R. 4171) and the RELIEF Act (H.R. 3210) suggest that the time is right for reform. The FOCUS Act addressed over-criminalization and due process problems by striking the foreign law references and criminal sanctions while retaining the “due care” standard for civil liability and potential forfeiture. The RELIEF Act resolved the “contraband” issue by ensuring CAFRA protection for innocent owners.

- Congress needs to correct the Lacey Act’s unduly broad incorporation of foreign law, perhaps by specifically defining those foreign laws that are jeopardy “triggers.” It should also clarify the “due care” defense so that Americans have fair notice of prohibited conduct. U.S. courts, enforcement agencies and citizens all would benefit from clear “rules of the road.”<sup>47</sup> In any event, the Constitution and our legal traditions demand nothing less.
- Congress should address the “contraband” issue by ensuring that CAFRA-defined “innocent owners” are not subject to Lacey Act forfeiture.

We thank you for your attention to this important matter and look forward to working with you.

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<sup>47</sup> See Juskiewicz, *supra* at note 8. Gibson CEO Juskiewicz suggests that limited government enforcement dollars are likely better devoted to fighting illegal logging and poaching by bad actors and not to fights with American companies that try hard to comply with the law. Therefore, he advocates creating a compliance system that allows businesses to know before they buy wood and other plant products whether or not they are in compliance. *Id.*