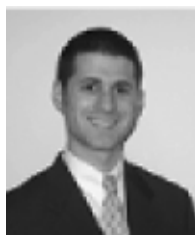


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DUE PROCESS

SUSTAINABILITY

Gibson Guitar, Forfeiture, and the Lacey Act Strike a Dissonant Chord



BY MARCUS ASNER, MAXWELL PRESTON, AND
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The Department of Justice (DOJ) announced on Aug. 6, 2012, that it had entered into a criminal enforcement agreement with Gibson Guitar Corp. regarding allegations that Gibson engaged in conduct that violates the Lacey Act, 16 U.S.C. § 3371, *et seq.*, and other civil and criminal laws.¹ This Agreement brought to a conclusion a controversial investigation and set of legal proceedings that have been ongoing for almost three years. As part of the Agreement, Gibson will pay

a penalty of \$300,000 and make a \$50,000 “community service payment” to the National Fish and Wildlife Foundation. Gibson also agreed to forfeit quantities of wood seized by the U.S. Fish & Wildlife Service (FWS), and to cooperate with government investigations and prosecutions concerning the Lacey Act. Further, Gibson will implement a rigorous “Lacey Act Compliance Program,” detailed in the Agreement, “to enhance [Gibson’s] current due care standards when purchasing wood products.”

The Gibson seizures and subsequent civil litigation resulted in a heated and, we believe, often regrettably uninformed, debate—in the media, on the Internet, and in Congress—regarding the proper scope of federal power and the adequacy of due process protections. The government’s authority to seize and forfeit wood under the Lacey Act has taken center stage in the con-

¹ Press Release, U.S. Dep’t of Justice, 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>. See also 152 DEN A-9, 8/8/12.

trover, and has led to proposed legislation that would alter significantly the Act's forfeiture provisions. While all statutes no doubt have room for improvement, we believe it is important for lawmakers and stakeholders to consider any proposed amendment with accurate facts at their fingertips. In this article, we seek to cut through the rhetoric and examine the claims of due process deprivation, both in the abstract and in the specific context of Gibson. Our hope is that, by setting straight the facts, we may be able to help further an informed debate.

I. The Gibson Guitar Controversy

The Gibson seizures arose out of a federal investigation into alleged violations of the Lacey Act, a law which prohibits, among other things, trade in plants and plant products that have been taken, transported, or sold in violation of law, including the law of other countries.² Over the past three years, federal officials seized guitars and wood products from Gibson on three occasions. The wood at issue allegedly had been obtained in violation of the laws of Madagascar and India.

Gibson hired a lobbying firm to argue its case in the press and to advocate for amending the Act.³ The ensuing media storm led some members of Congress to advocate pulling back on key provisions and to propose amendments designed to accomplish this goal. The Retailers and Entertainers Lacey Implementation and Enforcement Fairness (RELIEF) Act, H.R. 3210, for example, would, among other things, remove or limit some of the Act's provisions for plants and plant products imported before 2008, narrow the categories of foreign laws that trigger violations, and alter the Act's forfeiture provision to include an "innocent owner" defense.⁴ Proponents of the Lacey Act have been equally vociferous, emphasizing that the Act is designed to even the playing field for American businesses, root out criminal enterprises, and protect the world's natural resources, including the wood supply needed for American business and consumers.⁵ The forfeiture provision, for example, helps reduce trafficking in illegal re-

sources and encourages importers to inquire about their sources.

A common complaint about the enforcement action was that Gibson's wood was seized and held even though Gibson had not "had its day in court to defend itself,"⁶ and that Gibson was the victim of an abuse of governmental power.⁷ Henry Juskiewicz, Gibson's CEO, asserted:

[S]ome government bureaucrat—without due process—has declared that [the seized] raw material [was] illegal. Because they said it was illegal, they seized it, and their position is they will never release it under any circumstances.

We've attempted to litigate and the courts have generally supported the government's position, but we haven't been charged with anything. The government was so aggressive they put our business in jeopardy and they could have put us out of business without any type of hearing. . . . It goes against the Fifth Amendment. It goes beyond a wood issue or Lacey Act. . . . [I]t is rather frightening.⁸

In the Agreement, Gibson now for the first time states that it "accepts and acknowledges responsibility" for its conduct relating to the Madagascar wood. Gibson concedes that Madagascar sought to address illegal ebony logging with local laws prohibiting the harvest of ebony and the export of already harvested ebony except as "finished products." Gibson admits that one of its representatives knew about the relevant law and informed Gibson's management. Gibson nevertheless continued to order Malagasy ebony fingerboard blanks (rough, sawn, unfinished pieces of wood used to make fingerboards), without further investigation. Gibson now acknowledges that it "should have taken a more active role and exercised additional diligence with respect to documentation of legal forestry practices."

The government has backed off of its claims concerning the Indian wood, however, agreeing with Gibson that "certain questions and inconsistencies now exist regarding the tariff classification of ebony and rosewood fingerboard blanks pursuant to the Indian gov-

² For further information on the history and scope of the Lacey Act, see Marcus A. Asner et al., *The Lacey Act Gives Gibson Guitar the Blues*, 6 WHITE COLLAR CRIME REPORT (BNA) No. 25 (Dec. 16, 2011).

³ Anita Wadhvani, *Music Row Spent \$4 million on Lobbying in 3 Months*, The Tennessean (Nov. 20, 2011), <http://www.tennessean.com/article/20111120/BUSINESS/311200042/Music-Row-spent-4-million-lobbying-3-months>; Jonathan Meador, *Does Gibson Guitar's Playing the Victim Chord Stand Up to Scrutiny?*, Nashville Scene (Oct. 20, 2011), <http://www.nashvillescene.com/nashville/does-gibson-guitars-play-ing-the-victim-chord-stand-up-to-scrutiny/Content?oid=2656825> (discussing the Gibson controversy).

⁴ RELIEF Act, H.R. 3210, 112th Cong. (2012); Freedom from Over-Criminalization and Unjust Seizures Act of 2012, S. 2062, 112th Cong. (2012); Freedom from Over-Criminalization and Unjust Seizures Act of 2012, H.R. 4171, 112th Cong. (2012); see also Annie Johnson, *Gibson Pushing for Guitar Battle in Court*, Nashville Business Journal, June 1, 2012, <http://www.bizjournals.com/nashville/print-edition/2012/06/01/gibson-guitar-battle-in-court.html> (discussing legislative efforts).

⁵ See Letter from 350.org et al. to the United States House of Representatives (June 6, 2012) available at http://switchboard.nrdc.org/blogs/jschmidt/Don't_Weaken_Lacey_June_2012.pdf; Meador, *supra* note 3.

⁶ Tina Korbe, *Video: The Great Gibson Guitar Raid . . . Months later, still no charges*, Hot Air (Feb. 23, 2012, 3:40 PM), <http://hotair.com/archives/2012/02/23/video-the-great-gibson-guitar-raid-months-later-still-no-charges/>; see also John Roberts, *Gibson Guitar Case Drags On With No Sign of Criminal Charges*, FoxNews.com (Apr. 12, 2012), <http://www.foxnews.com/us/2012/04/12/gibson-guitar-case-drags-on-with-no-sign-criminal-charges/>.

⁷ See, e.g., Meador, *supra* note 3; Harvey Silverglate, *To the CEO of Gibson: It's Not Just a War Against Capitalism*, Forbes (July 30, 2012, 11:17 AM), <http://www.forbes.com/search/?q=To+the+CEO+of+Gibson%3A+It%27s+Not+Just+a+War+Against+Capitalism> (arguing DOJ is engaged in a "war against all of civil society" by over-enforcing "incomprehensibly vague and broad criminal statutes").

⁸ Robert Archer, Q&A: *Henry Juskiewicz, CEO, Gibson Guitar*, CEPro, May 7, 2012, http://www.cepro.com/article/print/qa_henry_juskiewicz_ceo_gibson_guitar/. See generally Henry Juskiewicz, *Gibson's Fight Against Criminalizing Capitalism*, The Wall Street Journal, July 19, 2012, <http://online.wsj.com/article/SB10001424052702303830204577448351409946024.html> (arguing that the federal government is hurting the economy through "overcriminalization" of business activity).

ernment's Foreign Trade Policy." Gibson will file petitions for remission regarding the seized Indian wood, which DOJ states it does not oppose.

Despite the Agreement, the debate over the Lacey Act and the government's actions has continued.⁹ The future of efforts to amend the Lacey Act remains to be seen.

II. Procedures Protecting a Claimant's Rights

A short review of the law of seizures and forfeiture will help shed light on Gibson's claim that it was denied due process of law.

It is well-settled that the federal government may seize property upon a showing of probable cause that the property is illegal. However, the U.S. Constitution prohibits the government from permanently depriving persons of property without providing adequate procedural due process.¹⁰ A person seeking return of seized property may contest the seizure, and if the government intends to permanently keep seized property, it generally must follow specific forfeiture procedures.¹¹

A. Procedures Underlying Seizures

Validly issued search warrants authorize an executing officer to seize evidence, suspected contraband (i.e., property that is illegal to possess), or other instrumentalities of a crime.¹² And a court may issue a warrant upon a showing a probable cause.¹³ "Pre-deprivation [due] process is not required[, however,] for the seizure of suspected contraband or the fruits of a crime. . . . To hold otherwise would require notice to the property owner and a hearing before a search warrant is executed."¹⁴

A person seeking the return of federally seized property may file a motion in federal court pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure, which requires the court to "receive evidence on any factual issue necessary to decide the motion." Where property was seized as alleged contraband, one issue that the court must consider is whether the property was truly

contraband.¹⁵ If the court grants a Rule 41(g) motion, the property is returned.¹⁶

B. Procedures Underlying Forfeiture

Even if a party fails to file a Rule 41(g) motion, the government generally must follow a formal forfeiture process to permanently keep seized property. Goods seized pursuant to the Lacey Act for allegedly failing to comply with foreign procedural requirements (e.g., failing to obtain proper permits) fall into the category of "derivative contraband"—property that is illegal to possess due to the manner in which it was used, possessed, or acquired.¹⁷ Derivative contraband may not be forfeited without due process.¹⁸

On the other hand, property that is intrinsically illegal to possess (e.g., illegal drugs or weapons)—"contraband *per se*"—can be forfeited summarily, without any procedural protections, "because one cannot have a property right in that which is not subject to legal possession."¹⁹ Contraband *per se* also includes (at least according to one court) goods seized pursuant to the Lacey Act where possession or exportation of such goods is banned by a foreign country.²⁰

1. Administrative and Judicial Forfeiture

The principal federal forfeiture procedures are set out in the Civil Asset Forfeiture Reform Act (CAFRA).²¹ Pursuant to CAFRA, a federal agency that seizes property typically must give notice, within sixty days, to the party from whom the property was seized.²² If the party fails to file a timely claim to the property, it is deemed administratively forfeited, and the government may keep it without further process.²³

If a party elects to file an administrative claim, the government must commence judicial forfeiture pro-

¹⁵ *Mendoza v. United States*, 2011 BL 335354, at *1 (S.D.N.Y. Apr. 4, 2011) (prevailing on Rule 41(g) motion requires demonstrating property is not contraband).

¹⁶ Fed. R. Crim. P. 41(g). The court may "impose reasonable conditions to protect access to the property and its use in later proceedings." *Id.*

¹⁷ See *United States v. 144, 774 Pounds of Blue King Crab*, 410 F.3d 1131, 1135 (9th Cir. 2005) (crabs seized pursuant to Lacey Act not inherently illegal to possess; were illegal because of failure to satisfy Russian reporting requirements); cf. *Conservation Force v. Salazar*, 677 F. Supp. 2d 1203, 1207 (N.D. Cal. 2009) (sport-hunted trophies are derivative contraband where imported without proper permits).

¹⁸ See, e.g., *Conservation Force*, 677 F. Supp. 2d. at 1210-11 (citations omitted).

¹⁹ See *Helton v. Hunt*, 330 F.3d 242, 247 (4th Cir. 2003) (citing *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699-700 (1965) and quoting *Cooper v. City of Greenwood*, 904 F.2d 302, 305 (5th Cir.1990)); see also *Conservation Force*, 677 F. Supp. 2d at 1210-11 ("[P]er se contraband may be summarily forfeited without any due process protections . . ."); *Lopez v. United States*, 2006 BL 102613, at *14 (D.D.C. Sept. 26, 2006) (illegal drugs); *United States v. Wilson*, 8 Fed. Appx. 593, 596 (8th Cir. 2001) (citation omitted) (heroin and sawed-off shotguns).

²⁰ See *United States v. Proceeds from Sale of Approximately 15, 538 Panulirus Argus Lobster Tails*, 834 F. Supp. 385, 391 (S.D. Fla. 1993) (lobster tails intrinsically illegal because Turks and Caicos law prohibits possession of tails below certain weight).

²¹ See 18 U.S.C.A. § 983.

²² See 18 U.S.C.A. § 983(a)(1)(A)(i).

²³ See *id.* § 983(a); 50 C.F.R. § 12.23 (describing administrative forfeiture by FWS but not amended since CAFRA).

⁹ *Gibson Comments on Department of Justice Settlement*, Aug. 6, 2012, <http://www2.gibson.com/News-Lifestyle/Features/en-us/Gibson-Comments-on-Department-of-Justice-Settlement.aspx>; Geert De Lombaerde, *I Don't Retreat from Any of My Prior Commentary*, Nashville Post, Aug. 7, 2012, <http://nashvillepost.com/taxonomy/term/18031> (reactions to Agreement).

¹⁰ U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law"); see, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976).

¹¹ See, e.g., 18 U.S.C.A. § 983 (procedures governing civil forfeiture proceedings). But see *infra* Part II.B. (discussing *per se* contraband and summary forfeiture).

¹² See Fed. R. Crim. P. 41(c)(2) (authorizing seizure of contraband); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298-301 (2008).

¹³ U.S. Const. amend. IV ("no Warrants shall issue, but upon probable cause"); Fed. R. Crim. P. 41(d) (procedure for obtaining warrant).

¹⁴ *Hentz v. Ceniga*, 2009 BL 49318, at *14-15 (D. Or. Mar. 3, 2009).

ceedings.²⁴ During these proceedings, the party may present evidence and argue that the seized property should be returned pursuant to Supplemental Rule G(5).²⁵ To prevail, the government must demonstrate by a preponderance of evidence that the property is subject to forfeiture,²⁶ and that the government had probable cause to believe the property was subject to forfeiture when it commenced the proceedings.²⁷

2. Petitions for Remission

In addition to contesting forfeiture in court, a party also may appeal directly to the seizing agency for redress, seeking remission or mitigation of forfeiture. See 16 U.S.C. § 3374(b). Pursuant to regulations promulgated by the FWS, for example, a party may file with the Solicitor of the Department of the Interior a petition for remission or mitigation of administrative forfeiture. 50 C.F.R. § 12.24. If there are sufficient “mitigating circumstances,” the Solicitor may remit or mitigate the forfeiture upon reasonable terms and conditions, or may discontinue the administrative proceeding. *Id.* § 12.24(f). Petitions for remission or mitigation of judicial forfeiture also may be filed with the U.S. Attorney and decided by DOJ. See 28 C.F.R. §§ 9.4-9.5.

III. Seizure and Forfeiture of Wood and Wood Products from Gibson

On Nov. 17, 2009, FWS seized from a Gibson factory six guitars and ebony wood in various other forms.²⁸ The seized wood was allegedly harvested in and/or exported from Madagascar in violation of Malagasy law and, therefore, was seized as contraband under the Lacey Act.²⁹ We are unaware of Gibson taking any official action (i.e., filing a Rule 41(g) motion or petition for remission) over the next nine months to seek return of the wood.

On Aug. 9, 2010, DOJ filed a complaint seeking judicial forfeiture of the seized wood (the “First Action”).³⁰ An extended period of legal wrangling followed. In accordance with the procedures of Supplemental Rule G(5), on Sept. 23, 2010, Gibson filed a claim contesting forfeiture.³¹ Gibson then filed a motion to dismiss the complaint on the ground that the wood was legal.³² The government opposed Gibson’s motion, arguing that

Gibson should be precluded from seeking dismissal on that basis until legality was determined.³³

On June 4, 2011, the government moved to strike Gibson’s claim, arguing that Gibson lacked standing to make the claim because the seized wood was contraband, and requested a hearing to establish Gibson’s lack of standing.³⁴ Gibson responded that it did have standing to contest the forfeiture because it had demonstrated a colorable interest in wood that might be legal. It maintained that the government had the burden of proving illegality, because the wood was derivative contraband rather than contraband *per se*.³⁵

Gibson meanwhile sought discovery, which prompted the government to seek to stay the First Action because “allow[ing] civil discovery in this case, at this time, [would] adversely affect the investigation and the prosecution of a related criminal investigation.”³⁶ CAFRA expressly permits DOJ to request a stay in this situation.³⁷ The parties then spent a few months trying unsuccessfully to resolve the dispute.³⁸

The dispute grew more complicated when, around July 29, 2011, Customs and Border Protection seized 25 bundles of Indian ebony en route to Gibson.³⁹ These bundles allegedly were exported from India in violation of Indian law, and were falsely labeled so as to appear legal. This seizure led to another judicial forfeiture action (the “Second Action”),⁴⁰ plus another search and a much-publicized third seizure on Aug. 24, 2011.⁴¹

On Sept. 28, 2011, the court denied all of the parties’ outstanding motions in the First Action, in light of an unspecified stay, and administratively closed the case.⁴² Gibson then filed a motion for reconsideration and to reopen the case on the ground that no stay actually was issued.⁴³ Meanwhile, the Second Action was stayed, pending a resolution in the First Action.⁴⁴ After a hearing in May 2012, the court granted Gibson’s motion in

³³ Plaintiff’s Preliminary Response to Claimant Gibson Guitar Corp.’s Motion to Dismiss, *Ebony Wood* (Nov. 18, 2010); Plaintiff’s Supplemental Response to Claimant Gibson Guitar Corp.’s Motion to Dismiss, *Ebony Wood*, (June 8, 2011).

³⁴ Motion to Strike Claims for Lack of Standing after a Hearing, *Ebony Wood* (June 4, 2011). The U.S. filed a supplemental response to Gibson’s motion to dismiss on June 6, 2011. Plaintiff’s Supplemental Response to Claimant Gibson Guitar Corp.’s Motion to Dismiss, *Ebony Wood* (June 6, 2011).

³⁵ Claimant Gibson Guitar Corp.’s Response to Plaintiff’s Motion to Strike, *Ebony Wood* (July 15, 2011).

³⁶ Memorandum of Law in Support of Motion to Stay, *Ebony Wood* (July 25, 2011).

³⁷ 18 U.S.C. § 981(g)(1).

³⁸ Renewed Motion to Stay, *Ebony Wood* (Sept. 20, 2011).

³⁹ Affidavit in Support of Application for Civil Forfeiture, *United States v. 25 Bundles of Indian Ebony Wood*, No. 3:11-cv-00913 (M.D. Tenn. Sept. 27, 2011).

⁴⁰ Verified Complaint in Rem, *United States v. 25 Bundles of Indian Ebony Wood*, No. 3:11-cv-00913 (M.D. Tenn. Sept. 27, 2011).

⁴¹ Affidavit in Support of Search Warrant # 11-MJ-1067 A, B, C, D, available at <http://www.motherjones.com/files/gibsonaffidavit.pdf> (last visited Aug. 3, 2012); Kate Sheppard, *Gibson’s Wood Problem: Is Your Guitar Solo Shredding the Rainforest?*, MOTHER JONES (Sept. 26, 2011, 2:30 AM), <http://www.motherjones.com/environment/2011/09/tea-party-gibson-guitar-wood> (discussing seizures and resultant outrage).

⁴² Order, *Ebony Wood* (Sept. 28, 2011).

⁴³ Claimant Gibson Guitar Corp.’s Motion to Reconsider and to Reopen Case, *Ebony Wood* (Oct. 7, 2011).

⁴⁴ Order, *United States v. 25 Bundles of Indian Ebony Wood*, No. 3:11-cv-00913 (M.D. Tenn. Jan. 26, 2012).

²⁴ See 18 U.S.C.A. § 983(a)(3).

²⁵ See 18 U.S.C.A. § 983(a)(4)(A) (contemplating claims pursuant to Supplemental Rules); Fed. R. Civ. P. Supplemental Rule G(5).

²⁶ See 18 U.S.C.A. § 983(b).

²⁷ See 19 U.S.C.A. § 1615; *United States v. \$493,850.00 in U.S. Currency*, 518 F.3d 1159, 1169 (9th Cir. 2008) (Section 1615 requires probable cause under CAFRA).

²⁸ Verified Claim Contesting Forfeiture, *United States v. Ebony Wood in Various Forms*, No. 3:10-cv-00747 (M.D. Tenn. Sept. 23, 2010) [hereinafter *Ebony Wood*]; Motion to Strike Claims for Lack of Standing after a Hearing, *Ebony Wood* (June 4, 2011).

²⁹ The seized wood was “unfinished” ebony from Madagascar, which prohibits logging ebony and exporting “unfinished” ebony.

³⁰ Verified Complaint in Rem, *Ebony Wood* (Aug. 9, 2010).

³¹ Verified Claim Contesting Forfeiture, *Ebony Wood* (Sept. 23, 2010).

³² Motion to Dismiss, *Ebony Wood* (Oct. 14, 2010).

the First Action for reconsideration and to reopen the case, but declined to make any decisions on the merits.⁴⁵

All of this wrangling culminated in the Criminal Enforcement Agreement announced on Aug. 6.⁴⁶ As noted above, Gibson now effectively concedes that the Madagascar wood was illegal and may be forfeited. But Gibson prevailed with respect to the Indian wood; the government effectively agreed that the Indian government's position on the law was uncertain, and agreed to return the Indian wood after Gibson filed a proper petition for remission and mitigation.

IV. Conclusion

Cries that Gibson was denied due process have been invoked to gather support for amending the Lacey Act.⁴⁷ But closer scrutiny belies these claims. Despite the sometimes heated rhetoric and efforts to litigate this dispute in the press, Gibson in fact had available multiple avenues to contest forfeiture and seek the return of the seized wood. Some of Gibson's arguments prevailed; as noted, the government agreed to return the Indian wood following a petition for remission and mitigation. Gibson, represented by able counsel, elected to follow certain of these procedures and to forego others. Contrary to the claim that Gibson never "had its day in

court," it actually engaged in litigation and negotiations with DOJ for nearly two years, a process that resulted in what appears to be a fairly measured Criminal Enforcement Agreement.

There may well be ways to improve the Lacey Act, but a reasoned debate about any amendments should be guided by an understanding of the facts and the legal landscape. Any movement to amend the Lacey Act should consider the record of the Gibson legal proceedings and the resulting Criminal Enforcement Agreement. As detailed above, that record suggests that the procedures governing forfeiture under the Lacey Act are fairly well-tailored to achieve the Act's goals while simultaneously protecting due process and property rights.

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This article does not represent the opinions of Bloomberg BNA, which welcomes other points of view.

⁴⁵ Order, *Ebony Wood* (May 15, 2012).

⁴⁶ See *supra* note 1.

⁴⁷ See *supra* note 4.