

Lacey Act: Why Should Americans Have to Comply with Foreign Laws
Wednesday, July 17, 2013 2:00 PM
Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs
Natural Resources Committee
1324 Longworth House Office Building, Washington, D.C. 20515
Responses Submitted August 21, 2013

QUESTIONS BY THE HONORABLE GREGORIO KILILI SABLAN

Mr. Asner:

- 1. Foreign laws serving as triggers for Lacey Act violations might be written in other languages. Is it fair to require English-speaking U.S. citizens to follow such laws? What if the foreign laws carry harsh penalties that would not be permitted in the U.S.?**

The Lacey Act does not require Americans to follow foreign laws, nor does the Lacey Act require the U.S. government to enforce foreign laws. Rather, the Lacey Act prohibits trade *in the United States* in illegal wildlife, fish, plants and plant products. Whether it is illegal to trade in particular items under the Lacey Act necessarily may turn on state, foreign or tribal law. So foreign law may provide a predicate for a Lacey Act violation, much the way that a violation of a foreign property law may form the predicate for a law banning trade in stolen goods. In both cases, a key to the offense is trade *in the United States* in illegal goods.

The Lacey Act is a United States law that governs trade in the United States. Accordingly, the only possible penalties for a violation of the Lacey Act are those enumerated by the Lacey Act. Penalties that foreign governments may impose for violations of their law are inapplicable to violations of the Lacey Act.

American consumers have a right to expect that the goods they purchase are legal. A consumer has a right to expect that the fish she buys at a supermarket has not been poached, just as she has a right to expect that the car she buys at a dealership has not been stolen. Companies importing wildlife, fish, plants and plant products from foreign countries can and should take reasonable steps to ensure that they are providing legal goods, and such reasonable steps in turn will protect companies from potential liability. Responsible companies can and do conduct due diligence both on their suppliers and on the sources of the goods they bring to the United States. Part of that due diligence should involve understanding the legal landscape governing their supply.

By conducting due diligence, companies can protect themselves from liability under the Lacey Act. The culpability requirements of the Lacey Act ensure that felony liability is limited to instances in which a company or person trades in illegal fish, wildlife, and plants and plant products, knowing that the goods are illegal, while misdemeanor liability lies only where the person should have known upon an exercise of due care that the goods were illegal. If a company could not understand a law because it is written in a foreign language and could not have learned about the law in the exercise of due care, then that company is not criminally liable.

A company also can protect itself against forfeiture in those rare instances where the company, despite exercising due diligence, nevertheless is tricked into unwittingly importing illegal goods. In such an instance, the company can petition for the return of any seized goods under the agencies' remission procedures. Companies can protect themselves further against forfeiture by including warranty provisions in their contracts with upstream suppliers to ensure that any pecuniary loss suffered as a result of Lacey Act violations is borne by the suppliers.

2. Why should the U.S. care that its companies and citizens comply with foreign laws? How does such compliance serve U.S. interests?

As noted, strictly speaking, the Lacey Act does not require Americans to follow foreign laws. Rather, the Lacey Act prohibits trade in the United States in illegal wildlife, fish, plants and plant products. While it is true that the Lacey Act can look to foreign law in determining whether foreign sourced goods are legal, nothing in the Lacey Act requires United States companies and citizens to comply with foreign laws.

Much like laws banning trade in stolen property, the Lacey Act focuses on trade in illegal goods, and, as noted, determining whether goods are illegal necessarily relies on local law, whether those laws are domestic or foreign. State or tribal law also may serve as a predicate for a Lacey Act offense. A corporation that buys timber knowing that it was illegally harvested in Alabama and then transports that wood over state lines will have committed a federal crime under the Lacey Act.

In predicating Lacey Act offenses on (among other things) violations of foreign law, the Act serves and protects the United States' economic, social, environmental, and national security interests. As noted in the President's July 1, 2013 Executive Order:

The poaching of protected species and the illegal trade in wildlife and their derivative parts and products (together known as "wildlife trafficking") represent an international crisis that continues to escalate. Poaching operations have expanded beyond small-scale, opportunistic actions to coordinated slaughter commissioned by armed and organized criminal syndicates. The survival of protected wildlife species such as elephants, rhinos, great apes, tigers, sharks, tuna, and turtles has beneficial economic, social, and environmental impacts that are important to all nations. Wildlife trafficking reduces those benefits while generating billions of dollars in illicit revenues each year, contributing to the illegal economy, fueling instability, and undermining security. Also, the prevention of trafficking of live animals helps us control the spread of emerging infectious diseases. For these reasons, it is in the national interest of the United States to combat wildlife trafficking.¹

No witness at the hearing questioned the value of global conservation efforts as "important to all nations." By imposing criminal and civil liability for violations, the Act reduces the demand for illegal and unsustainably harvested goods, which helps to protect endangered fish, wildlife, and plants, as well as to protect the global supply of natural resources upon which American consumers depend. The Lacey Act also protects the rights of property owners whose plants, fish,

¹ Exec. Order No. 13,648 (2013), 78 Fed. Reg. 40,621-23 (July 5, 2013).

or wildlife were illegally taken and encourages other countries to offer reciprocal protection. As Mr. Von Bismarck explained in his written testimony, America's strong efforts to combat illegal poaching and harvesting have set an example that other countries are beginning to follow.²

The Lacey Act also helps level the playing field for law-abiding U.S. companies. Companies that turn a blind eye to their supply chains enjoy a competitive advantage that allows for a temporary and artificial reduction in prices, just as people dealing in stolen or counterfeit goods often sell contraband at below market prices. Meanwhile, overharvesting seriously affects the worldwide and U.S. market's supply. As a result, any reduction in market price in the short-term due to the influx of illegal goods is short-lived, and prices will increase in the long-term as supply is depleted due to illegal and often unsustainable practices. By reducing the supply of illegal goods in the marketplace, the Lacey Act benefits U.S. companies and consumers.

The Lacey Act also helps reduce corruption and promote the rule of law in foreign countries. In his *Statement for the Record on the 2012 Worldwide Threat Assessment of the US Intelligence Community*, the Director of National Intelligence included "environmental crime" in the list of ways in which transnational organized crime threatens U.S. national interests:

Illicit trade in wildlife, timber, and marine resources constitutes a multi-billion dollar industry annually, endangers the environment, and threatens to disrupt the rule of law in important countries around the world. These criminal activities are often part of larger illicit trade networks linking disparate actors—from government and military personnel to members of insurgent groups and transnational organized crime organizations.³

The Lacey Act provides a tool in the fight against criminal organizations with ties to terrorism, narcotrafficking, and other illegal activities that threaten our national security. There are numerous reports that poaching and illegal timber harvesting provides a funding source for criminal and terrorist organizations.⁴ For example, Mr. Von Bismarck pointed to examples of illegal logging or poaching providing funds for insurgents in Afghanistan, human rights violators in Peru, Joseph Kony's Lord's Resistance Army in East and Central Africa, and al-Qaeda's al-Shabaab in Somalia.⁵ Criminal organizations often are quite adept at constructing elaborate, sophisticated systems to conceal the proceeds of criminal schemes.⁶ As companies strengthen their Lacey Act compliance, they increasingly will ensure that their suppliers are legitimate

² *Oversight Hearing on "Why Should U.S. Citizens Have to Comply with Foreign Laws": Hearing Before the Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs, 113th Cong. (2013) (Statement of Alexander Von Bismarck, Executive Director, Env'tl. Investigation Agency at 9-10) [hereinafter Von Bismarck Statement], available at <http://docs.house.gov/meetings/II/II22/20130717/101133/HHRG-113-II22-Wstate-vonBismarckA-20130717.pdf>.*

³ *Statement for the Record on the Worldwide Threat Assessment of the US Intelligence Community, Before the S. Select Comm. On Intelligence, 113th Cong. 5-6 (2013) (statement of James R. Clapper, Director of National Intelligence) [hereinafter Clapper Statement], available at <http://www.intelligence.senate.gov/130312/clapper.pdf>. The Statement also noted that "[t]ransnational organized crime (TOC) networks erode good governance, cripple the rule of law through corruption, hinder economic competitiveness, steal vast amounts of money, and traffic millions of people around the globe." *Id.* at 5.*

⁴ *Clapper Statement, supra* note 3, at 5-6.

⁵ *Von Bismarck Statement, supra* note 2, at 3-4, 7.

⁶ *See* Memorandum of Law in Further Support of the Government's Application for Writ Under 28 U.S.C. § 1651(a) and in Support of the Government's Motion for Order to Show Cause, *United States v. Bengis*, No. 1:03-cr-00308-LAK, (S.D.N.Y. Apr. 22, 2013), ECF No. 232.

companies and that the goods they buy are legal. By driving out of business suppliers who continue to supply goods that are illegal or of questionable legality, the Act decreases the demand for and profits associated with such illegal goods. This, in turn, will decrease the money available to fund related criminal and terrorist organizations.

3. Several people have suggested that the government create a database of foreign laws, on the theory that more information is better and it would help with compliance. Do you agree with this suggestion?

Of course, having more information is a good idea, and helping American companies understand the legal landscape governing their supply chains is a good thing. Providing companies with more information about the types of local laws and regulations that they may encounter (and should investigate) may help them ensure that the goods they are buying are legitimate. But, as I understand it, the “database” proposal takes things a step further. As I understand the proposal, proponents want the government to create a definitive list of laws to serve as the complete and exclusive predicates under the foreign law provisions of the Lacey Act. Put simply, proponents envision a list of foreign laws, and all goods that violate one of those laws will be illegal under the Lacey Act, while all goods that do not violate one of those laws will be legal under the Act.

I do not support this proposal because it is unworkable, undercuts the purposes of the Lacey Act, and is bad for American business. American consumers have a right to buy legal goods and American companies have a right to provide legal goods—period. Companies selling goods in the United States should know where the goods come from, and are in the best position to make sure that their suppliers are following the law. It would not be in their best interest to have someone in the government create a list of laws that could trigger the Lacey Act; such a list inevitably would be over- or under-inclusive, and it would not provide any meaningful protection for legitimate companies trading in legal goods, for consumers seeking comfort that they are purchasing legal goods, or for the victims who had their resources stolen. Companies should have the right to argue their understanding of the predicate law at issue, and it is up to the judge or jury to determine whether a particular good or activity is illegal under a particular law.

At bottom, the database proposal appears to be an attempt to solve a problem that, as a practical matter, does not exist. The premise appears to be that companies importing goods are baffled by a wide array of foreign laws and will find themselves exposed to criminal liability for unwittingly violating a foreign law. That premise misunderstands both the Lacey Act and how companies actually do business. As I have noted, companies and individuals that reasonably believe they are trading in legal goods are not guilty under the Lacey Act. Legitimate companies long have taken a deep interest in their supply chains, in order to make sure that they are supplying their customers with legal goods. At times, that requires them to take affirmative steps to understand the local legal landscape governing their supply. Companies are in the best position to understand and evaluate the legal landscape governing their supply chains, and should have the liberty to make that determination for themselves.

4. In addition to creating a database, Mr. Larkin suggested that the Lacey Act's *mens rea* requirement be changed from "knowingly" to "willfully" and that a "mistake of law" defense be added. What do you think about these suggestions?

I disagree with Mr. Larkin's proposal both because the suggested changes are unnecessary and because the changes would tend to undercut the Lacey Act's efficacy as means to combat trafficking in illegal goods.

To begin with, in 1981, Congress explicitly rejected Mr. Larkin's suggestion that the Lacey Act embrace a higher "willfully" culpability standard. Prior to 1981, the Lacey Act in fact did require that a person act "knowingly and willfully" in order to face criminal liability. Congress amended the Lacey Act in 1981 to change the culpability standard to just a "knowingly" standard, after finding the earlier standard to be "too stringent" such that it was "limit[ing] the[] effectiveness [of the Lacey Act and the Black Bass Act] as wildlife enforcement tools."⁷ Congress's 1981 amendment makes sense: if a person knows that certain goods are illegal under a state or foreign law, she easily can avoid criminal liability under the Lacey Act by simply declining to trade in those goods. Imposing a higher "willfulness" standard accordingly would serve no legitimate purpose. Rather, it simply would make enforcement more difficult, while allowing morally culpable people to avoid liability for knowingly trading in illegal goods.

Mr. Larkin's proposed "mistake of law" defense is unnecessary. Specifically he suggested that the Lacey Act be amended such that "a person who reasonably believed that what he or she did was not a crime" would be exempted from criminal liability.⁸ But the Lacey Act's culpability requirement already "prevents the Act from criminally punishing those who violate the Act's provisions but are reasonably unaware that they are doing so."⁹ The creation of a separate "mistake of law" defense is unnecessary and would be redundant.

5. The criminal penalties under Lacey can be substantial, as we saw in *McNab*. Why are criminal penalties necessary in some cases to serve the goals of the Lacey Act?

As the Director of National Intelligence, James R. Clapper, has explained: "[i]llicit trade in wildlife, timber, and marine resources constitutes a multi-billion dollar industry annually."¹⁰ When illegal traders deal with such large quantities of money, the confiscation of property whose worth is in the thousands, or even hundreds of thousands, of dollars is simply ineffective. Fines would be similarly ineffective.

Moreover, criminal law inherently serves a greater, moral purpose, and reflects the community's condemnation of certain behavior:

⁷ S. Rep. No. 123 at 2, 11, *reprinted in* 1981 U.S.C.C.A.N. at 1749, 1758; *see also* H.R. Rep. No. 276 at 32 (letter of Donald Paul Hodel, Undersecretary of the Interior).

⁸ *Oversight Hearing on "Why Should U.S. Citizens Have to Comply with Foreign Laws": Hearing Before the Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs, 113th Cong. (2013) (Statement of Paul J. Larkin, Jr. at 12) [hereinafter Larkin Statement], available at* http://democrats.naturalresources.house.gov/sites/democrats.naturalresources.house.gov/files/2013-07-13_FWOIA_larkintestimony.pdf.

⁹ *United States v. Lee*, 937 F.2d 1388, 1395 (9th Cir. 1991).

¹⁰ *Clapper Statement, supra* note 3, at 5-6.

[A crime] is not simply anything which a legislature chooses to call a “crime.” It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a “criminal” penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.¹¹

Environmental conservation and the protection of property rights have long been important American goals and values. The illegal and unsustainable harvest of fish, wildlife, and plants and plant products are actions worthy of the moral condemnation that a criminal penalty carries, especially in light of the international scope of the issue and the related crimes (narcotrafficking, terrorism) associated with such behavior.

6. There is a saying that many of us use in politics: “know what you don’t know.” If someone isn’t sure about whether or not it is legal to import something into the United States, can’t they just ask? Is the concept of “due care” really that complicated or unreasonable?

A company dealing with foreign suppliers can take a number of reasonable steps to get comfort that the goods are legal, and it can be as simple as just asking questions. Conducting due diligence on foreign suppliers and questioning such suppliers about the legality of their supply chains are prudent steps that we, as consumers, have a right to expect. As noted, a company faces no criminal liability if it did not know that a foreign law was violated and should not have known in the exercise of due care. Moreover, a prudent company also may obtain warranties from its foreign suppliers to protect the company against any pecuniary losses due to forfeiture for an unwitting Lacey Act violation.

In truth, “due care” is a straightforward and familiar concept in a variety of legal settings. “As a test of liability for negligence,” due care is “the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances.”¹² The United States Supreme Court long ago explained that a “the general rule . . . defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done.”¹³ No further definition is required. The concept of “due care,” like “the legal concepts of ‘the reasonable man,’ . . . ‘causation,’ ‘preponderance of the evidence,’ and ‘beyond a reasonable doubt,’ . . . is incapable of precise definition and must be defined on a case-by-case basis.”¹⁴

As a fundamental concept of common law, it is not surprising that the term “due care” is commonly used in federal statutes. For example, statutes make due care a consideration in assessing damages,¹⁵ a condition for liability,¹⁶ a condition for an affirmative defense,¹⁷ and a

¹¹ Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 405 (1958).

¹² Black’s Law Dictionary 240 (9th ed. 2009)

¹³ *Tiller v. Atl. Coast Line R. Co.*, 318 U.S. 54, 67 (1943).

¹⁴ *United States v. Texas Ed. Agency*, 467 F.2d 848, 864 (5th Cir. 1972).

¹⁵ E.g., 15 U.S.C.A. § 7706(f)(3)(D).

¹⁶ E.g., 42 U.S.C.A. § 5409(a)(4).

condition for determining when the statute of limitations begins to toll.¹⁸ The term is familiar in the law and certainly is not unique to the Lacey Act. It is flexible, reasonable, and uncomplicated.

Thank you again for the opportunity to share my views on this important subject. Please do not hesitate to contact me if any additional questions arise.

¹⁷ E.g., 39 U.S.C.A. § 3017(e).

¹⁸ E.g., 33 U.S.C.A. § 2712(h)(2).