

**QUESTIONS BY THE HONORABLE JOHN FLEMING
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WILDLIFE, OCEANS AND INSULAR AFFAIRS
FOR THE RECORD**

Questions for Mr. Marcus Asner
Responses submitted August 21, 2013

1. Can a person be held criminally liable under the Lacey Act for violating a foreign law that is written in a foreign language?

No. The Lacey Act does not penalize people for violating foreign laws, regardless of the language in which such laws are written. Nor does the Lacey Act require the United States to enforce foreign law. Rather, the Lacey Act prohibits a person from *trading in the United States* in certain categories of goods, provided that the person *knew or in the exercise of due care should have known* that the goods were taken, possessed, transported, or sold in violation of federal, state, tribal, or foreign law.¹ This prohibition is similar to the National Stolen Property Act's prohibition of importing goods considered stolen under the laws of a foreign country.² Moreover, only certain types of underlying laws may serve as predicates to Lacey Act liability. For example, the section of the Act focused on plants and plant products specifically limits its application to plants taken, possessed, transported or sold in violation of laws that:

1. protect plants;
2. regulate the theft of plants;
3. regulate the taking of plants from a park, forest reserve, or other officially protected area;
4. regulate the taking of plants from an officially designated area;
5. regulate the taking of plants without, or contrary to, required authorization;
6. require payment of appropriate royalties, taxes, or stumpage fees for the plant; or
7. govern the export or transshipment of plants.³

¹ 16 U.S.C.A. § 3372(a)(1)-(2) (making it unlawful “to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce” any plant, fish, or wildlife taken in violation of federal, state, tribal, or foreign law where the requisite culpability requirements are met).

² 18 U.S.C. §§ 2314-15; see *United States v. Portrait of Wally*, 663 F. Supp.2d 232 (S.D.N.Y. 2009) (local law determines property rights).

³ Kristina Alexander, Congressional Research Service, *The Lacey Act: Protecting the Environment by Restricting Trade* 6-8 (2013) (citing § 3372(a)(2)(B)); see also Elinor Colbourn & Thomas Swegle, Dep’t of Justice, *The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber*, ST036 ALI-ABA 365, 369 (2012) (“The foreign laws that serve as the underlying predicate must be plant-related laws.”).

If a law is not written in English and a person neither knows of the law nor in the exercise of due care should know about the law, then that person cannot be found criminally liable under the Lacey Act.

2. Can a person be held criminally liable under the Lacey Act for violating an unpublished foreign law?

No. As with my previous answer, the Lacey Act does not penalize people for violating foreign laws, regardless whether such laws are published or not. Rather, as explained above, the Lacey Act prohibits trade in the United States in certain categories of goods—goods that were taken, possessed, transported, or sold in violation of federal, state, tribal, or foreign law. And, as described above, only certain types of laws may serve as predicates to Lacey Act liability. If a predicate law is not published and a person neither knows of the law nor in the exercise of due care should know about the law, that person cannot be guilty of a crime under the Lacey Act.

3. Can a person be held criminally liable under the Lacey Act for violating a foreign law that no reasonable person could find?

No. As explained above, the Lacey Act provides for criminal liability for trade in the United States in certain categories of goods, provided that the person knew or in the exercise of due care should have known that the goods were taken, possessed, transported, or sold in violation of federal, state, tribal, or foreign law. If a person neither knows of the predicate law nor in the exercise of due care should know about the law, that person cannot be guilty of a crime under the Lacey Act.

4. Can a person be held criminally liable under the Lacey Act for violating an unpublished administrative order?

No. As I explained above, the Lacey Act does not penalize people for violating foreign laws. Rather, the Lacey Act prohibits trade in the United States in certain categories of illegal goods. If a predicate administrative order is not published and a person neither knows of the order nor in the exercise of due care should know about the order, then that person cannot be guilty of a crime under the Lacey Act.

To the extent that this question is asking whether foreign administrative orders are within the term “foreign law” in the Lacey Act, as discussed in my response to question 11, Congress intended the phrase “foreign law” to be interpreted broadly, encompassing all forms of conservation laws regardless of their form. Courts have adopted this broad interpretation.⁴

5. Can a person be held criminally liable under the Lacey Act for violating a foreign law when that person could not be found guilty in the criminal or civil courts of that foreign nation for violating that law?

No. As discussed above, the Lacey Act does not penalize people for violating foreign laws. Rather, as explained above, the Lacey Act prohibits trade in the United States in certain

⁴ See, e.g., *United States v. McNab*, 331 F.3d 1228, 1237-39 (11th Cir. 2003); *United States v. Lee*, 937 F.3d 1388, 1391 (9th Cir. 1991).

categories of illegal goods. Whether those goods are illegal may turn on state, foreign or tribal law. Moreover, as described above, only certain types of laws may serve as predicates to Lacey Act liability. If goods were taken in violation of a foreign law, and if an individual knowingly trades in those goods *in the United States* knowing that they were taken in violation of foreign law, she can be found guilty for her conduct *in the United States*.

The underlying, predicate laws are what make the goods illegal to trade in under the Lacey Act, and those goods will be illegal to trade in regardless whether the person personally violated a state, foreign or tribal law. For example, if Person A illegally harvests goods in Country X and Person B imports those goods into the United States knowing that the goods were illegally taken, then Person B could be found guilty in the United States of violating the Lacey Act without ever leaving the United States or personally violating the laws of Country X. This same rule would apply under the National Stolen Property Act if Person B were knowingly importing goods stolen in a Country X by Person A.

6. Can the state of Massachusetts prosecute one of its residents under Louisiana law for a crime committed in Louisiana?

No. Moreover, the fact pattern presented has no bearing on the Lacey Act. A person in Massachusetts cannot be prosecuted under the Lacey Act for violating Louisiana law. Rather, as explained above, the Lacey Act only would allow conviction of a such a person trading in Massachusetts in certain categories of goods, provided that the person *knew or in the exercise of due care should have known* that the goods were taken, possessed, transported, or sold in violation of Louisiana law.⁵ A person trading in Massachusetts in wood illegally taken from a Louisiana state park knowing such wood to be illegal would be guilty of violating the Lacey Act.

7. Suppose an American firm uses a foreign intermediary to obtain wood furniture for sale in the United States. Suppose also that the foreign intermediary or someone in the country of the wood's origin violated a paperwork regulation or didn't pay the full tariff. Can the American firm be held criminally liable under the Lacey Act?

Whether the firm could be held criminally liable under the Lacey Act depends in part on the firm's *mens rea*. The firm only could be found liable if it knew or in the exercise of due care should have known that the intermediary was violating foreign law. An American firm that imports goods *knowing* that its foreign intermediary violated regulations or failed to pay required tariffs may well face exposure. A prudent, law-abiding firm in such a situation should refuse the goods and insist that further shipments comply with all applicable laws and regulations.

Whether certain paperwork regulations or tariff rules qualify as predicates for the Lacey Act will turn on the type and underlying purpose of the regulation or rule. For example, foreign laws requiring the payment of fees may serve an important conservation purpose of limiting illegally harvested trees and the profit from such illegal logging.⁶ "From an enforcement perspective, these violations can be easier to prove . . . and the conservation benefits can more easily be

⁵ § 3372(a)(1)-(2) (making it unlawful "to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce" any plant, fish, or wildlife taken in violation of federal, state, tribal, or foreign law where the requisite culpability requirements are met).

⁶ Alexander, *supra* note 3, at 7.

realized.”⁷ In such circumstances, the regulation or tariff may well serve as a predicate under the Lacey Act.

8. **Mr. Asner, on May 16th, you testified that “people who make a mistake who make an innocent mistake under the Lacey Act, are not guilty, period.” If I purchase a \$100,000 boat constructed outside of the United States and a government investigation finds that a tiny inlay of wood may have been obtained in violation of an obscure foreign law, then I may not be guilty but I am likely to have to forfeit this boat and my \$100,000 investment. Is this correct? Please answer simply with a YES or a NO.**

No. First, the United States likely would never push for forfeiture. United States Fish and Wildlife Service (“FWS”) has publicly stated that its enforcement efforts are not focused on consumers who unwittingly purchase items containing wood that may have been illegally obtained.⁸ Rather, FWS is focused on traffickers who knowingly transact in larger volumes of illegal products.⁹ Indeed, this fact pattern is a classic example of a circumstance in which an agency would simply decline enforcement or, if the boat had been seized (which is extremely unlikely), an administrative petition for rescission would be granted.

Second, in the highly *unlikely* event that the United States elected to push for forfeiture, the likely result would be that only the inlay would be forfeited, rather than the entire boat.

Lastly, as a prudent person, you may well try to protect yourself from any potential problems with the boat by including a warranty in the sales agreement.

In contrast to the highly *unlikely* situation described in the question, it is far more likely that watering down the Lacey Act forfeiture provisions would increase the flood of illegal goods into the United States, increasing the profits of criminal and terrorist organizations profiting from illegal harvesting and poaching, undercutting the rights of legitimate property owners, and leading to devastating reductions in the worldwide populations of protected plants, fish, and wildlife.

9. **Mr. Asner, you mentioned in your previous testimony that “the government bears the burden of, providing it is contraband, or that it is illegally possessed.” Are you familiar with the Blue King Crab Case? In the event you are not, that decision in 2005 stated that “although the language of CAFRA is ambiguous with regard to the definition of contraband, we need not resolve this issue because if the crab at issue here was imported, received, or acquired in violation of the Lacey Act, it constitutes ‘property that is illegal to possess.’” Is it true that all Lacey Act products are considered contraband?**

I am familiar with *Blue King Crab*, which is cited in my previous testimony. As that case made clear, goods that were taken, possessed, transported, or sold in violation of federal, state, tribal,

⁷ Alexander, *supra* note 3, at 7.

⁸ FWS, *Where We Stand: The Lacey Act and our Law Enforcement Work*, <http://www.fws.gov/news/blog/index.cfm/2011/9/22/where-we-stand-the-lacey-act-and-our-law-enforcement-work> (last visited Aug. 20, 2013).

⁹ *Id.*

or foreign law are, at the least, “property that is illegal to possess.”¹⁰ In other words, as I read the opinion, the court in *Blue King Crab* does not actually address whether such goods qualify as contraband *per se*, but instead decides that the goods in any event qualified as “property that is illegal to possess.”

“Contraband” is divided into two different sub-concepts: contraband *per se* and derivative contraband.¹¹ 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.¹² The crabs in *Blue King Crab* in any event were property illegal to possess due to a failure to satisfy reporting requirements.¹³ Contraband *per se*, on the other hand, includes property that is intrinsically illegal to possess such as illegal drugs, weapons, and (according to at least one court) goods seized pursuant to the Lacey Act where possession or exportation of such goods is banned by a foreign country.¹⁴

Regardless of the type of goods at issue, the government would bear the burden at any judicial forfeiture proceeding to prove by a preponderance of evidence that seized goods were taken, possessed, transported, or sold in violation of any law and thus subject to forfeiture.¹⁵

10. In your testimony, you discuss the *Bengis* case that you prosecuted where lobsters from South Africa were illegally taken far in excess of their quota and recently, the court ordered restitution to South Africa. The ring leader Arnold Bengis received a sentence of 46 months. In comparison to the *McNab* case which did not involve quotas and where Honduras asserted that no valid Honduran regulation was violated, do you think it is fair that the defendants in *McNab* were given more than twice the sentence given to Bengis, namely 97 months or more than 8 years?

While I was not involved in *McNab*, I have had the opportunity to review the court of appeals decisions and some of the record. As I understand the proceedings (and I have not reviewed the full sentencing record), the sentences in *McNab* seem to me to have been appropriate and in conformity with the law.

¹⁰ *United States v. 144,744 Pounds of Blue King Crab*, 410 F.3d 1131, 1132, 1136 (9th Cir. 2005)

¹¹ For further information, see generally Marcus A. Asner, Maxwell C. Preston and Katherine E. Ghilain, *Gibson Guitar, Forfeiture, and the Lacey Act Strike a Dissonant Chord*, Bloomberg BNA’s Daily Environment Report (also published in the Daily Report for Executives, White Collar Crime Report, and the International Environment Reporter) (Sept. 4, 2012), available at http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP.BloombergBNA%27sDailyEnvironmentReport_090412.pdf.

¹² See *Blue King Crab*, 410 F.3d at 1135 (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).

¹³ See *Blue King Crab*, 410 F.3d at 1135 (crabs seized pursuant to Lacey Act not inherently illegal to possess; were illegal because of failure to satisfy Russian reporting requirements).

¹⁴ 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).

¹⁵ 18 U.S.C.A. § 983(c).

Why were some of the sentences in *McNab* higher than the sentence Arnold Bengis received? Sentencing in federal criminal cases is very case and defendant specific, and depends on a large number of factors. At the time of sentencing in both *Bengis* and *McNab*, the United States Sentencing Guidelines were binding on the federal courts, so barring unusual circumstances, sentences usually fell within the sentencing range dictated by the Guidelines. (The law has changed since then, and the Sentencing Guidelines are now advisory rather than mandatory.)

According to the record I have reviewed, three of the defendants in *McNab*—McNab, Blandford and Schoenwetter—received sentences of 97 months’ imprisonment. A fourth defendant—Huang—received a sentence of 24 months’ imprisonment, which is lower than some of the sentences in *Bengis*.

A number of factors appear to have resulted in higher sentences for three of the defendants in *McNab*. First, at least two were convicted of money laundering, which led to an *increase* in their Sentencing Guidelines ranges under U.S.S.G. § 2S1.1. Second, at least two of the defendants—Blandford and Schoenwetter—were found to have willfully obstructed justice in the grand jury investigation, which led to another *increase* in their Sentencing Guidelines ranges, pursuant to U.S.S.G. § 3C1.1. Finally, the defendants in *McNab* elected to go to trial and failed to accept responsibility for their criminal actions. They were convicted at trial. While their decisions to take the case to trial did not increase their sentences, by electing to go to trial, they also did not get to enjoy the reduction in sentencing typically afforded to defendants who accept responsibility for their crimes and plead guilty in a timely matter. In contrast, the defendants in *Bengis* elected to plead guilty and accept responsibility for their crimes, which led to a substantial *reduction* in their Sentencing Guidelines ranges under U.S.S.G. § 3E1.1.

11. As Mr. Kamenar testified, the term “foreign law” in the Lacey Act does not specify “foreign regulations” and makes a good case that it does not, noting that in 1981, an amendment to the Lacey Act included “foreign regulations” in the law was rejected. As a matter of due process and fair notice, shouldn’t Congress make it clear that foreign regulations are covered under the Lacey Act? After all, I note on Page 6 of your testimony, you refer to the Tariff Act of 1930 that prohibits the importation of wild mammal or bird if it violates “the laws or regulations of the exporting country.”

The phrase “foreign law” as used in the Lacey Act has been uniformly interpreted to include foreign regulations. In fact, the “generally broad definition” of the word “law” describes the “body of rules of action or conduct prescribed by controlling authority, and having binding legal force.”¹⁶ To the extent that there are multiple definitions of the word “law,” courts have agreed that Congress clearly intended that word to be interpreted broadly “to encompass the wide range of laws passed by ‘the world’s regimes that possess systems of law and government that defy easy definition or categorization.’”¹⁷ Not all countries operate by means of the same legal system as the United States. Indeed, there even are significant differences among the states. As I understand it, for example, the State of Louisiana operates at least in part under a civil law system derived from European civil code systems that is different from the common law systems under which the other states operate. Congress’ decision to use the broadly defined term “law”

¹⁶ *Lee*, 937 F.3d at 1391 (citation and quotation omitted); *see also McNab*, 331 F.3d at 1237.

¹⁷ *Lee*, 937 F.2d at 1391 (citation omitted); *accord McNab*, 331 F.3d at 1237-38 (citation omitted).

allows Lacey Act violations to be predicated on all forms of conservation laws regardless of their form, whether they be statutes, regulations, civil codes, monarchical decrees, or some other form of law.

Mr. Kamenar’s “narrow interpretation of the phrase ‘any foreign law’ would prevent the wildlife conservation laws of many countries from serving as the basis for Lacey Act violations and would limit the Act’s utility.”¹⁸

12. How many foreign laws, regulations, resolutions, decrees and non-statutory provisions were triggered by the 2008 Lacey Act plant and plant product amendments?

The categories of laws that may serve as predicate laws under the 2008 Amendments are clearly laid out in the statute. Those categories are laws that:

1. protect plants;
2. regulate the theft of plants;
3. regulate the taking of plants from a park, forest reserve, or other officially protected area;
4. regulate the taking of plants from an officially designated area;
5. regulate the taking of plants without, or contrary to, required authorization;
6. require payment of appropriate royalties, taxes, or stumpage fees for the plant; or
7. govern the export or transshipment of plants.¹⁹

A company trading in goods in the United States that were sourced from foreign countries only needs to be wary of the relevant plant-based laws in the countries from which they are sourcing goods, something that prudent, law-abiding companies do in any event.

¹⁸ *McNab*, 331 F.3d at 1239.

¹⁹ Kristina Alexander, Congressional Research Service, *The Lacey Act: Protecting the Environment by Restricting Trade* 6-8 (2013) (citing § 3372(a)(2)(B)); see also Elinor Colbourn & Thomas Swegle, Dep’t of Justice, *The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber*, ST036 ALI-ABA 365, 369 (2012) (“The foreign laws that serve as the underlying predicate must be plant-related laws.”).

13. Mr. Asner, as for the compilation of a database to list Lacey Act prohibited wildlife, fish, plants, and wood that are in violation of foreign law, you said in your written testimony that “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 would not provide any meaningful protection for the company in court, for consumers, seeking comfort that they are purchasing legal goods, or for the victims who had their resources stolen”. I thought a consumer wants more information not less about products they buy; if a certain wood product is on the list, consumer could check the database and if it’s listed, then they know not to buy it. In fact, they could notify our government that a company is trafficking in prohibited products. A company can check the list as part of their “due care” standard. Can you explain why you prefer consumers and companies having LESS information rather than MORE?

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 would 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.

14. Based on your position, would you be comfortable if the Fish and Wildlife Service decided that in the future they would not print an updated list of those species it determines are threatened or endangered in the United States?

Of course not. The Endangered Species Act (“ESA”) operates in a manner that is completely different than the Lacey Act. The ESA focuses on the recovery of particular species that have been identified by federal agencies as needing protection. A list of the protected species therefore is an important component of the ESA. The Lacey Act, in contrast, is focused solely on trade in the United States, making it illegal to trade in illegal wildlife, fish, plants and plant products.

Moreover, the premise of the question—that the Fish & Wildlife Service (“FWS”) somehow could decide unilaterally that the government will not publish a list of the species covered by the ESA—is faulty. The ESA’s threatened and endangered species lists are regulations, published in the U.S. Code of Regulations.²⁰ Revising the lists involves a procedure set forth in 50 C.F.R. Part 424. Adding a species to or otherwise revising the list is a rulemaking action, the conclusion of which is publication of the final rule in the Federal Register.²¹ In other words, the procedures of the ESA make it impossible for a species to be added to the list without publication. As discussed further in question 15, if a species does not appear on the list in the regulations, it is not protected by the ESA and cannot trigger an ESA violation. The Lacey Act is different because, unlike the ESA, it is not focused specifically on protecting particular species by banning all taking of and trade in those species. Rather, the Lacey Act reflects the United States’ determination that trade in *illegal* wildlife, fish, plants and plant products should not be permitted in the United States. Accordingly, the Lacey Act, among other things, targets businesses that elect to traffic in illegal goods, which helps legitimate United States companies that are serious about making sure that the goods they sell are legal and benefits American consumers.

15. If they choose that approach, couldn’t citizens be prosecuted for performing activities that are contrary to the Endangered Species Act, even though they would have no knowledge that the species in question were being protected?

As discussed in question 14, the FWS could not choose to add a species without publishing an updated list. If a species does not appear on the list, it cannot trigger an ESA violation.

As noted, the ESA operates in a manner that is completely different than the Lacey Act because the ESA is focused on the recovery of particular species that have been identified by federal agencies as needing protection. Section 4 of the ESA requires federal agencies to determine whether certain factors indicate that the survival of a particular species is imperiled, and to maintain lists of endangered and threatened species.²² The Act protects only the species on the threatened and endangered lists; section 9 of the ESA, which describes acts prohibited by the statute, states that the prohibitions apply “to any endangered species of fish or wildlife listed,” and “to any endangered species of plants listed” pursuant to the Act.²³ In other words, a person

²⁰ 50 C.F.R. §§ 17.11 (wildlife) and 17.12 (plants).

²¹ 50 C.F.R. § 424.18.

²² 7 U.S.C. § 1533.

²³ 50 C.F.R. § 1538(a)(1)-(2) (emphasis added).

can only violate the ESA if the species at issue is listed, and, as I mentioned above, those lists appear in the U.S. Code of Regulations.²⁴ If a species is not listed, the ESA does not apply.

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.

²⁴ 50 C.F.R. §§ 17.11, 17.12.