

**OVERSIGHT HEARING ON  
THE 2008 LACEY ACT  
AMENDMENTS PART 1 AND 2**

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**OVERSIGHT HEARING**

BEFORE THE

SUBCOMMITTEE ON FISHERIES, WILDLIFE,  
OCEANS AND INSULAR AFFAIRS

OF THE

COMMITTEE ON NATURAL RESOURCES  
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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Thursday, May 16, 2013 (Part 1)  
Wednesday, July 17, 2013 (Part 2)

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## OVERSIGHT HEARING ON “THE 2008 LACEY ACT AMENDMENTS.” PART 1

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Thursday, May 16, 2013  
U.S. House of Representatives  
Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs  
Committee on Natural Resources  
Washington, D.C.

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The Subcommittee met, pursuant to notice, at 10:03 a.m., in Room 1324, Longworth House Office Building, Hon. John Fleming [Chairman of the Subcommittee] presiding.

Present: Representatives Fleming, Wittman, Thompson, Duncan, Sablan, Shea-Porter, Lowenthal, and Garcia.

Also Present: Representative Harris.

Dr. FLEMING. The Subcommittee will come to order. The Chairman notes the presence of a quorum.

### STATEMENT OF THE HON. JOHN FLEMING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Dr. FLEMING. Good morning. Today I am holding what I hope will be the first in a series of hearings on various provisions of the Lacey Act. It is appropriate to start this oversight by closely examining the most significant—and some would say contentious—changes to this Act in almost 40 years.

The expansion of the Lacey Act, to include all plant and plant products, was signed into law on May 22, 2008. The full House was never given the opportunity to debate or amend the 2008 Lacey Act amendments. The language was added in the Senate as a fore-amendment to the 700-page 2008 farm bill. These provisions are costing millions of dollars in compliance costs and subjecting Americans to literally thousands of foreign laws, regulations, and decrees.

It is now 5 years later, and it is time to examine whether this law has had its intended effect of reducing, if not stopping, the importation of illegally harvested timber and products made from such wood. It is also time to ask what is the benefit of having U.S. importers and small businesses fill out tens of thousands of plant and plant product declaration forms at a cost of hundreds of millions of dollars, when these forms are not shared, have not been used to initiate a single investigation, and not even being reviewed? There must be a better way to collect this information in a more effective manner.

On panel one we have representatives from the Animal and Plant Health Inspection Service and the Fish and Wildlife Service. I am interested in finding out the status of the Section 8204 report on the cost of legal plant imports and the extent of illegal logging and trafficking, which was to be submitted to the Congress no later than November 22, 2010; whether the agencies plan to issue regulations affecting products manufactured prior to May 22, 2008, or

containing a de minimis amount of Lacey Act products; and whether there are any ongoing efforts to establish and maintain a data base of foreign laws.

On panel two I am looking forward for specific evidence—not anecdotal examples, hearsay comments, or rumors—but proof that these amendments have stopped or at least reduced the amount of illegal wood entering the international market. In addition, I would like to find out about alternative information collection methods besides the declaration form which may be more cost-effective; whether the Federal Government should be required to establish and maintain a comprehensive list of foreign laws; what problems are created by an innocent owner defense; and what changes this Congress should consider to the 2008 amendments.

At this time I am happy to welcome back to the Subcommittee the Ranking Minority Member from the Commonwealth of Northern Mariana Islands, Congressman Sablan, for any opening remarks or statements that he would like to make.

[The prepared statement of Dr. Fleming follows:]

**Statement of The Honorable John Fleming, Chairman, Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs**

Good morning, Today, I am holding what I hope will be the first in a series of hearings on various provisions of the Lacey Act. It is appropriate to start this oversight by closely examining the most significant and some would say contentious changes to this Act in almost forty years.

The expansion of the Lacey Act to include all plant and plant products was signed into law on May 22, 2008. The full House was never given the opportunity to debate or amend the 2008 Lacey Act Amendments. The language was added in the Senate as a floor amendment to the 700-page 2008 Farm Bill. These provisions are costing millions of dollars in compliance costs and subjecting Americans to literally thousands of foreign laws, regulations and decrees.

It is now five years later and it is time to examine whether this law has had its intended effect of reducing, if not stopping, the importation of illegally harvested timber and products made from such wood.

It is also time to ask what is the benefit of having U. S. importers and small businesses fill-out tens of thousands of Plant and Plant Product Declaration Forms at a cost of hundreds of millions of dollars, when these forms are not shared, have not been used to initiate a single investigation and not even being reviewed. There must a better way to collect this information in a more effective manner.

On Panel 1, we have representatives from the Animal and Plant Health Inspection Service and the Fish and Wildlife Service. I am interested in finding out the status of the Section 8204 Report on the cost of legal plant imports and the extent of illegal logging and trafficking, which was to be submitted to the Congress no later than November 22, 2010; whether the agencies plan to issue regulations affecting products; manufactured prior to May 22, 2008 or containing a “de minimis” amount of Lacey Act products and whether there are any ongoing efforts to establish and maintain a database of foreign laws.

On Panel 2, I am looking for specific evidence—not anecdotal examples, hearsay comments or rumors—but proof that these amendments have stopped or at least reduced the amount of illegal wood entering the international market. In addition, I would like to find out about alternative information collection methods besides the declaration form which may be more cost effective; whether the federal government should be required to establish and maintain a comprehensive list of foreign laws; what problems are created by an innocent owner defense; and what changes this Congress consider to the 2008 Amendments.

At this time, I am happy to welcome back to the Subcommittee, the Ranking Minority Member from the Commonwealth of the Northern Marina Island, Congressman Sablan for any opening statement he would like to make.

**STATEMENT OF THE HON. GREGORIO KILILI CAMACHO  
SABLAN, A DELEGATE IN CONGRESS FROM THE TERRITORY  
OF THE NORTHERN MARIANA ISLANDS**

Mr. SABLAN. Well, thank you very much, Mr. Chairman. And I would like to welcome all of our witnesses and our guests this morning. Today we will discuss the Lacey Act, our most comprehensive Federal law to combat natural resources crime.

The 112-year-old law is one of the most powerful protections we have for natural resources in the United States, and the most effective tool that we have for conserving important wildlife and habitat abroad. Majestic species like tigers, rhinos, elephants, and apes captivate the human imagination. Yet they face multiple threats around the world. Although these animals are not native to the United States, Americans have consistently supported measures protecting these iconic animals in their natural habitat.

For example, grants from the multi-national Species Conservation Funds supplements the efforts of developing countries to control illegal poaching, reduce human-wildlife conflict, and protect essential habitat. While these grants play an integral part in species protection, the global trade in illegal wildlife is still estimated to be worth between \$20 and \$25 billion, annually.

Last Congress the Natural Resource Committee Majority pushed ill-conceived legislation that would have lowered Lacey Act penalties and taken firearms out of the hands of conservation police officers, clearing a path for organized crime syndicates to increase wildlife poaching and trafficking on the black market. The Committee's Majority also promoted a bill last Congress to roll back the important 2008 Lacey Act amendments that deal with plants and plant products. Fortunately, that legislation failed.

I hope that today's hearing does not mark the beginning of another such effort to weaken this important law. Rather, this Subcommittee should be taking an honest look at the successes of the law and areas that need to be improved, including whether or not the Federal agencies with responsibility for the Lacey Act are getting the resources they need.

It is clear that vulnerable wildlife species will not recover as long as their habitats continue to be destroyed. The 2008 amendments to the Lacey Act address this deficiency by cracking down on the importation of illegally logged wood, where many of these species live.

These provisions also protect people and their livelihoods. The loss of foreign resources have been found to directly affect the livelihood of 90 percent of the 1.2 billion people living in extreme poverty, worldwide.

It is estimated that between 50 to 90 percent of all logging in key-producing tropical countries is illegal. Importantly, the Lacey Act helped reduce illegal logging by at least 22 percent globally, with reductions as high as 50 to 70 percent in some key countries.

Illegal logging also affects domestic jobs. Prior to passage of the 2008 amendments, timber industries in the United States were forced to compete with countries that illegally log in national parks, avoided duties and taxes, and paid little or nothing for raw materials. These unfair practices caused a domestic timber industry \$1 billion a year, which directly translates to a decrease in

American jobs. For that reason, a broad coalition of U.S. timber harvesters, manufacturers, retailers, musicians, and conservation groups combined their efforts to defend the Lacey Act last year.

It is telling that the Lacey Act has been examined and unanimously agreed-upon by Congress on a bipartisan basis multiple times over the last 112 years. The Lacey Act is working to invigorate U.S. businesses and protect human rights and the environment around the world. The 2008 amendments level the playing field for U.S. timber, protect the private property rights of crime victims, and respect the laws of countries that have an interest in ensuring responsible and beneficial use of their natural resources, and they should remain part of the Lacey Act.

Thank you very much, and I look forward to hearing from our witnesses.

[The prepared statement of Mr. Sablan follows:]

**Statement of The Honorable Gregorio Kilili Camacho Sablan, Ranking Member, Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs**

Thank you, Mr. Chairman and welcome to all our guests.

Today we will discuss the Lacey Act, our most comprehensive federal law to combat natural resources crime. This 112-year-old law is one of the most powerful protections we have for natural resources in the United States, and the most effective tool we have for conserving important wildlife and habitat abroad.

Majestic species like tigers, rhinos, elephants and apes captivate the human imagination, yet they face multiple threats around the world. Although these animals are not native to the United States, Americans have consistently supported measures to invest in protecting these iconic animals in their natural habitat. For example, grants from the Multinational Species Conservation Funds supplements the efforts of developing countries to control illegal poaching, reduce human-wildlife conflict, and protect essential habitat. While these grants play an integral part in species protection, the global trade in illegal wildlife is still estimated to be worth between \$5 and \$20 billion annually.

Last Congress, the Natural Resources Committee Majority pushed ill-conceived legislation that would have lowered Lacey Act penalties and taken firearms out of the hands of conservation police officers, clearing a path for organized crime syndicates to increase wildlife poaching and trafficking on the black market. This Committee's Majority also promoted a bill last Congress to roll back the important 2008 Lacey Act amendments that deal with plants and plant products. Fortunately that legislation failed. I hope that today's hearing does not mark the beginning of another such effort to weaken this important law. Rather, this subcommittee should be taking an honest look at the successes of the law and areas that need to be improved, including whether or not the federal agencies with responsibility for the Lacey Act are getting the resources they need.

It is clear that vulnerable wildlife species will not recover as long as their habitats continue to be destroyed. The 2008 amendments to the Lacey Act addressed this deficiency by cracking down on the importation of illegally logged wood, thus protecting the forest ecosystems where many of these species live. These provisions also protect people and their livelihoods. The loss of forest resources has been found to directly affect the livelihood of 90 percent of the 1.2 billion people living in extreme poverty worldwide. It is estimated that between 50 and 90 percent of all logging in key producing tropical countries is illegal. Importantly, the Lacey Act has helped reduce illegal logging by at least 22 percent globally, with reductions as high as 50 to 70 percent in some key countries.

Illegal logging also affects domestic jobs. Prior to passage of the 2008 amendments, timber interests in the United States were forced to compete with countries that illegally logged in national parks, avoided duties and taxes, and paid little or nothing for raw materials. These unfair practices cost the domestic timber industry a billion dollars a year, which directly translates into a decrease in American jobs. For that reason, a broad coalition of U.S. timber harvesters, manufacturers, retailers, musicians, and conservation groups combined their efforts to defend the Lacey Act last year.

It is telling that the Lacey Act has been examined and unanimously agreed upon by Congress on a bipartisan basis multiple times over the last 112 years. The Lacey

Act is working to invigorate U.S. businesses and protect human rights and the environment around the world. The 2008 amendments level the playing field for U.S. timber, protect the private property rights of crime victims, and respect the laws of countries that have an interest in ensuring responsible and beneficial use of their natural resources, and they should remain part of the Lacey Act.

Thank you and I look forward to hearing from our witnesses.

Dr. FLEMING. The gentleman yields his time. Thank you. Before we go to the panel, the Chairman asks unanimous consent that the gentleman from Maryland, Dr. Harris, be allowed to sit with the Subcommittee and participate in the hearing.

[No response.]

Dr. FLEMING. Hearing no objection, so ordered.

We will now hear from our first panel of witnesses, which includes Ms. Rebecca Bech, Deputy Administrator, Plant Protection Quarantine, Animal and Plant Health Inspection Service; and Mr. Stephen Guertin, Deputy Director of the U.S. Fish and Wildlife Service.

Your testimony will appear in full in the hearing record, so I ask that you keep your oral statements to 5 minutes, as outlined in our invitation letter to you, and under Committee Rule 4(a).

Our microphones are not automatic, so please press the button when you are ready to begin, and make sure that the tip is close to you so we can hear.

Timing lights are very simple. You have 5 minutes. You are on the green light for 4 minutes. You will be under yellow light, caution light, for the last minute. And when it turns red, we ask that you please conclude your remarks.

Ms. Bech, you are now recognized for 5 minutes to present your testimony of the Animal and Plant Health Inspection Service.

**STATEMENT OF REBECCA BECH, DEPUTY ADMINISTRATOR,  
PLANT PROTECTION AND QUARANTINE, ANIMAL AND PLANT  
HEALTH INSPECTION SERVICE, U.S. DEPARTMENT OF  
AGRICULTURE**

Ms. BECH. Yes, thank you. Dear Mr. Chairman and members of the Subcommittee, thank you for the opportunity to testify at today's hearing on implementation of the 2008 farm bill amendments of the Lacey Act. I am Rebecca Bech, Deputy Administrator of Plant Protection and Quarantine, a program within USDA's Animal and Plant Health Inspection Services.

APHIS has a broad mission that includes protecting U.S. animal and plant health, administering the Animal Welfare Act, and carrying out wildlife damage management activities. APHIS's responsibilities were further broadened with the passage of the 2008 farm bill, which amended the Lacey Act by expanding its protections to a broader range of plant and plant products.

Over the past 5 years, our agency has focused on implementing our piece of the Lacey Act amendments, the Declaration Requirement, while continuously working with our stakeholders to carry out Congress's direction in a common-sense way.

Since we last testified before this Subcommittee 1 year ago, we have made progress on several regulatory and administrative fronts to further refine the requirements of the Act and ease the burden on industry, while enhancing our ability to collect and ana-

lyze declaration data. Our goal remains to implement the declaration requirement in a way which is consistent with the statutory requirements protective of the environment and natural resources, and manageable for the regulated community.

Now, since 2009, APHIS has received approximately 1.8 million import declarations, or about 40,000 per month. Estimates indicate the full enforcement of the Act would result in over 1 million import declarations per month. Given the scope, the inter-agency group has decided to phase in the enforcement of the declaration requirements, gradually adding categories of products to give affected industries and agencies time to comply and help ensure the legal trade would not be unintentionally or unnecessarily disrupted.

To date we have implemented four phases for plant declarations, and will provide a minimum of 6 months' notice to the public before any other phases are implemented. APHIS has implemented the Lacey Act amendments and we have been faced with a number of challenges, particularly in regard to the scope of the provisions. We found that we can use existing regulatory and administrative flexibilities to deal with a number of these challenges.

For example, APHIS has drafted a final rule defining common food crop and common cultivar, and intends to publish it in the near future. This will clarify the existing statutory exclusion and eliminate approximately 500,000 imports per month. Additionally, APHIS has initiated a rulemaking process to develop de minimis exclusions which would provide industry cost and time savings by eliminating the need for declarations of products comprised of minimal plant material. We published an advance notice of proposed rulemaking in June 2011, and we are using this feedback received through this process to move forward with rulemaking.

To address the concerns raised regarding goods manufactured to the effective date of 2008, APHIS published guidance on declaring pre-amendment wood. And under this guidance, if importers of items manufactured entirely before the effective date are unable, through the exercise of due care, to determine the genus of the species of the plant materials contained in the item, the importer can then use a special designation pre-amendment. We have also implemented other special use designations, and will continue to provide a way for the public to propose other special use designations.

A new development I would like to mention is a web-based solution we call our LAWGS. It is the Lacey Act Web Government System. We are developing LAWGS to help eliminate the need for the paper-based declaration, and provide an electronic alternative for collecting and maintaining declarations. Having this IT structure will help the Agency analyze and monitor the declarations for compliance. To fund our Agency's implementation of the Act, we received \$775,000 in 2012, the first time the Agency received appropriated funds. And in 2013, \$716,000. We are requesting \$1.445 million for 2014.

Mr. Chairman, thank you for the opportunity to testify today. I assure you that APHIS will continue to implement the 2008 amendments, balancing the legitimate needs of industry with the requirements of the Act. For this to be a successful effort, APHIS will continue its commitment to listening to the public, business,

and industry, seeking their input, and implementing the Act in a way that addresses their concern in the best possible way, while still following the direction of Congress.

I would be happy to answer any questions. Thank you.

[The prepared statement of Ms. Bech follows:]

**Statement of Rebecca Bech, Deputy Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture**

Dear Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify at today's hearing on implementation of the 2008 Farm Bill amendments to the Lacey Act. I am Rebecca Bech, Deputy Administrator of the Plant Protection and Quarantine Program within USDA's Animal and Plant Health Inspection Service (APHIS).

APHIS has a broad mission that includes protecting U.S. animal and plant health, administering the Animal Welfare Act, and carrying out wildlife damage management activities. These efforts support the overall mission of USDA: to protect and promote food, agriculture, and natural resources. The Food, Conservation, and Energy Act of 2008, more commonly known as the 2008 Farm Bill, amended the Lacey Act (16 U.S.C. 3371 et seq.) by expanding its protections to a broader range of plants and plant products (Section 8204, Prevention of Illegal Logging Practices) and requiring APHIS to implement the import declaration requirement for those products.

The Administration is fully supportive of the 2008 amendments. Over the past five years, our Agency has focused on implementing our piece of the Lacey Act amendments—the declaration requirement—while continuously working with our stakeholders to carry out Congress' direction in a common sense way. Since we last testified before this Subcommittee one year ago, we have made progress on several regulatory and administrative fronts to further refine the requirements of the Act and to ease the potential burden on industry, while enhancing our ability to collect and analyze declaration data, all of which I will discuss in more detail. While our focus is on the declaration requirement, we are part of the broader Lacey Act inter-agency group tasked with implementing the provisions of the Act, which includes representatives from the U.S. Forest Service, U.S. Department of Homeland Security's Customs and Border Protection (CBP), U.S. Trade Representative, U.S. Department of Justice (DOJ), U.S. Department of State, U.S. Fish and Wildlife Service (FWS), the Council on Environmental Quality, and the U.S. Department of Commerce.

**APHIS' Implementation of the Declaration Requirement—A Phased-In Approach**

In implementing the amendments, it was important that we take into account the large and diverse quantity and value of imported products that require a declaration under the Lacey Act; goods containing plant material are included in at least 59 of the 99 chapters of the Harmonized Tariff Schedule of the United States (HTS), encompassing an estimated 5,000 types of goods. Additionally, estimates indicate that full enforcement of the Act would result in over 1 million import declarations per month. Given this scope, the interagency group decided to phase in enforcement of the declaration requirement, gradually adding categories of products that require a declaration, to give affected industries and agencies time to comply and to help ensure that legal trade would not be unintentionally or unnecessarily disrupted.

To date, APHIS has implemented four phases for plant declarations, encompassing 447 HTS codes. The interagency group identified categories of goods to be included in each of these phases that were relatively less complex goods for which the required declaration information should be more readily available.

APHIS introduced the latest phase of the implementation schedule in April 2010. Since that time, the Agency has focused on soliciting input from the public on ways to improve the administration of the 2008 amendments, development of the common food crop and common cultivar rule, the analysis and working towards the completion of the required report to Congress, as well as discussions on how to deal with the administrative challenges of implementing the Act. While APHIS has not yet announced additional phases as part of the implementation process, the Agency has had interdepartmental discussions about what types of additional products and corresponding HTS codes could be included in the next phase of enforcement that meet the goals of the Act while presenting the least potential burden on legitimate trade and the Agency. Consistent with a Notice APHIS published on February 3, 2009 in

the Federal Register, the Agency still commits to provide a minimum of six months' notice before further phases are implemented.

#### **Using Regulatory and Administrative Flexibilities to Refine the Requirements**

As APHIS has implemented the Lacey Act amendments, we have been faced with a number of challenges, particularly in regard to the scope of the provisions. While the Act directs us to provide legislative recommendations to Congress to assist in the identification of plants imported in violation of the amendments, we have found that we can use existing regulatory and administrative flexibilities to deal with a number of the challenges we have encountered.

On the regulatory front, APHIS is moving forward with two regulations to further refine the requirements of the Lacey Act amendments. First, the Agency plans to complete the rule defining "common food crop" and "common cultivar," which will greatly benefit industry, by clarifying the existing statutory exclusions and excluding large numbers of products from the declaration requirement. Common food crops would include plant material, such as fruits, vegetables, and grains. Common cultivars would include plant material, such as cotton. Any plant material imported into the United States that falls under either definition would not be considered a "plant" under the Lacey Act, and would not be subject to the requirements of the Act. On August 4, 2010, APHIS published a proposed rule in the Federal Register to establish definitions for these terms, and later extended the comment period at the request of stakeholders. Under the proposed rule, these exclusions would cover approximately 500,000 imports per month. APHIS has drafted a final rule and intends to publish it in the near future to provide greater clarity to regulated entities.

Second, APHIS has initiated the rulemaking process to develop de minimis exclusions, which would provide industry cost and time savings by eliminating the need for declarations of products comprising of minimal plant material. In June 2011, the Agency published an Advance Notice of Proposed Rulemaking soliciting input on such an exception, particularly in regard to developing a de minimis standard for the amount of plant material that must be present in a product for the declaration requirement to apply. We are using the feedback received through this process as we move forward with rulemaking.

Administratively, APHIS has been able to streamline data requirements for the declaration form and address concerns about the resulting costs to industry to provide that information. The Agency has implemented Special Use Designations (SUD) to help importers expedite their reporting of various wood products. For example, APHIS has made a SUD available for one type of common trade grouping, Spruce Pine Fir (SPF), an acceptable industry short-hand that signifies a larger group of species that may otherwise be difficult to differentiate from one another. Additionally, we have developed SUDs for importers of other plant products, such as products containing composite, recycled, or reused plant materials. Given the positive feedback we have received on this initiative, APHIS has now implemented a formal process for stakeholders to propose special use designations for other species groupings, and is currently reviewing recommended suggestions for possible inclusion.

Another area of interest has been goods manufactured prior to the effective date of the 2008 amendments. APHIS has published guidance on these goods, consistent with comments received through the June 30, 2011, Advance Notice of Proposed Rulemaking that included a section on declaring pre-Amendment wood. Under this guidance, if importers of items manufactured entirely prior to May 22, 2008, are unable through the exercise of due care to determine the genus or species of the plant materials contained in that item, the importer can use the SUD "PreAmendment." In addition, we are working with other interagency group members to explore other possible policies to address such plant products manufactured prior to 2008.

#### **Improving Data Collection and Use**

Since 2009, APHIS has received approximately 1.8 million import declarations. Of this total, approximately 40,000 declarations are filed per month, and approximately 15 percent of these declarations are submitted on paper forms that require significant resources to analyze and store securely. Prior to fiscal year 2012, APHIS had not received funding specific to the implementation of the Lacey Act; however, we are now able to dedicate resources to address the administrative challenge of paper declarations. The Agency is developing a web-based solution to help eliminate the need for paper-based declarations and provide an easier electronic alternative for collecting and maintaining declarations. The system, Lacey Act Web Governance System, or LAWGS, will provide another alternative to importers for filing declarations (as importers currently go through a licensed customs broker or fill out a

paper declaration) and allow APHIS to be more responsive to importers' needs. In addition, an information technology infrastructure will help the agency to analyze and monitor these declarations for compliance with the Act. We have completed Phase 1 development of LAWGS and conducted our first webinar for industry on its use in March 2013. We anticipate piloting the system this summer before full implementation this fall.

Additionally, APHIS continues to work with U.S. Customs and Border Protection (CBP) on improvements to data transmission by importers into CBP systems. APHIS and CBP are collaborating to strengthen the guidance and streamline the process importers need to file Lacey Act declaration information in CBP's electronic system for Participating Government Agencies (PGA's). The PGA Message Set is a single, harmonized set of importer information collected by CBP as part of Customs and Trade Automated Interface Requirements.

APHIS has also acquired new software to improve the Agency's ability to monitor and analyze Lacey Act data from the import declarations. When the system is fully operational, the Agency will be able to create sets of reports to aid in accountability and to perform regular compliance checks of the data. It will allow the Agency to easily target problem shipments and repeat offenders, helping to ensure compliance with the 2008 amendments. It is important to clarify that APHIS' enforcement role only pertains to the declaration requirement. When we notice errors or discrepancies on the declaration forms, we work with importers to educate them about how to comply with the Act. However, APHIS makes declaration forms available to the enforcement agencies should they be needed for investigations. DOJ requested and APHIS provided full electronic declaration data available during 2009–2011. More recently, DOJ, FWS, and CBP enforcement officials requested and APHIS coordinated the delivery of information related to almost 3,000 electronic Lacey Act declarations in support of their investigations.

#### **Outreach and Collaboration**

Since the enactment of the 2008 amendments, the U.S. Government has undertaken substantial public outreach efforts, both domestically and internationally, to inform and educate importers, producers, suppliers, and foreign governments on the requirements of the Lacey Act. APHIS leads Lacey Act outreach efforts in the United States. Serving as the public's primary point of contact on the Lacey Act, APHIS:

- Maintains a dedicated Web site ([http://www.aphis.usda.gov/plant\\_health/lacey\\_act/](http://www.aphis.usda.gov/plant_health/lacey_act/)), which contains extensive Lacey Act materials and updated guidance on how to comply.
- Answers dozens of telephone and email inquiries monthly from members of the public seeking guidance on the Lacey Act.
- Along with its federal partners, meets with and educates industry trade groups, professional forestry organizations, non-governmental organizations, legal professionals, companies, other U.S. Government agencies, and foreign government officials and industry officials.
- Developed a Lacey Act primer to educate importers on APHIS' role in implementation of the Act, and provided it to industry and on our Web site.

We also recognize the critical role that the public and industry have in informing the process as we continue implementation of the Lacey Act amendments. Throughout implementation, APHIS has actively solicited comments from the public on how best to administer the program to balance the needs of businesses and industry with the need to meet the goals of the Act and implement the statutory requirements. For example, several times, APHIS adjusted the phased enforcement schedule to address concerns raised by businesses and industry associations. Beyond that, APHIS, in its Federal Register notices, has solicited comments on other issues related to Lacey Act implementation. For example, the special use designations discussed above resulted in part from a recommendation that APHIS develop a list of short-hand designations that would satisfy the genus and species requirement. Many stakeholders also raised the need for a *de minimis* exemption to the declaration requirement, which, as was previously mentioned, we are addressing. APHIS has also heard regularly from luthiers who manufacture artisan stringed instruments using stores of tropical hardwoods that were imported before the 2008 amendments, and we have provided guidance to clarify requirements and address their concerns.

APHIS again sought public comment through a notice in the Federal Register on February 28, 2011, consistent with the requirement in the 2008 amendments that the Secretary provide public notice and an opportunity for comment before conducting a review of implementation of the amendments. The comments received in response to that notice, as well as comments received in response to earlier Federal

Register notices relating to the implementation of the 2008 amendments, have been taken into account in the preparation of the Act's required report to Congress. I apologize for the delays in completing this report and providing it to your Committee. As we have developed the report, we felt it was important that it reflect input received from stakeholders and the other Federal agencies interested in the 2008 amendments, and that process has taken some time.

**Cost of Implementation**

As part of the rulemaking process for the common food crop and common cultivar rule, the Agency developed an economic analysis that included the estimated cost of compliance of the declaration requirement. Our economic analysis estimates that these exemptions could save industry and the government between \$900,000 and \$2.8 million per year just for the five percent of products that is excluded.

To fund our Agency's implementation of the Lacey Act, APHIS received \$775,000 in FY 2012—the first time the Agency received appropriated money for the program. In FY 2013, the Agency received \$716,000 and we are requesting \$1.445 million for FY 2014. This funding has been and will be used for full-time staff, recordkeeping and secure storage for paper declarations, education and outreach, and continued development of the LAWGS database and other tools.

Mr. Chairman, thank you for the opportunity to testify today. I assure you that APHIS will continue to implement the 2008 amendments balancing the legitimate needs of industry with the requirements of the Act. For this to be a successful effort, APHIS will continue its commitment to listening to the public, business and industry, seeking their input and implementing the Act in a way that addresses their concerns in the best possible way, while still following the direction of Congress.

Dr. FLEMING. Thank you, Ms. Bech.  
And now, Mr. Guertin, you have 5 minutes.

**STATEMENT OF STEPHEN D. GUERTIN, DEPUTY DIRECTOR,  
U.S. FISH AND WILDLIFE SERVICE**

Mr. GUERTIN. Good morning, Chairman Fleming, Ranking Member Sablan, and members of the Subcommittee. I am Steve Guertin, Deputy Director of the U.S. Fish and Wildlife Service. Thank you for the opportunity to testify before the Subcommittee today.

The Lacey Act prohibits trafficking in illegally taken fish, wildlife, and plants. Its premise is simple, but effective. People who take wildlife in violation of a State, Federal, tribal, or foreign law, and then engage in interstate commerce with the wildlife, are violating Federal law.

The Lacey Act provides a deterrent to wildlife trafficking through criminal penalties. It gives law enforcement officers the tools to conduct investigations, make arrests, and protect themselves from criminals. The service is one of the lead Federal agencies for enforcing the Lacey Act. Our law enforcement agents' efforts to stop wildlife smuggling put them against organized criminal networks conducting high-profile, black-market—

Dr. FLEMING. Mr. Guertin, would you suspend for a moment? Would you pull that microphone closer? We have some bagpipes in the background, which I really enjoy, but unfortunately, I can't fully hear what you are saying.

Thank you. Go ahead.

Mr. GUERTIN. Thank you, Chairman. I never testified with theme music before, either.

However, the Service's 216 special agents work on over 13,000 investigations each year involving complex crimes that target highly endangered species such as elephants, rhinos, tigers, and sea turtles, as well as domestic species managed by States, such as

bears, turtles, and paddlefish. We also have 136 wildlife inspectors who are our front-line defenders in combating illegal trade in wildlife and wildlife products.

Congress has amended the Lacey Act many times since 1900. In 2008, stronger protections were added for plants, notably timber. Simply put, the plant amendments will bring plants under the same standards as all wildlife species that have been protected by the Lacey Act for over the last 100 years. The 2008 plant amendments were supported by a broad coalition of trade associations, environmental organizations, and unions. The Service is working with our Federal partners to implement the 2008 plant amendments. These amendments provide relatively new statutory authority, and agencies are working on their implementation.

The declaration requirement is being implemented in phases, in order to minimize any undue effects on trade in illegal wood products. The Service is currently working with APHIS to finalize a rule to define the terms “common cultivar” and “common food crop,” which are exempt from Lacey Act plant requirements.

Providing clear definitions for these terms will facilitate continued legal trade in these plant species. The Administration is exploring other possible policies to address plant products manufactured prior to 2008. APHIS has provided almost 3,000 declarations to the Service, Customs, and Border Protection, and the Department of Justice, in support of enforcement Agency investigations.

Service special agencies are currently pursuing three investigations of potential violations of the 2008 plant amendments. A recent case involving a domestic guitar manufacturer ended last August with a criminal enforcement agreement in which the firm accepted responsibility for illegal actions.

Congress can improve the 2008 plant amendments by making sure that the agencies tasked to enforce them have the resources to do so. The Service cannot fully allocate the resources needed to pursue the international organized crime we know to exist in this arena without pulling resources from other enforcement responsibilities. The number of Service law enforcement officers has remained essentially the same since 1978. Due to sequestration, we are not able to hire a new class of 24 law enforcement officers in Fiscal Year 2013.

In contrast, illegal trade has grown in sophistication. The global economy for wildlife products has expanded. And new law enforcement mandates have been enacted. Congress can also strengthen the Service’s position to address trans-national wildlife and timber trafficking by supporting our plans to station senior special agent international attachés in key regions overseas, including Asia, Africa, and South America.

Wildlife trafficking is increasing, becoming a transnational crime involving illicit activities in two or more countries and often two or more global regions. Cooperation between nations is essential to combat this crime. The 2008 Lacey Act amendments were a significant environmental accomplishment.

We appreciate your Subcommittee holding this hearing to learn about the progress being made to implement the plant amendments and to evaluate their effectiveness. We look forward to continuing to work with the Subcommittee on this issue, and we would

be pleased to answer any further questions you or the Members may have. Thank you.

[The prepared statement of Mr. Guertin follows:]

**Statement of Stephen D. Guertin, Deputy Director, U.S. Fish and Wildlife Service, Department of the Interior**

Good morning Chairman Fleming, Ranking Member Sablan, and Members of the Subcommittee. I am Stephen Guertin, Deputy Director for the U.S. Fish and Wildlife Service (Service), in the Department of the Interior (Department). I appreciate the opportunity to testify before you today to provide an update on implementation of the 2008 plant amendments to the Lacey Act. Simply put, the plant amendments bring plants under the same standards as all wildlife species that have been protected by the Lacey Act for the last hundred years.

The Service is one of the lead federal agencies for enforcing the Lacey Act (16 U.S.C. §§ 3371–3378), a long-standing law that prohibits trafficking in illegally taken fish, wildlife, and plants. The Service also enforces many other U.S. laws that protect wildlife, including the Endangered Species Act, the Marine Mammal Protection Act, and the Migratory Bird Treaty Act. The Lacey Act complements and strengthens our ability to enforce these and other statutes. The Lacey Act also strengthens our ability to enforce the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), an international treaty signed by 178 countries, including the United States, to prevent species from becoming endangered or extinct because of unregulated international trade.

The Service's 216 special agents work on some 13,000 investigations each year involving complex, high-impact wildlife crimes. These wildlife crimes include highly endangered species such as elephants, rhinos, tigers, and sea turtles; rainforests in the tropics; wildlife habitat in the United States; and native species like bears, ginseng, turtles, and paddlefish that are poached in violation of state laws. Our agents' efforts to stop wildlife smuggling pit them against transnational organized networks and criminals conducting high-profit, black market trade valued in the billions of dollars. Our agents are responsible for covering the nearly four million square miles of land that make up this country. They are an extraordinary group of public servants focused on combating illegal taking and trafficking of wildlife, plants and wildlife and plant products in the United States.

We have 136 wildlife inspectors stationed at 38 of the more than 400 U.S. Customs ports of entry throughout the country. Last year they processed approximately 187,000 declared shipments of wildlife and wildlife products worth more than \$4.4 billion, supporting jobs and economic development for businesses large and small. Wildlife inspectors are also our front line defenders in combating illegal trade in wildlife and wildlife products. They utilize the Lacey Act to help stop the import of injurious species that could devastate our native ecosystems and industries if illegally imported or smuggled into the country.

The Service also employs 393 Federal Wildlife Officers who serve as the uniformed police force and conservation officers for the 561 National Wildlife Refuges and 38 Wetland Management Districts in the United States and territories, comprising approximately 150 million acres of the National Wildlife Refuge System (NWRS). They also regularly conduct enforcement operations off of NWRS lands enforcing the provisions of the Migratory Bird Treaty Act. These officers perform the full range of law enforcement duties, including patrols, surveillance, investigations, apprehensions, participation in raids, detentions, seizures and arrests, and interaction with the judicial system. In addition to the Service, each of the land managing agencies within the Department including the National Park Service, Bureau of Land Management, Bureau of Reclamation and the Bureau of Indian Affairs enforce the Lacey Act across hundreds of millions of acres of public and tribal lands.

These agents and officers depend on the Lacey Act to do their work. The Lacey Act is the single most effective law to protect wildlife and plants available in the United States. Its prohibitions protect animal and plant resources from rapacious exploitation here and around the world. Its penalties make prison sentences and significant fines a real possibility for hard-core profiteers; reduce financial incentives for wildlife and plant trafficking; and provide real deterrents for wildlife crime. Notably, the Lacey Act also supports those businesses that engage in legitimate wildlife and plant trade here and abroad by ensuring a level playing field and helping to secure the continued commercial availability of natural resources needed by U.S. businesses by supporting domestic and foreign conservation laws. The Lacey Act shows that our Nation's commitment to wildlife and plant conservation goes beyond words to encompass action. This law equips law enforcement officers with the tools

they need to conduct investigations and bring criminals to justice, while leveling the playing field for businesses that follow the rules.

### **Historical Background**

The Lacey Act was the Nation's first federal wildlife protection law. Its passage in 1900 was prompted by growing concern about interstate profiteering in illegally taken game species and the impact of that trafficking on states and their wildlife resources.

The original law made it illegal to transport from one state or territory to another wild animals or birds killed in violation of state or territorial law. According to the House Committee Report from the 56th Congress, its "most important purpose" was "to supplement the state laws for the protection of game and birds." It also banned the importation of injurious wildlife that threatened crop production and horticulture in this country. In its original version, the Lacey Act focused on helping states protect their resident wildlife.

Congress expanded the Lacey Act through amendments several times during the law's first century. One of the most significant of these amendments occurred in 1935, when Congress extended the Lacey Act's prohibitions on interstate commerce to include wildlife and birds taken in violation of federal or foreign law.

Amendments enacted in 1981 expanded the scope of the statute to: include certain unlawfully harvested fish; increase penalties for trafficking; strengthen tools for enforcement; apply prohibitions on interstate and international trafficking to any type of wild animal; and extend protection to certain wild plants. The 1981 amendments also added tribal laws and U.S. treaties to the list of underlying laws upheld; incorporated strict liability forfeiture provisions consistent with other resource laws; and established criminal felony liability for those buying or selling protected specimens of fish or wildlife that they knew had been taken and transported in violation of an underlying law.

### **2008 Plant Amendments**

The most recent amendments to the Lacey Act were passed by Congress and signed into law on June 18, 2008, as part of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110-246). They expanded the definition of plants covered by the Act, and similarly expanded and clarified the predicate violations that could trigger the Lacey Act.

Under the 2008 amendments, it is unlawful to import, export, sell, receive, acquire or purchase in interstate or foreign commerce any plant that was taken in violation of a federal, state, tribal or foreign conservation law. The statute specifies that the underlying laws that trigger a plant trafficking violation include laws and regulations that:

- Protect the plant;
- Regulate the (i) theft of plants, (ii) taking of plants from a park, forest reserve, or other officially protected area, (iii) taking of plants from an officially designated area, or (iv) the taking of plants without, or contrary to, required authorization;
- Require the payment of royalties, taxes or stumpage fees for the taking, possession, transportation or sale of any plant; and
- Govern the export or transshipment of plants.

The amendments were supported by the Bush Administration as part of its Presidential Initiative against Illegal Logging. The initiative responded to widespread concerns about the environmental and economic impacts of illegal logging. Both Republicans and Democrats supported the amendments as a way to protect jobs from unfair and illegal logging practices.

The Lacey Act plant amendments were supported by more than 50 trade associations, non-profits, and unions, representing the entire range of stakeholders, as well as members of both parties in Congress. This broad support was driven by concerns that illegal logging has a negative impact on biodiversity, indigenous peoples, the global climate, and on U.S. businesses that operate by the rules.

In particular, the law received strong support from the U.S. forest products industry. The 2008 amendments help ensure that all businesses, including foreign companies that send their goods into this country, are operating on a level playing field.

The amendments equipped the United States with tools for addressing timber trafficking and discouraging illegal logging. They provided a new definition of the term "plant" making it clear that (with some limited exceptions) the prohibitions apply to plant products as well as whole plants. Specifically, the term "plant" was defined as "any wild member of a plant kingdom, including roots, seeds, parts, or products thereof, and including trees from either natural or planted forest stands."

The inclusion of “products” parallels wildlife provisions in the Lacey Act, which cover not only live fish and wildlife, but also products made from them.

The amendments also added a declaration requirement for plant products. This mandate is similar to the requirement for the declaration of wildlife imports and exports established by the Endangered Species Act, which also applies to all wildlife and wildlife products, whether protected under a specific conservation law or not.

The U.S. Department of Agriculture’s Animal and Plant Health Inspection Service (APHIS), operating within available funding, has implemented and enforced the amendments with respect to the declaration process. As in the past, the Fish and Wildlife Service remains responsible for conducting criminal investigations of Lacey Act violations, including those authorized by the plant amendments. While APHIS has long had a role in implementing CITES requirements for plant trade, the agency was assigned new responsibilities with respect to developing and implementing a declaration system and collecting and maintaining the resulting plant import data.

### **Importance of the Lacey Act**

Today the Lacey Act makes it unlawful to traffic in fish, wildlife, or plants taken, possessed, transported, or sold in violation of federal, state, foreign, or tribal conservation law, treaty, or regulation. It allows the United States to help states, Tribes, and countries worldwide protect their natural resources by discouraging a U.S. market and U.S. demand for illegally obtained plants and wildlife. The law is a critical cornerstone for resource protection and conservation law enforcement.

Under the Lacey Act, Service law enforcement agents expose illegal guiding operations (i.e., guided hunting trips) profiteering in state, tribal, and federally protected species and pursue cases involving the illegal large-scale commercial exploitation of wildlife and plant resources in violation of state, tribal, or federal law. The Lacey Act provides a unique mechanism for states and Tribes to address crimes within their borders by out-of-state or non-tribal guides and hunters as well as the interstate sale or international export of unlawfully acquired U.S. wildlife or plants. Such sales fuel the market for certain species, putting domestic wildlife and plant populations increasingly at risk. Illegal commercialization of wildlife is a real and present threat to conservation.

On the international front, the Lacey Act provides an essential tool for combating large-scale exploitation of natural resources in developing nations and the subsequent smuggling and interstate commerce in foreign and shared species protected and regulated under federal laws, international treaties such as CITES, and the conservation laws of other countries. Its provisions give the Justice Department access to powerful enforcement tools which enable the Department to bring charges against international organized crime rings and criminals who knowingly and deliberately traffic in the world’s most imperiled species and in its most important natural resources, such as fisheries and timber. Trafficking in illegally harvested wood, for example, is estimated to generate proceeds of approximately \$10 billion to \$15 billion annually worldwide, according to a 2012 report by the World Bank.

The existence and enforcement of the Lacey Act’s foreign law provisions have made the United States a leader and role model for countries around the world—particularly those that, like the United States, have long been major markets for wildlife and plant resources illegally taken in developing countries that struggle to feed their people, let alone protect their wildlife, plants, and forests. Through these provisions, our Nation holds itself accountable for stopping illegal trade in natural resources involving interests in our country, and recognizes and supports the efforts of other countries to level the playing field for legitimate businesses who manage their natural resources responsibly.

### **Implementation of the 2008 Plant Amendments**

In terms of implementing the 2008 plant amendments, the declaration requirement is being enforced in phases so as to minimize any potential undue effects on trade in legal wood products. The Service is currently working with APHIS to finalize a rule to define the terms “common cultivar” and “common food crop”, which are excluded from Lacey Act plant requirements. Providing clear definitions of these terms will facilitate continued legal trade in these plant species. The Service is also working with other interagency group members to explore other possible policies to address plant products manufactured prior to 2008.

APHIS makes Lacey Act plant import declarations available to the Service, Customs and Border Protection, and the Department of Justice, upon written request, should they be needed for investigations. APHIS has provided almost 3,000 declarations pursuant to the 2008 plant amendments to the Service, Customs and Border

Protection, and the Department of Justice in support of the enforcement agencies' investigations.

Service special agents are currently pursuing three investigations of potential violations of the 2008 plant amendments. A recent case involving the Gibson Guitar Company ended last July with a criminal enforcement agreement. In the agreement, the firm accepted responsibility for continuing to purchase rare wood from Madagascar after Madagascar had banned the sale and export of such wood. Gibson agreed to over \$600,000 in penalties including the forfeiture of wood imported after implementation of the ban.

The Service has not conducted a comprehensive review of the effect of the 2008 plant amendments; however, we strongly support this law, which, in 2011, has been cited by United Nations Agencies and the World Future Council as one of the world's top three forest conservation laws in 2011. Congress can improve the 2008 plant amendments by making sure that the agencies tasked to enforce them have the resources to do so. The Service cannot fully allocate the resources needed to pursue the transnational organized crime we know to exist in this arena without pulling resources from other enforcement responsibilities. The number of Service law enforcement officers has remained essentially the same since 1978. Due to sequestration, the Service was not able to hire a new class of 24 law enforcement officers in fiscal year 2013. In contrast, illegal trade has grown in sophistication, the global economy for wildlife products has expanded, and new law enforcement mandates have been enacted.

Congress can also strengthen the Service's position to address transnational wildlife and timber trafficking by supporting our plans, as identified in the President's fiscal year 2014 Budget, to station senior special agent international attachés in key regions overseas (including Africa, Asia, and South America) and by working with the Service to make needed adjustments in laws so that it can be fully utilized in the investigation and prosecution of international criminal syndicates. The Service budget request for fiscal year 2014 provides \$68.3 million for the law enforcement program to investigate wildlife crimes and enforce the laws that govern the Nation's wildlife trade. Wildlife trafficking is increasingly a transnational crime involving illicit activities in two or more countries and often two or more global regions. Cooperation between nations is essential to combat this crime. Investigations of transnational crime are inherently difficult, and they become even more so without organizational structures to facilitate this cooperation. This request of \$6.1 million above the 2012 appropriation also includes funding to foster these needed partnerships to address technical challenges in the science of wildlife forensics.

The 2008 Lacey Act plant amendments were a significant environmental accomplishment. We urge Congress to support continued implementation of this law and to ensure that the United States remains a leader in the global effort to save forests and protect the planet and its people.

### **Conclusion**

I would like to thank the Subcommittee for your continued support for the conservation and protection of fish, wildlife, and plants throughout the world. Thank you for the opportunity to present testimony on the 2008 plant amendments to the Lacey Act. I would be pleased to answer any questions that you may have.

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Dr. FLEMING. OK. Thank you, Mr. Guertin. At this point we will begin Member questioning of the witnesses. To allow all Members to participate, and to ensure we can hear from all our witnesses today, Members are limited to 5 minutes for their questions. However, if Members have additional questions, we can have more than one round of questioning. I now recognize myself for 5 minutes.

My first question—and this is for both panel members—is what is your definition of legal logging? Yes, go ahead, Mr. Guertin.

Mr. GUERTIN. Mr. Chairman, your question is what is my definition of legal and—

Dr. FLEMING. Yes.

Mr. GUERTIN. And I assume you relate this to legal and lawful take of wildlife, plant, or animal species, as we are talking about here today?

Dr. FLEMING. Yes.

Mr. GUERTIN. Yes. It would be in accordance with the rules and regulations and the laws enforced here in the U.S., and also those of the international community.

Dr. FLEMING. OK. Ms. Bech?

Ms. BECH. I would defer to the definition that he just gave. We concur with that.

Dr. FLEMING. OK. Again, for the panel, can a wood product be sustainable and illegal?

Mr. GUERTIN. Mr. Chairman, your question was can a wood product be sustainable and legal?

Dr. FLEMING. Yes.

Mr. GUERTIN. Yes, sir. It can.

Dr. FLEMING. OK. You agree with that, Ms. Bech?

Ms. BECH. Yes, sir.

Dr. FLEMING. OK. All right. It is now 2½ years since the Animal and Plant Health Inspection Service was required to submit a report to the Congress characterizing the cost of legal plant imports and the extent of illegal logging practices and trafficking. Can you tell me what is the status of this?

Ms. BECH. Yes, sir. I apologize for the delay in completing this report and providing it to your Committee. We felt like, in developing the report, it was important to reflect input received from the stakeholders and the other Federal agencies, and this has taken some time. We were hoping to have the report ready today, but I am happy to say that we will be providing the report to you within the next week.

Dr. FLEMING. OK, thank you. Since APHIS has finished its analysis, what can you share with us in terms of illegal logging practices and trafficking?

Ms. BECH. Well, our piece of the responsibility in implementing the Lacey Act is focused on just the declarations. And we have done some monitoring of the declarations and looked at the errors in that. The report, however, focuses on the work that we have done to complete the declarations. And I would defer, then, to my colleague to see if he has any comment on the illegal practice of logging.

Dr. FLEMING. When you review the declarations, are you just reviewing them to ensure accuracy, or to see if it complies with the law?

Ms. BECH. Yes, sir. We are looking at them for any errors, and to ensure that they are complying with the declaration. We have referred some declarations that we found to be problematic to DOJ and the Fish and Wildlife Service. To date, though, we have done very minimal monitoring. We have had limited resources. And so we focused initially on helping to educate and provide outreach, so that people can comply with the declaration, and that has been our focus.

Dr. FLEMING. OK. So the focus—and I am not saying this is inappropriate—is on accuracy. If you come across issues that may suggest problems, you refer that.

Ms. BECH. Yes, sir. That is correct.

Dr. FLEMING. OK. What is the status of regulations exempting plant products manufactured prior to May 22, 2008, and those products containing a de minimis amount of Lacey Act material?

Ms. BECH. We have implemented what we call a special use designation pre-amendment. So, for importers who, through due diligence, have tried to determine the genus and the species, but they are unable to do that for products that pre-date 2008, then we allow them to use the special use designation on the declaration, and then they are in compliance with the declaration.

As far as de minimis, we are moving forward. We published an advance notice of proposed rulemaking in 2011 to determine what the standard would be for de minimis, and we are moving forward on rulemaking for that now.

Dr. FLEMING. Wouldn't it be simpler just to exempt, prior to May 22nd, things that—it seems problematic to try to make that difference and deal with that. It is such a gray area. Why not just exempt those prior to May 22nd?

Ms. BECH. Well, currently, the way the Lacey Act states the requirement is that there must be a declaration. And so, for us to exempt something or to say that you don't have to require the declaration, we don't have the authority, currently, to do that.

Dr. FLEMING. So you would require action from this Committee, perhaps—Congress itself, then—to fix that problem?

Ms. BECH. Yes, sir. We don't have the authority, currently.

Dr. FLEMING. OK, thank you. All right. My time is up. I yield to Mr. Sablan for 5 minutes for questions.

Mr. SABLAN. Well, thank you very much, Mr. Chairman. Let me start.

Ms. Bech, I share Chairman Fleming's concern on the long-overdue report the 2008 Lacey Act amendments require. So we look forward to next week's submission. And we are going to sort of hold you to your word.

But many wood product importers have applauded your agency's phasing implementations of goods to be declared. And your agency took smart steps toward facilitating the declaration process by phasing in products based on their degree of processing and complexity of their composition. What other actions have you taken to facilitate compliance with the 2008 amendments?

Ms. BECH. Well, I mentioned these in my testimony. We, again, have some special use designations. So this is where people can look at things that are common, such as fir and hemlock and Western Cedar, and they can group those together underneath the special use designation. It is also used for the pre-amendment, those things that they can't tell genus and species of products that were done before 2008.

We have done a lot of outreach and education. As we have reviewed the declaration and we have looked at the errors, we have gone back to the importers, working with them to correct these errors. And we are also developing our LAWGS data base, which is a web-based system. We are hoping that will really streamline, in particular, the paper declaration process. Looking at the errors that we have seen, we are developing drop-down menus to make it easier for people to classify the plant units and the common names and scientific names.

So, we are providing a lot of these kind of efforts and, again, a lot of outreach and education.

Mr. SABLAN. Thank you. Mr. Guertin from Fish and Wildlife. From where I am from, it has been sometimes reported that the United States authority has been, a lot of the time, charging people with poaching of the Marianas fruit bat. And there is some truth to that also, because we were concerned that all she was doing was bringing fruit bat cases to the court. But I must compliment Fish and Wildlife for doing that, because it is an endangered species in the Northern Marianas. But we are talking about logging here now.

So, let me say that the World Bank estimates that illegal logging accounts for 50 to 90 percent of the volume of forestry activities in key producer tropical countries, and 10 to 30 percent of all wood traded globally. This tragedy is occurring even in formerly protected forests.

So, how are the 2008 Lacey Act amendments essential in reducing global trade in illegal timber? And have they set an example for other countries? I flew into the island of Hispanola, and I see that half of the island is large with forest and the other half is barren because of logging, over-logging.

Mr. GUERTIN. Thank you, Congressman. We think that the amendments are very important, because they tell the world that the United States will not allow importation of illegally harvested timber. U.S. businesses dealing in commercial timber scale imports are responsible for knowing where their timber comes from, as are other businesses operating in other environments. The United Nations has cited this law as one of its foremost forest conservation laws enacted in recent years, and both the EU and Australia have recently enacted laws that are very similar to the 2008 amendments to the Lacey Act.

Mr. SABLAN. All right. And again, after pushing for legislation in Congress last year to change the Lacey Act, while still under investigation by the U.S. Department of Justice, the Gibson Guitar Corporation signed a criminal enforcement agreement to avoid further prosecution.

In addition to admitting to knowingly and intentionally importing wood taken illegally from Madagascar, and agreeing to fines and forfeitures in excess of \$600,000, Gibson was required to develop a Lacey Act compliance program. Can this program serve as a model for other wood imports?

Mr. GUERTIN. Congressman, we think this is a great case that illustrates why education and outreach to both the timber and music industries is critical for the Service and all the Federal partners. Certainly the case and the precedent set by the Gibson case sent everyone a strong message that the U.S. is serious about enforcing this law. But we want to focus our efforts rather on outreach, education, and a proactive engagement with industry to, rather, tell the good story and get allies to enlist to work on a common cause toward achieving the larger policy objective.

Mr. SABLAN. Yes, because we need to work together. Otherwise, from where I come from, we don't have bagpipes that we just heard earlier, but we have guitars and ukeleles strumming.

So, Mr. Chairman, my time is up, I yield back.

Dr. FLEMING. Thank you. The Chair now recognizes Mr. Wittman for 5 minutes.

Dr. WITTMAN. Thank you, Mr. Chairman. Ms. Bech, Mr. Guertin, thank you so much for joining us today. I want to begin by getting both of your perspectives on the Lacey Act. Specifically, can you give me what you believe are the pros and cons of having the Lacey Act focus on just laws involving conservation?

Mr. GUERTIN. Congressman, we are a conservation organization, so my testimony will be largely focused on that. But the Lacey Act, in many ways, is where it all began. This goes back to the 1850s and the whole development of the common law doctrine that wild-life, fisheries resources, and plants are there for all American citizens and future citizens to enjoy. And over the last 150 years, our country has formulated the North American model of conservation, which puts that premise at the forefront, that these natural resources are for all citizens to enjoy now and in the future for future generations, as well.

And so, these plant amendments have now brought up the take of plants and timber products and other things like that under that purview, as well. But it is our guiding principle, as a conservation organization, to manage for now and future generations for all citizens to benefit from these natural resources.

Dr. WITTMAN. OK. Ms. Bech?

Ms. BECH. USDA supports the aim of the Lacey Act in protecting natural resources from illegal logging and harvesting, as well as the role in eliminating unfair competition. And so we support the amendments and our role in that in implementing the declaration. Thank you.

Dr. WITTMAN. OK. Let me ask this. I know that there has been a number of stories and real-life instances where people are dealing with the 2008 amendments to the Lacey Act, and really has a lot of people scratching their heads to say, "How in the world are those folks in the regulated community going to deal with this?"

Can you tell me? What are both of your agencies doing to help the regulated community deal with these changes to the Lacey Act in 2008? As you know, for many of them, they have scratched their heads, they have monumental amounts of paperwork that they have to go through. And, even then, they are frustrated to say, "I have no idea what I need to do to comply."

Can you give me your perspective on what you are doing, or what you need to do, to assist the regulated community?

Ms. BECH. Well, I think first we tried to take an approach of a phased-in approach, so that we dealt with things that were very clear that could fall underneath the declaration requirements, and those that were more complex and more difficult have come in further phases. And so we are still continuing with that process.

And we have looked at a lot of the issues initially, and maybe some of the head-scratching that was going on with how to comply. That is how we geared our outreach and education. We have done several things, again, to help with that, and address these problems. And we have actually found that initially it took, we estimated, about an hour-and-a-half to fill out the declaration because it was so new and difficult. And what we are finding today is we are estimating it is down to about 30 minutes to file the declaration, due to the outreach efforts that we have done.

And also, I think that the creation of our new data base, the LAWGS, that is going to be very, very helpful for those that are still struggling with paper declarations. And so it is numerous steps like this included in my testimony.

Dr. WITTMAN. Thank you. Mr. Guertin?

Mr. GUERTIN. Thank you, Congressman. We are trying to focus our efforts largely on education and outreach and partnering with the commercial sector, sending our personnel to trade organizations and conferences and meetings, outreach seminars, talking about what the requirements are and how we are trying to streamline compliance. We are focusing less of our effort on going after prosecution of individual violations, but rather, focusing our limited law enforcement, if we need to, on criminal-level commercial exploitation of these wood products overseas.

Dr. WITTMAN. Let me ask you all a couple of questions I want to try to get in before my time is up. Just simple yes-or-no answers.

Do you believe that the 2008 amendments to the Lacey Act are reasonable? Ms. Bech?

Ms. BECH. Yes.

Dr. WITTMAN. Mr. Guertin?

Mr. GUERTIN. Yes, Congressman, from our perspective.

Dr. WITTMAN. Do you believe that there are any changes that are needed to those amendments in any future reauthorizations? Ms. Bech?

Ms. BECH. Well, we believe we have the regulatory authority and flexibility now, with our current administrative processes, to deal with the challenges.

Dr. WITTMAN. OK. Mr. Guertin?

Mr. GUERTIN. We would concur, Congressman. The legislation could stand, and we could work with the Federal family to streamline some of the procedural requirements.

Dr. WITTMAN. So you believe, then, the statutory authority could be refined in order to make sure that the process is streamlined?

Mr. GUERTIN. I don't think we would need to amend the legislation, Congressman. We could work within the existing legislation to streamline the processes.

Dr. WITTMAN. Do you believe that you have achieved that now, currently, Ms. Bech?

Ms. BECH. I believe that we still have some work to do, and that as we continue to develop the data base and continue focusing on some of the issues and challenges we face, we have other means and flexibility in working with our inter-agency partners to address those in administrative ways.

Dr. WITTMAN. Mr. Guertin, quickly, yes or no?

Mr. GUERTIN. Yes.

Dr. WITTMAN. OK. Thank you. Mr. Chairman, I yield back.

Dr. FLEMING. The gentleman yields back. The Chair now recognizes Mr. Lowenthal for 5 minutes.

Dr. LOWENTHAL. Thank you, Mr. Chairman, for holding this hearing. And thank you to the witnesses for attending today. I admit, as a new Member, and like many Americans, I was not familiar with the Lacey Act before coming to Congress. But after learning about this landmark wildlife protection law, it quickly became apparent that the Act has broad public support, from indus-

try to environmental NGO's, because of the effective job that it has done in protecting American jobs threatened by the illegal wildlife trade, and in reducing the harvesting of threatened fauna and flora throughout the world.

For example, I have a letter here that was signed by 55 U.S. forest products companies supporting the Lacey Act. In the letter from the forest companies it says, "Our organizations stand in strong support of the Lacey Act and all that it has accomplished in addressing the issue of illegal logging worldwide since its passage in 2008." I am talking about the recent amendments. "Illegal logging and the threat posed to the United States in terms of jobs and forest resources by illegally sourced products throughout the world is being addressed by the Lacey Act, allowing our industry to compete fairly in the international market."

I ask, then, for unanimous consent to place this letter into the record, Mr. Chair.

Also, the U.S. forest products industry supports the Act because it helps to create a level playing field for U.S. forest product companies, preventing them from being undermined by illegal loggers. This has contributed to a 70 percent increase in U.S. forest products over the past few years, while most other global exporters have remained flat, or have declined, according to the Hardwood Federation. This translates into more jobs and a stronger U.S. economy.

So, therefore, the Lacey Act has also had a significant role in reducing illegal global deforestation, which has contributed to a 22 percent decline in illegal logging, according to the non-partisan think tank, The Chatham House. This reduction in illegal logging has helped to combat climate change by eliminating an estimated one billion tons of greenhouses gases, an amount nearly equivalent to the annual emissions from Japan.

I also then ask for unanimous consent to place into the record a letter supporting the Lacey Act from over 30 environmental groups to the record. These numerous and substantial benefits explained why the law has such broad-based support from environmental groups, unions, and industry.

[The letters submitted for the record by Mr. Lowenthal follows:]

LETTER SUBMITTED BY THE U.S. FOREST PRODUCTS INDUSTRY

JUNE 4, 2012

Dear U.S. House of Representatives:

Our organizations stand in strong support of the Lacey Act and all that it has accomplished in addressing the issue of illegal logging worldwide since its passage in 2008. We strongly oppose legislation such as H.R. 3210, The Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act, H.R. 4171, the Freedom from Over-Criminalization and Unjust Seizures Act (FOCUS) Act of 2012 which weaken this important law, and/or the amendments being offered by Subcommittee Chairman Fleming.

The U.S. forest products industry produces about \$175 billion in products annually and employs nearly 900,000 men and women in good paying jobs. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 47 states. An industry study prior to passage of the 2008 Lacey Act amendments estimated that illegal logging cost the U.S. forest products industry some \$1 billion annually in lost export opportunities and depressed U.S. wood prices.

Because of the seriousness of this issue, our industry has worked within a unique coalition that also includes environmental groups, labor organizations, retailers and

others to amend the Lacey Act, and to encourage full and timely implementation. The coalition has continued consensus talks in the U.S. Senate.

The U.S. forest products industry has a proud tradition of providing sustainable and legal resources to our customers both domestically and around the world. Illegal logging and the threat posed to U.S. jobs and forest resources by illegally sourced products throughout the world is being addressed by the Lacey Act, allowing our industry to compete fairly in the international market. Please oppose H.R. 3210 (The RELIEF Act), H.R. 4171 (The FOCUS Act), the Fleming amendment to H.R. 3210, and other amendments that weaken and undermine the Lacey Act. We stand ready to work with you and your colleagues on finding alternative approaches.

Sincerely,

*Please See Attached for Full List of Signatures*

Action Floor Systems Alabama	Missouri Forest Products Assoc.
Forestry Assoc. American Forest & Paper Assoc.	National Alliance of Forest Owners
American Forest Resource Council	National Hardwood Lumber Assoc.
American Forest Foundation	National Wood Flooring Association
American Hardwood Export Council	NewPage Corp.
Anderson Hardwood Floors	Northeastern Loggers Assoc.
Appalachian Hardwood Manufacturers Inc.	Northern Hardwoods
Associated Oregon Loggers, Inc.	Northland Forest Products
Atlanta Hardwood Corp.	Oregon Forest Industries Council
California Redwood Assoc.	Oregon Women in Timber
Columbia Forest Products	Pennsylvania Lumbermens Mutual Insurance Co.
Domtar	Penn-York Lumbermen's Club
Empire State Forest Products Assoc.	Plum Creek Timber Co.
Emporium Hardwoods	Resolute Forest Products
Graphic Packaging International	Rock-Tenn Co.
Hardwood Federation	The Rossi Group
Hardwood Manufacturers Assoc.	Scotland Hardwoods
Hardwood Plywood & Veneer Assoc.	The Shannon Lumber Group
Highland Hardwood Sales	Shannon Plank Flooring
International Paper Co.	Shaw Industries Group
Kentucky Forest Industries Assoc.	Tennessee Forestry Assoc.
Lake States Lumber Assoc.	Texas Forestry Assoc.
Mallery Lumber Co.	Timber Products Co.
Maple Flooring Manufacturers Assoc.	Treated Wood Council
Maxwell Hardwood Flooring	Virginia Forestry Assoc.
Minnesota Forest Industries	Western Hardwood Assoc.
Minnesota Timber Products Assoc.	Wood Component Manufacturers Assoc.

LETTER SUBMITTED FOR THE RECORD BY: 350.ORG; BLUE GREEN ALLIANCE; CENTER FOR BIOLOGICAL DIVERSITY; CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW; CLEAN AIR TASK FORCE; DOGWOOD ALLIANCE; EARTH DAY NETWORK; ENVIRONMENTAL INVESTIGATION AGENCY; FOREST STEWARDSHIP COUNCIL-UNITED STATES; FOREST TRENDS; FRIENDS OF THE EARTH; GLOBAL WITNESS; GREENPEACE; INTERNATIONAL FUND FOR ANIMAL WELFARE; LEAGUE OF CONSERVATION VOTERS; NATIONAL WILDLIFE FEDERATION; NATURAL RESOURCES DEFENSE COUNCIL; OLYMPIC FOREST COALITION; RAINFOREST ACTION NETWORK; RAINFOREST ALLIANCE REVERB; SAINT LOUIS ZOO; SIERRA CLUB; SOUND & FAIR; SUSTAINABLE FURNISHINGS COUNCIL; THE FIELD MUSEUM; THE LANDS COUNCIL; THE MADAGASCAR FAUNA GROUP; THE NATURE CONSERVANCY; UNION OF CONCERNED SCIENTISTS; UNITED STATES GREEN BUILDING COUNCIL; UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (USW); WILDLIFE CONSERVATION SOCIETY; WORLD WILDLIFE FUND

JUNE 6, 2012

Dear Representative:

On behalf of our millions of members and supporters, we urge you to oppose H.R. 4171: The Freedom from Over-Criminalization and Unjust Seizures Act of 2012 (FOCUS Act), and H.R. 3210: The Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act (RELIEF Act), as well as any other amendments under consideration that would undermine the Lacey Act. ***The RELIEF and FOCUS Acts will hurt American businesses and severely***

***undermine longstanding U.S. leadership in global conservation and curbing illegal logging. The Fleming Amendment to H.R. 3210 would be equally damaging and would do nothing to address the concerns outlined below.***

Responding to the economic and environmental costs of illegally traded timber, the Lacey Act was amended in 2008 with overwhelming bipartisan support from Congress, industry, labor and environmental organizations to make it unlawful to trade timber and wood products or other plants taken in violation of the laws of either a U.S. state or a foreign country.

With illegal logging costs to the U.S. timber and wood products industry estimated at approximately \$1 billion per year, the consequences of undercutting this law are significant. In an October 11, 2011 letter to Congress more than 15 U.S. trade associations underscored that “Illegal logging threatens U.S. jobs by allowing unfair competition in wood commodities throughout the world and destroys the world’s forests.” When the U.S. government combats illegal logging, this promotes the use of sustainably and legally sourced U.S. forest products. This ensures that the U.S. forest products industry can compete on a level playing field, thereby boosting its strength and supporting U.S. jobs.<sup>1</sup>

After four years, the 2008 amendments are already showing impressive results. Illegal logging is on the decline, as much as 25% worldwide, with reductions as high as 50–70% in some key countries. Companies around the globe are changing the way they make sourcing decisions and monitor their supply chains. Consistent enforcement over time is essential to solidify these new behaviors so they become common practice. Signatories to the October 11th letter urged, “that no legislative action be taken to diminish the contributions of the Lacey Act to these important objectives.”

**H.R. 3210, the Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act (RELIEF) Act, would destroy the effectiveness of three key provisions of the Lacey Act responsible for driving positive change:**

- **Import Declaration.** *H.R. 3210 would remove the requirement for manufacturers and retailers of all non-solid wood products to know what kind of wood they are trading.* Knowing the type and source of wood is essential to ensuring legality, one of the centerpieces of the Lacey Act. Among the multitude of products this would exempt, this measure would explicitly exclude pulp and paper from any future requirement to document its wood source. Pulp, paper, paperboard, and the products made from them are by far the largest segment of imports covered by the Lacey Act amendments. Excluding pulp and paper alone risks killing good paying manufacturing jobs in an industry that employs almost 400,000 people in forty-two states with a combined \$30 billion in annual compensation.<sup>2</sup>

The agencies of jurisdiction have already decided to implement the declaration requirement in a phased manner to allow industry time to prepare. In addition, leading retailers, importers, producers, labor and environmental groups have developed a careful consensus on recommendations to improve implementation of the declaration. This measure would ignore that consensus.<sup>3</sup>

- **Significant penalties to deter illegal-sourcing.** The law has been effective in part through the deterrent effect it has on bad operators, who perceive their risk of being prosecuted or having goods seized as a reason to change behavior. *H.R. 3210 would remove this impetus for change by limiting penalties for all “first infractions” to a minor fine of \$250, regardless of size of the company, volume or value of the illegal product.* This provision would likely impact a case currently under investigation involving significant quantities of precious wood allegedly logged illegally in the biodiversity-rich forests of Madagascar.
- **Forfeiture of illegally-obtained product.** Under the Lacey Act, ill-gotten gains are subject to confiscation, as is U.S. standard practice for dealing with illegal goods. *H.R. 3210 would instead allow for all major manufacturers to keep wood that has been proven to be stolen, regardless of the severity of evidence*

<sup>1</sup> The U.S. forest products industry produces about \$175 billion in products annually and employs nearly 900,000 men and women in good paying jobs. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 47 states.

<sup>2</sup> United States Department of Labor, Occupational Safety and Health Administration: <http://www.osha.gov/SLTC/pulppaper/index.html> & American Forests and Paper Association: <http://www.afandpa.org/PulpAndPaper.aspx>.

<sup>3</sup> The more than 50 organizations supporting the consensus process are also now discussing the proper treatment of composites in detail. For reference, the 2009, 2010 & 2011 consensus statements are available at <http://www.eia-global.org/LaceyActConsensusStatements>.

*of illegal logging.* Without the threat of losing merchandise that has been acquired in contravention of the law, what is the incentive to ensure legal sourcing?

Contrary to arguments that this bill will benefit musicians, a number of prominent musicians have signed a pledge stating that they support the Lacey Act and oppose current efforts underway to weaken the law, such as the RELIEF Act.<sup>4</sup> This pledge also urges lawmakers to help ensure that the music industry has a positive impact on the environment rather than contributing to forest destruction and human rights abuses.

**H.R. 4171, the Freedom from Over-Criminalization and Unjust Seizures Act (FOCUS) Act, removes all criminal penalties as well as the need to comply with foreign laws from the entire Lacey Act.**

- **Foreign Laws.** The scope of foreign laws covered is explicitly identified and described for the purposes of capturing those laws most relevant to stopping illegal trade in wildlife and plant products. The FOCUS Act proposes to remove these protections, leaving legitimate business operators once again vulnerable to being undercut by illegal competitors. It also seriously hampers enforcement of the Endangered Species and Marine Mammal Protection Acts as well as the Convention on the International Trade of Endangered Species (CITES) because violations of these measures are often enforced under the Lacey Act.
- **Criminal Penalties.** Criminal penalties are an essential part of the Lacey Act, as civil penalties alone will not be strong enough to deter the organized crime and criminal mafias that are often at the heart of illegal logging and wildlife trafficking operations. As a World Bank report from March 2012 makes clear, an effective fight against this scourge has to look beyond the poor loggers in the forest or the petty criminals, and focus on those who are truly enriched by this illicit activity.

Further, if the Lacey Act is decriminalized, violators will not be subject to federal search warrants and may very well be in a “safe harbor” simply by crossing state lines. Illegal commercialization of fish, wildlife and plants is often sophisticated, well financed and often engaged in other illegal activities. When these ventures cross state lines, as they almost always do, the resources of the U.S. Fish and Wildlife Service and the enforcement powers allowed under the current Lacey Act are essential to a successful prosecution. The proposed changes will likely take the U.S. Fish and Wildlife Service out of the picture and make effective enforcement of interstate violations virtually impossible.

We are committed to working with Members of Congress, companies, NGOs, Agencies, and other interested stakeholders in developing rules that ensure effective implementation of the Lacey Act and maintain its environmental integrity. Now is the time for sensible dialogue to ensure the Lacey Act amendments of 2008 remain strong while addressing reasonable concerns. Dismantling the principal tenets of the law is misguided and would be a travesty for American businesses and global conservation efforts.

We urge you to oppose H.R. 3210, H.R. 4171 and any related amendments, including the Fleming Amendment, which would bring sweeping changes to undermine implementation and enforcement of this incredibly effective century-old law.

Dr. LOWENTHAL. So, this is my question in the time. To help me understand, from the Administration’s point of view, how the Administration views the Act as being effective, do they believe that it has been as effective as I have stated by these groups? And what have been the major complaints about the Act that you are hearing? I would ask both witnesses.

Mr. GUERTIN. Thank you, Congressman. Yes, we think it has been a very effective addition to the Act to help in the larger con-

<sup>4</sup>This pledge has been signed by: Mick Jagger, Sting, Bonnie Raitt, Willie Nelson, David Crosby, Dave Matthews Band, Bryan Adams, Bob Weir, Sarah McLachlan, Lenny Kravitz, Jack Johnson, Jason Mraz, Maroon 5, Lily Allen, Lana Del Rey, Simon Le Bon (Duran Duran), Debbie Harry, Jools Holland, Barenaked Ladies, Brad Corrigan (Dispatch), Pat Simmons (Doobie Brothers), Brett Dennen, My Morning Jacket, Guster, The Cab, Ryan Dobrowski and Israel Nebeker (Blind Pilot), Ray Benson (Asleep at the Wheel), Of A Revolution (O.A.R.), Jack Antonoff, Razia Said, Richard Bona, and over 40,000 other musicians and individuals from around the world. Full text of the pledge can be viewed: <http://www.reverb.org/project/lacey/index.htm>.

servation goals our agency pursues with all of the other Federal agencies. We are trying to work through some of the very legitimate concerns our partners in private industry have expressed to us about some of the procedural requirements that—

Dr. LOWENTHAL. So it is the procedural requirements.

Mr. GUERTIN. Yes, Congressman. Much as many of these environmental statutes and requirements—what our partners and industry are seeking is certainty and decisions from the Federal Government whether they can move forward or not. And what we are working on with APHIS and the other Federal partners is to give industry that certainty and that ability to move forward with legitimate business purposes.

Dr. LOWENTHAL. Thank you.

Ms. BECH. APHIS's piece of implementing the Act is on the declaration process. And so, the things that we have heard the importers say that are difficult with that initially have been researching the product and the sources for the products, and then the more administrative piece of just complying with filing the declarations.

We have, of course, as I have stated earlier, done many things to help with outreach and education, looking at the common errors, going back and providing information to the importers, so that it makes it easier for them to comply.

Dr. LOWENTHAL. So you think that the complaints that you have heard can be corrected internally, without any other legislative changes?

Ms. BECH. Yes, sir. We believe that we have enough flexibility within our regulatory framework and our administrative processes right now to address the concerns that have been raised to date.

Dr. LOWENTHAL. Thank you. I yield back my time.

Dr. FLEMING. The gentleman yields back. Next Mr. Thompson is recognized for 5 minutes.

Mr. THOMPSON. Thank you, Chairman.

Dr. FLEMING. You can defer your time to someone else, if you like.

Mr. THOMPSON. No, I am ready to go.

Dr. FLEMING. Oh, OK.

Mr. THOMPSON. Yes, yes, I am good to go on the Lacey Act. Thank you, Mr. Chairman. Thanks for having this hearing. And to both deputy administrators—thanks, Deputy Administrator, Deputy Director, thanks for being here. As Chair of the Subcommittee on Agriculture that has jurisdiction over forestry, obviously the Lacey Act, I think, it is an important piece of legislation, and the purpose behind it is to deter and hopefully prevent illegal logging.

I think the frustrations that come with it come with every regulation, it comes at the implementation phase. And that is not easy. You don't have easy jobs. But we are all charged with trying to do our best for the citizens to make sure what regulations are necessary, that there is a pathway to compliance. And so, that is why I appreciate this hearing. It allows us to really talk about some of those issues.

Deputy Administrator Bech, you mentioned in your testimony that the amendment directs you to provide legislative recommendations to Congress to assist with the identification of plants in violation. I am actually more curious to see what you have found that

can help you deal with this administratively? And can you give examples of what you have already done in this regard?

Ms. BECH. Yes, sir. Well, several things. One of the ones we have mentioned is the de minimis, and looking at that. That further will clarify products that would fall outside of the requirements.

Certainly we have talked about the definition of the common food crop and common cultivar. Again, that takes out a major part of those kinds of products, over 500,000, that would be exempt, then, from the declaration. So these are just a few of the things, administratively. And we are very excited about the Web site, the web data base that we are providing, which will make—

Mr. THOMPSON. What is the progress of that? What is your timeline, in terms of implementation? That obviously makes a lot of sense, in terms of assisting folks to navigate this.

Ms. BECH. Well, we provided our first webinar to industry groups on this, and we are beginning to pilot that this summer. We hope for full implementation in the late fall.

Mr. THOMPSON. OK. Thank you. Deputy Director Guertin, currently the Lacey Act requires people to exercise due care to learn whether it is against the law anywhere in the world to transport, possess, or sell a specific fish, wildlife, or plant product. And yet the Federal Government has taken the position that it is not their job to identify what international law might trigger a Lacey Act violation.

It seems like the law is set up in a way that folks will violate it no matter what they do. It is difficult enough for probably large, multi-national companies to keep track of all the international laws covered by the Lacey Act, but how do we expect an individual musician, a mom-and-pop business to exercise due care, especially when there is no data base of international laws to consult? That lack of a data base is something I saw as striking, actually.

Mr. GUERTIN. Yes, Congressman. And we recognize that is a great frustration, both for industry and private citizens. Like APHIS, we are focusing a lot of effort on education, outreach, interpretive materials for folks coming in across the borders through various mechanisms to relieve some of the uncertainty, particularly for those who are musicians in the population.

The U.S. just sponsored, at the Congress of Parties conference in Thailand, CITES, this past spring a new musical passport that will be implemented mid-next month that would allow American citizens to have one document, instead of having to require them to obtain a document for every country they travel to. So we are really trying to pursue some creative solutions to give both private citizens and industry a little more certainty. Because we recognize the overwhelming majority of commerce is very legitimate—law-abiding citizen, as well as industry.

Mr. THOMPSON. Thank you for sharing what you are doing, in terms of specific musicians. That is obviously the kind of background that really got this teed up most recently. But it obviously expands beyond a guitar or a musical instrument. The folks are traveling overseas, and they pick up some type of trinket, some type of souvenir, like we have all done. How do we assure that the citizens who, quite frankly, find themselves in a situation where they are being arrested, prosecuted, made an example of, when,

quite frankly, these are folks who were just acting the way most innocent tourists do?

Mr. GUERTIN. Sure, Congressman. The Fish and Wildlife Service or any Federal agency will not try to make a case against anyone who has unknowingly violated any type of wildlife law. We, again, try to focus on education, outreach, a lot of just information for people. We focus all of our law enforcement at the commercial scale, where we think we can really make a significant difference with those bad actors out there who are doing the wholesale take of plant, fish, wildlife, and other species like that.

If a citizen is caught, unfortunately, it is just, for us, more of a unfortunate situation. We may or may not confiscate the item, let them off with a warning. But it is more about education and outreach for the individual citizen.

Mr. THOMPSON. Very good. Thank you. Thank you, Mr. Chairman.

Dr. FLEMING. The gentleman yields back. Next, Ms. Shea-Porter.

Ms. SHEA-PORTER. Thank you, Mr. Chairman. And I am always impressed when I look back in history and see how much our forefathers and mothers had the insight and the foresight to see some of the challenges ahead and to put laws into place to protect our very precious environment.

And about a week ago I read in the New Hampshire newspaper that we were having problems—illegal harvesting of eel elvers. And for those who don't know, those are baby eels. And I have to admit I didn't know that word, either. But the issue existed, and continues to exist, and so we are grateful for organizations and government agencies such as yours to monitor and to help protect these resources for this generation and the next generation, as well.

I, too, am concerned, and I hope we will see that report next week. There are certain responsibilities that come with that and, you know, that is given, and I appreciate the fact that you have addressed that.

So I have questions for both of you. First, how has the difficult budget climate hindered APHIS's ability to implement the 2008 Lacey Act amendments? And can you also tell me, please, what impact you expect the sequester to have on your agency, going forward?

Ms. BECH. Yes. Thank you. Well, certainly it wasn't until just a few years ago that we actually received any appropriated funds for helping us implement. We have had very, very limited resources to provide work for this effort.

We are requesting the \$1.445 million for next year, and we are hopeful that will be supported. Certainly these resources are much needed. We would continue to add some staff to this effort. We would look at other innovative ways—enhancing the data base that we have to help us analyze the information, and looking at other efforts in providing outreach and education.

So, with the support of the budget, we believe, then, that we will be able to continue the efforts that we have already begun. Thank you.

Ms. SHEA-PORTER. So your workload has increased without the extra funding to enable you to accomplish all that you hope to accomplish, and that we have asked you to.

Ms. BECH. The workload has increased. And, of course, there is certainly more that we would like to do, as well. And so, again, we are hopeful that the budget request will be supported. Thank you.

Ms. SHEA-PORTER. Thank you.

Mr. GUERTIN. Thank you, Congresswoman. Specifically with the impacts of the sequestration on our law enforcement program, because of the way this was applied at the sub-activity level, it precluded us from being able to move forward to hire a new class of law enforcement agents to add additional capacity. Our solution, like all the Federal agencies, is we are focusing our efforts with the folks we do have on board, where we can make the most significant impacts. But not bringing in that next cadre of folks will have a long-term effect on our ability to implement the program.

As to moving forward, the President's budget request for 2014, which the U.S. Congress is currently evaluating for your consideration through the appropriations process, there are some incremental funding increases in their for our law enforcement program, which would allow the Service, if Congress appropriates this funding, to hire an additional five positions overseas in range countries—specifically in Asia and Africa, for example—as attachés to work with the international business community, international countries, education, enforcement, as well as proactive solutions to keep a better eye and put solutions on the ground for the trade in wildlife, plants, and fish species as well.

Ms. SHEA-PORTER. OK, thank you. And you can keep your mic on, because I had one more question for you. After China, the United States imports more wood products than any other country in the world. Do the 2008 Lacey Act amendments make it more difficult to bring illegal wood into the U.S.? And what do you base your statement?

Mr. GUERTIN. We don't think it makes it any more difficult for legitimate businesses to import any type of product in with the new requirements of the 2008 Lacey Act. What this Act has given the Federal agencies the ability to do is get a better handle on the illegal importation of some of these products, and for us then to focus our efforts on those bad actors who are out there.

Ms. SHEA-PORTER. Have you been able to reduce any of the illegal wood coming in by using that?

Mr. GUERTIN. It is only anecdotal information coming in so far, Congresswoman, but we believe the trend is starting to show up that there has been an impact on making a difference in some of this illegal commercial utilization overseas.

Ms. SHEA-PORTER. Which would be good for domestic producers.

Mr. GUERTIN. It would be very good for domestic producers, yes.

Ms. SHEA-PORTER. Thank you, and I yield back.

Dr. FLEMING. The gentlelady yields back. Mr. Harris?

Dr. HARRIS. Thank you very much. And thank you, Mr. Chairman and the Committee, for allowing me to sit in in my old Subcommittee.

Let me just ask a question, just so I get it straight. Now, Ms. Bech, you are charged with kind of collecting these forms, but you

don't investigate them or all. How do they get from you over to Fish and Wildlife?

Ms. BECH. Yes, sir. That is correct, we don't do the enforcement piece. So we are collecting the declarations. We send these over once a month, and also at request. Like recently, the Department of Justice has asked for all the paper declarations, and they will be scanning those and then using those in their enforcement actions.

Dr. HARRIS. OK. So you are just a passive conduit. I mean you don't do anything with those forms. You don't look at them in any way, you are a conduit. You collect them and pass them on.

Ms. BECH. Well, we do monitor them.

Dr. HARRIS. But what is monitor? If you are not doing investigations, what does monitor mean? I mean this sounds just like the background check for guns. The FBI gets the NICS call, but it doesn't do anything. It just hands everything over to ATF. So is this the same situation? I mean you are not responsible for enforcement at all?

Ms. BECH. No, sir. We are not—

Dr. HARRIS. OK. And you collect—was your testimony that if you had—all these reports were made, you are getting about 40,000 a month—did you say it would be a whole lot more if everybody had to report everything? It would be, like, a million a month? Is that what you said?

Ms. BECH. Yes, sir. That is correct.

Dr. HARRIS. A million a month. And you would just be passing them—OK. Well, let me get to Mr. Guertin.

So, what peaks your interest in these reports? Because my question to you is I have information here, I want to know if it is true, there are only three ongoing investigations, none of them triggered by a declaration form. Is that right?

Mr. GUERTIN. There are actually six cases that we have worked on in the last fiscal year, Congressman. Three have been satisfied, three are ongoing. In some part, our information was derived from these declaration forms. I can't get into the details of those cases, but they do include commercial exploitation overseas.

Dr. HARRIS. Commercial what?

Mr. GUERTIN. Exploitation of paper product or timber overseas.

Dr. HARRIS. OK. All six of those?

Mr. GUERTIN. All six of these cases we have looked into have been wood-related.

Dr. HARRIS. OK. And how many of them were triggered by the fact that somebody at Fish and Wildlife saw something on one of these 1.9 million forms?

Mr. GUERTIN. The three cases that are currently under investigation right now were partly informed by the information derived—

Dr. HARRIS. I don't understand what "partly informed" means, because it means—somebody's ears have to go up on something. Partly informed could mean that it is just part of the investigation. I mean how many originated because one of these forms triggered—because I am going to an on-demand system, where, obviously, you wouldn't see a form. So—

Mr. GUERTIN. I can't share any further information because this is an ongoing investigation. We would be glad to sit with you offline and go through some of the specifics of this.

Dr. HARRIS. Why? I am just curious; I am relatively new to Congress. Why would offline and online be any different? Are we hiding something from the American people?

Mr. GUERTIN. Not at all.

Dr. HARRIS. Then go ahead and answer my question.

Mr. GUERTIN. These are cases that are under active investigation right now with us and the Department of Justice.

Dr. HARRIS. Are these national security issues? Look, this is a congressional inquiry. You are collecting 1.9 million pieces of paperwork causing tens of millions of dollars to American businesses. I want to know if any of those pieces of paperwork was the origination of investigation.

Mr. GUERTIN. In part it was, Congressman. But, Congressman, I will also be honest with you—

Dr. HARRIS. Let me tell you how other systems work, like NICS. You know, ATF doesn't investigate someone trying to illegally obtain a firearm unless the FBI says, "Someone tried to illegally obtain a firearm, here is the information, go ahead and investigate."

I want to know if that is how those investigations started. It is a simple question. It is not a complicated question. I mean did somebody sitting in an office, wasn't going to do anything, got a piece of paper or an electronic form from Ms. Bech's 1.9 million submissions and said, "Oh, my gosh, I think there is a crime here," or did somebody have a suspicion, got a piece of paper, and continued to investigate, which would lead to the belief that an on-demand system would work just fine?

This is not a complicated question. There are only six of these. If you have to go back and take some time to review back at home at the office, all six, just tell me you need time to review.

Mr. GUERTIN. Congressman, you won't be satisfied with my oral statement here, so yes, we will provide for the record a more detailed—

Dr. HARRIS. And when will you have that answer available to me?

Mr. GUERTIN. Within the next week, if that would be satisfactory.

Dr. HARRIS. A week would be fine. Now, let's get to an on-demand system. Can you do it under the current confines of the statute, or would you need a statutory change?

Ms. BECH. APHIS does not have the authority under the current statute to implement an on-demand system at this time, since the Lacey Act does require importers to file a declaration upon importation.

Dr. HARRIS. So you would need a statutory change. And—

Ms. BECH. Yes, we—

Dr. HARRIS. And was your testimony exactly the same before? What were you talking about before when you said, yes, you may have some ability to change some of the declaration process? Was that just with electronic declaration, or—

Ms. BECH. No, sir. What we believe is through electronic submissions and our web-based system, that we can do some further

streamlining of the declaration process to address some of the concerns that people have identified that they feel like an on-demand system would correct. And so, we feel like some of those issues that have been brought forward can be addressed through another mechanism.

Dr. HARRIS. OK. Thank you very much. Thank you, Mr. Chairman.

Dr. FLEMING. The gentleman yields back. Mr. Duncan is recognized.

Mr. DUNCAN. Thank you, Mr. Chairman. And just the nature of Congress, things pull you away sometimes. This is a very interesting topic, something that we have been following for a number of years.

And I really don't have any questions for the panelists, but this may have been brought up earlier, but when this Lacey Act issue, especially with Gibson Guitars and maybe a couple of others came out, we raised concerns about whether certain groups were being targeted by the U.S. Fish and Wildlife Service over the Lacey Act because they were contributors to certain campaigns or had certain leanings. And in light of what we see going on right now with the IRS targeting certain groups that just have words like "patriot" or "freedom" in their names, or that study the Constitution, in light of that scandal that is going on right now, I think it is important that we keep in mind and be cognizant of what happened with Gibson Guitar, and the concerns we raised about the Lacey Act being used to target certain groups. I think it is time to revisit that.

I don't know if there is any substance to it, but it is something that I am cognizant about, as we have this hearing, in light of what is going on in Washington. And after that comment, I will just yield back. Thank you so much.

Dr. FLEMING. The gentleman yields back. I believe that is all for the first round. I think there is perhaps some follow-up questions—

Ms. SHEA-PORTER. Mr. Chairman? Could I make one more statement, please?

Dr. FLEMING. Yes.

Ms. SHEA-PORTER. Thank you. I am concerned that when we have these hearings, we are not germane and we are just not staying on topic a lot of times. And I have some concerns. I realize that there are issues that divide us. But honestly, I mean, to keep politicizing this, we are not having an IRS hearing right now. And I just don't think it is helpful to the tone. We are sitting here trying to bridge this gap. It is not just the feet between us, but it is also some viewpoints. And I just think that I hope the next panel—

Dr. FLEMING. Does the gentlelady want to bring up a point of order?

Ms. SHEA-PORTER. Yes, I—

Dr. FLEMING. Because I will be happy to give you time in just a moment—

Ms. SHEA-PORTER. Thank you.

Dr. FLEMING [continuing]. If you have—

Ms. SHEA-PORTER. Thank you. I just wanted to say—actually, I will just leave it as it is, and say our next panel—

Dr. FLEMING. The Chairman duly notes that.

Ms. SHEA-PORTER [continuing]. I hope we can concentrate on the issue at hand. Thank you.

Dr. FLEMING. So we will begin another round here of questioning. And I will recognize myself for 5 minutes.

I just want to be sure, Mr. Guertin. You said something and I am not sure—we may have miscommunicated in question-and-answer. Just to be sure—because I asked if—that it is both sustainable and legal. In other words, if it is illegal, can it also be sustainable. And your answer, I wasn't sure whether you agreed with that or not.

Mr. GUERTIN. Congressman, I think the bagpipes were playing then. I thought you said can it be both sustainable and legal. But you are clarifying now “illegal”? No——

Dr. FLEMING. My question is “illegal.”

Mr. GUERTIN. And I apologize, because I——

Dr. FLEMING. Yes.

Mr. GUERTIN [continuing]. Misunderstood what your question was.

Dr. FLEMING. Yes.

Mr. GUERTIN. But it cannot be both sustainable and illegal. And thank you for that opportunity to clarify that.

Dr. FLEMING. OK, thank you. Now, Ms. Bech, it is interesting. You said, as I understand your testimony and your response to questions, you do not feel any further amendments are necessary for the Lacey Act, that everything can be done without any further amendments?

Ms. BECH. That is correct.

Dr. FLEMING. And do you agree with that, Mr. Guertin?

Mr. GUERTIN. Yes, Chairman.

Dr. FLEMING. But yet, when I said, “Well, it seems like to me we could solve a lot of problems here by exempting prior May 22nd,” you said that would require further acts. So it seems like, to me, that you are already suggesting that—and there have been other questions raised, as well—that there are problems already that we can't fix without further legislation.

Ms. BECH. Well, we believe that by providing the special use designation, where a importer can come in and through due care has tried to determine genus and species, is unable to do so, then they can evoke the special use designation and say pre-amendment 2008, and therefore they meet the requirement of the declaration.

Dr. FLEMING. Yes, but that is very problematic. So why not just exempt? Prior to May 22nd that is old history. Why in the world are we still struggling with this problem? You say that under current law you don't have the ability to create regulations to solve that problem.

Ms. BECH. That is correct.

Dr. FLEMING. That is correct?

Ms. BECH. Yes.

Dr. FLEMING. OK. All right. Now, here is the other question I have. Do I also understand, Ms. Bech, that you said that industry widely accepts this, that the current Lacey laws in effect, and the amendments of 2008 are widely accepted by industry? Is that part of your testimony? I thought I heard you say that. I just wanted to confirm. Did you say that or not? We can always go back to the

transcript. So you seem to be a little hesitant to agree with yourself on this. I just want to get clarification.

Ms. BECH. Well, I don't recall specifically stating it is widely accepted. I said that we have been working with importers on the use of it, and we have streamlined efforts to help them. And so they are able to comply with the declaration.

Dr. FLEMING. But my question is, is industry widely accepting this? What, in your view, is industry acceptance on this? I mean we are hearing about 1,000-page applications that have to be completed, very expensive, lots of impact. You heard Mr. Duncan refer to what we are seeing in government today, where industry is being intimidated by the Federal Government in many different areas, not just the IRS. We are hearing reports about the Endangered Species Act and other areas.

So, my question is, do you have a sense that industry widely accepts the current Lacey Act and the 2008 amendments?

Ms. BECH. Well, I think that we have heard from many industries that feel like there are a lot of challenges in complying with it. And we have also heard from industries that feel very strongly in support of it. So we have tried to address the concerns and the challenges that some of the industries have brought—

Dr. FLEMING. What about you, Mr. Guertin? What is your perception of industry? Is it widely accepted by the industry?

Mr. GUERTIN. I think we have some acceptance from certain segments and certain individual companies and individuals in industry. We have heard concerns from other members of industry, as well. We are trying to, within that framework, move forward to be proactive and put solutions on the ground for implementation, so that we can make this law—

Dr. FLEMING. I am not hearing that you are confident at all that industry is comfortable with what is going forward, and it isn't fully implemented.

Well, let me ask one other question. Do you have the authority to establish a data base of foreign laws? Either one of you.

Mr. GUERTIN. I would have to check with our authorization lawyers on that, Mr. Chairman—

Dr. FLEMING. Ms. Bech?

Mr. GUERTIN [continuing]. Personally aware—

Dr. FLEMING. Do you know?

Ms. BECH. Yes. We currently have no plans to establish that data base. And again, I—

Dr. FLEMING. I am sorry. I didn't ask you if you had plans. Do you have the authority? Because, again, you said, "We don't need any more laws, we don't need any more amendments." Do you have the authority to do that?

Ms. BECH. I would have to check with my office of general counsel.

Dr. FLEMING. I would ask that you both find out and report in writing on that.

Thank you. I would now recognize Mr. Sablan for 5 minutes.

Mr. SABLAN. Thank you very much, Mr. Chairman. And let me say, Mr. Guertin, can you please explain why the declarations required under the 2008 Lacey Act amendments are an important tool for law enforcement? Doesn't having these records increase

your chances of finding patterns of illegal activities? And would an on-demand system limit your ability to identify patterns of illegal activity in real-time?

Mr. GUERTIN. Thank you, Congressman. As is the case with many wildlife cases that we are involved with, most of the declarations filed are never used, because they are filed by businesses that are following the law. That said, we use these declarations as part of all of the tools at our disposal for law enforcement to prioritize which cases we want to pursue. And this type of on-demand system that you and the other Members and the Chairman have been talking about may be a way forward to help further strengthen this program, overall.

Mr. SABLAN. All right. That is why I am thinking, because I heard over a million declarations were filed. And out of that, maybe six, maybe less than six have led to investigations.

Because Dr. Harris raised questions earlier about filing all the declarations. And I am sure in the medical professions, checklists serve as an important tool to avoid medical mistakes. I am not a doctor, but I am assuming that, because I have seen my doctor do that.

So, in your view—I am thinking, but I am asking you—in your view, is the declaration a kind of checklist to help those in the timber industry ensure that they are not contributing to illegal logging? Maybe those one million declarations have led to maybe six or less investigations—maybe those checklists helped. I am asking both of you. We will start with Mr. Guertin, please.

Mr. GUERTIN. Thank you, Congressman. The forms that are filed, we don't view them necessarily as a checklist, as just a report of what the product is that is being shipped into the U.S. We use this and a whole lot of other information to prioritize our caseload for our law enforcement program. Our agents work each year on about 13,000 high-priority cases, where we evaluate and then prioritize which cases warrant further workload and investigation, if there has been a significant violation.

Of those, it is probably in the hundreds that we actually turn into a formal case to investigate and then try to prosecute. And of those, over the last two cycles, six have been plant-related. So it is part of an information process that we use to focus up—

Mr. SABLAN. Ms. Bech, I have several questions. Can you give me a short one on my question?

Ms. BECH. Yes, sir. Again, we are primarily responsible for collecting the declaration. We do refer those. And I am aware, from Fish and Wildlife Services and DOJ, that there are some open investigations.

Mr. SABLAN. All right. And so now, Ms. Bech, let me ask. How has public feedback affected how you have implemented the 2008 Lacey Act amendments? Have you been open to industry's suggestions for making compliance easier?

Ms. BECH. Yes, sir. We have worked very hard with the industry groups to hear what their concerns are. And we have tried to address those in many different ways. We have provided, again, a lot of guidance to them in how to fill out the declaration forms. Primarily we heard that their ability to research the sourcing of the product has been a real challenge.

Mr. SABLAN. So if a company makes an honest mistake, for example, what happens? Wouldn't the United States Department of Agriculture, your, what, Animal and Plant Health inspection service be most interested in helping those companies comply with the law?

Ms. BECH. Yes, sir. When we find that there has been an error or a problem with filling out the declaration, we go directly back to the importer and try to work with them to help them in completing the declaration accurately. And so we provide a lot of direct comments back to them and work with—

Mr. SABLAN. And maybe that is why we have maybe six of them, maybe—charges filed. I think it is working. I am not sure—something that works—but anyway, Mr. Chairman, I yield back my time.

Dr. FLEMING. The gentleman yields back. The Chair now recognizes Mr. Thompson for 5 minutes.

Mr. THOMPSON. Thank you, Chairman. I wanted to try to get to some numbers, actually, in terms of violations, Deputy Director Guertin, can you provide an accounting for how many Lacey Act violations have been investigated And prosecuted since the 2008 amendments, a description of the violation, and the international law and the country of origin at issue, and how the matter was resolved? Is there a data base like that available that—I don't expect, obviously, all that information today. But whether it is—is that something you could provide within 2 weeks, or—

Mr. GUERTIN. Yes, Congressman. We will provide the information that we have available in the Fish and Wildlife Service as a follow-up for the questions and records—and an insert for the record for the hearing, if that would be acceptable.

Mr. THOMPSON. I think that would be very helpful, in terms of good transparency, gives us some idea of a kind of a way to check the pulse of what we are seeing, where the violations are.

Do we—and I am in the camp that—I think we should be, as we get information in terms of international laws that impact this, in terms of avoiding the bureaucracy that sometimes gets folks into trouble when they are not aware of—I really do believe we should be creating that type of a Web site for folks to peruse. Do we put that information out, that you are going to be able to provide me, in a public way so that is at least a tool that people can look to and say, “Hey, well, you know what? Obviously, this has been recognized as a violation, so it is not a place I want to go. It is not a plant product that I want to go after”?

Mr. GUERTIN. Yes, Congressman. We do annual reports from our law enforcement program that—some of it is included in the budget justification, some of it we have on pamphlets and web pages. And we would be glad to include those reference materials as part of the hearing record, as well.

Mr. THOMPSON. That would be great. Is that a part of the—what you talked about, the education, more collaborative approach that you—where possible, that you are able to take on this issue?

Mr. GUERTIN. Yes, Congressman, we would be glad to provide those details as part of the hearing record.

Mr. THOMPSON. OK. I wanted to kind of really focus and see if—how many misdemeanor convictions have you had during the past 5 years in regards to plant and plant products? Is it—

Mr. GUERTIN. We have had none, Congressman.

Mr. THOMPSON. No convictions.

Mr. GUERTIN. No. With your permission, Congressman, I clarify no convictions for a misdemeanor.

Mr. THOMPSON. OK. Any idea of how many violations, investigations of violations?

Mr. GUERTIN. Just the six we have talked about, Congressman.

Mr. THOMPSON. OK. Very good. Mr. Chairman, I yield back. Thank you.

Dr. FLEMING. The gentleman yields back. Ms. Shea-Porter?

Ms. SHEA-PORTER. Thank you, Mr. Chairman. Of course, a part of the job here is to provide those guidelines so people don't make those mistakes. And so it isn't simply an enforcement tool, it is also a tool to educate and to make sure—so I think the fact that we have everybody register their cars and get licenses, we don't assume—and actually, it is a very small number that actually do something terrible in their cars, but there is still a process where they learn, have a permit, they study the rules.

And so, is it so that this actually helps people to protect? It is not simply a punitive tool that you are seeking, but also to help protect our environment and our resources and help protect our businesses? Do you see that as your role, also?

Mr. GUERTIN. Yes, Congresswoman. This is part of a larger portfolio of conservation statutes that the Fish and Wildlife Service and the other agencies work on in partnership with the States, the Tribes, and the international community to safeguard under the rubric of the North American Model of Conservation that goes back 150-some years here in our country that guides this larger founding principle that these wildlife, plant, and fish species belong to all of us and for future generations to come.

Ms. SHEA-PORTER. Right. And I think that we would rather protect than prosecute. So I think it speaks well that there are few prosecutions.

Now, I heard the Chairman say that this—all of this seems to somehow or another intimidate businesses. But I am holding a letter to the House of Representatives from businesses. And I would like to read into the record. It says, "The U.S. forest products industry has a proud tradition of providing sustainable and legal resources to our customers, both domestically and around the world. Illegal logging and the threat posed to U.S. jobs and forest resources by illegally sourced products throughout the world is being addressed by the Lacey Act, allowing our industry to compete fairly in the international market." So they oppose these amendments, and they go on to list their names here.

And this is industry speaking now, and I will just name a few of them, because they are big ones. American Forest and Paper Association, they do not seem to be intimidated. Anderson Hardwood Floors, Associated Oregon Loggers, Appalachian Hardwood Manufacturers, Columbia Forest Products. I am trying to pick from around the country. Hardwood Federation, International Paper, Kentucky Forest Industries Association, Minnesota Timber Prod-

ucts Association, Virginia Forestry Association, Treated Wood Council, Timber Products, Texas Forestry Association, Wood Components Manufacturers Association. I would argue, Mr. Chairman, that rather than be intimidated, they seem to be supporting and appreciating our role here, and the Lacey Act, in trying to protect them from illegal actions.

Dr. FLEMING. Would the gentlelady yield—

Ms. SHEA-PORTER. Yes, I will.

Dr. FLEMING [continuing]. Just for a moment? None of those are importers of wood products.

Ms. SHEA-PORTER. Say that again.

Dr. FLEMING. None of those that you listed are importers of wood products.

Ms. SHEA-PORTER. The point that we are making here, again, is that what we are trying to do is, first of all, make sure that we don't have that. So they support this. The other part is—we are talking about American industry. And American industries, that is what we are about. That is our goal here.

Let me read a little bit more, reclaiming my time—

Dr. FLEMING. Well, could I just—

Ms. SHEA-PORTER. Reclaiming my time, thank you. "Because of the seriousness of this issue, our industry has worked within a unique coalition that also includes environmental groups, labor organizations, retailers, and others, to amend the Lacey Act and to encourage full and timely implementation." And they go on to talk about the importance of the industry meeting a payroll of approximately \$50 billion annually.

This is important to our industry. It is important to our country. And it is also important to not only the people who occupy this land now, but those who will be here in times to come. And so, while we certainly always want to make sure that these agencies do the work properly, that they don't go after any certain sector, and we want to make sure that it is fair, there is also reason that we do this. These laws don't just come about because certain people have decided to harass other people here. This is critical work they are doing.

And again, the law dates back to, what, 1900? So all of the issues and the sub-issues that we are arguing here, 1900 they recognized that there was a problem and they wanted to address it to conserve and protect. And I think that while we talk about this, we need to make sure that we are careful about how we talk about this, as well. Thank you, and I yield back.

Dr. FLEMING. The gentlelady yields back. Again, before I recognize a point of personal privilege, what we are discussing today is filling out these voluminous, very expensive forms. And again, I can understand that a domestic wood company would not have a problem with that because, again, they don't deal with that.

So, with that, I will yield to the gentleman, Mr. Duncan.

Mr. DUNCAN. Thank you, Mr. Chairman. And thanks for making those comments. And I believe in the Lacey Act. I believe it serves a very valid purpose, from its original intent. And so I don't want any comments to be construed that I don't appreciate the efforts of Fish and Wildlife Service and other agencies that actually have to enforce this.

But I am concerned, and I appreciate the comments that a consumer wouldn't really have any criminal liability if they did due diligence to investigate where the particular material that made whatever consumer product they were purchasing, and I will use a guitar here, since Gibson is on my mind. But when a customer goes in a store and they purchase a guitar or any other item from the shelf, they play it, they like it, like the sound of it, like the look of it, how much more due diligence do they really have to do about where that wood came from, or where other products that were used in that item came from?

And so, I appreciate there is no criminal liability, but I still question them out of due diligence.

And then the second thing I just—and I don't expect an answer on that. The second thing I am concerned about is a story that I read last year when we were having these Lacey Act hearings about—I believe it was lobster tail that was packaged by a company in the United States that were to be shipped, I believe, to Honduras. And they were seized by our government, not because that company had violated U.S. law at all, other than a provision in the Lacey Act of 2008 that says you can't violate a law in another country. So that company has to know the laws of another country, and hope that they are not violating that, when their own government swoops in with SWAT-like tactics, often times, to seize products and face tremendous fines that actually puts that company out of business. That seems a little un-American to me, that we would require and enforce the laws of another country. I think that is a caveat within the 2008 amendment when we start enforcing laws of other nations. We should enforce the laws of the United States.

So, I think that is just something the courts are probably going to end up having to decide, or we in Congress are going to have to change within the 2008 law, to take that ambiguity out, because I think we have an ultimate goal and role to support U.S. industry, U.S. small businesses. And so that is just a concern I have. Maybe you all have touched on that.

But the last question I would like to ask is the accounting of how the Lacey Act violations have been investigated and prosecuted since the 2008 amendments. And so I am asking can you provide to this Committee, preferably within 7 days, a description of the violations, international laws, and country of origin at issue, and how the matter was resolved, where there has been Lacey Act violations? If you can just provide us an accounting. Maybe you have that today. If you do, that is great. If not, I look forward to that being submitted.

Mr. GUERTIN. Thank you for that question, Congressman. To put everything in context, we work on almost 13,000 law enforcement cases each year for all of the wildlife laws that we enforce. And of that total, almost 2,500 are for violations of the Lacey Act, interstate—

Mr. DUNCAN. 2,500.

Mr. GUERTIN. But when you throw in all of the other statutes, Endangered Species, African Elephant Conservation Act, the Rhino and Tiger Act, smuggling laws, and things like that, the Lacey Act is a small subset of that. And of those 2,500, we have pursued

about 6 for plant-related things. But we are largely focusing our efforts on some of these larger smuggling rings for rhinos and tigers and some of these charismatic megafauna.

The caseload is building slowly for some of these plant species and timber species as well, but as we told your colleague, Congressman Thompson, we would be glad to provide a detailed rack-up of these statistics, as well, for the record.

Mr. DUNCAN. Yes. Well, Mr. Chairman, I don't have any further questions. I just hope the panelists and government agencies that are overseeing the Lacey Act understand the frustration of Members of Congress as we hear from companies that have been affected in other ways about what is the role of Federal Government, what should we be enforcing and what are we enforcing and why, and how we can just pull back a little bit to make sure that businesses understand the law.

Businesses don't want to violate the law. There are violators out there. There are people that are going to break the laws anyway. I am not talking about that. I am talking about the companies that are just trying to provide for their workers and their family, provide products for this country, and they are trying to do it within this myriad of regulations and rules that they have to operate in. They need to be able to have some certainty that the game isn't going to change tomorrow. They need to have some certainty that they can legibly read and understand the laws that are on the books, so that they can comply.

Whether that is State or local or Federal laws, I think we owe it to those businesses to provide that ability for them to understand how they need to operate, what does that spectrum look like, so that they can provide those services and provide for their family, ultimately, and be successful chasing the American dream. And so that is why I think this is so important, Mr. Chairman. And I appreciate you guys understanding our frustration as we hear from the others, and as we work together to make sure that we support those businesses. And I will yield back.

Dr. FLEMING. The gentleman yields back. And we thank you today for your testimony and answering questions. We need to move along to our next panel, so we will excuse you and ask the next panel, the second panel, to step forward.

Your written testimony will appear in full in the hearing record. So I ask that—oh, I am sorry, I jumped ahead here. Yes, right here, here we are.

OK, all right. We are now ready for our second panel of witnesses, which includes Mr. Steve McCreary, General Manager, Collings Guitars; Mr. Travis R. Snapp, Chief Operating Officer of Benchmark Holdings; Ms. Birgit Matthiesen, Special Advisor to the President and CEO, Canadian Manufacturers and Exporters; Mr. Jameson S. French, President and CEO, Northland Forest Products; Mr. Marcus A. Asner, Partner, Arnold and Porter; and Mr. Erik O. Autor, the President and CEO of Autor Global Strategies and Total Spectrum.

Your written testimony will appear in full in the record today, so I ask that you keep your oral statements to 5 minutes, as outlined in our invitation letter to you, and under Committee Rule

4(a). Our microphones are not automatic, so be sure and push the button to turn it on, and keep the mouthpiece close.

The timing lights are very simple. You have 5 minutes in your testimony.

You will be under green light for the first four, yellow light for the last minute, and when it turns red we ask that you quickly conclude your comments.

I now recognize Mr. McCreary for 5 minutes on your testimony on behalf of the National Association of Music Merchants.

**STATEMENT OF STEVE MCCREARY, GENERAL MANAGER,  
COLLINGS GUITARS, INCORPORATED**

Mr. MCCREARY. Mr. Chairman, Congressman Sablan, and members of the Subcommittee, my name is Steve McCreary. I am the general manager of Collings Guitars, which is a medium-sized manufacturing company located in Austin, Texas. I am here today on behalf of NAMM, the National Association of Music Merchants. They are headquartered in Carlsbad, California. They have more than 9,000 member companies who make and sell a variety of musical instruments and accessories. I appreciate the opportunity to be here today and share our industry's views on the 2008 amendments, one of our country's most important conservation laws, of course, the Lacey Act.

We operate in a 27,000 square-foot facility in Austin with 90 employees. Last year we produced more than 2,700 high-end acoustic and electric guitars, mandolins, and ukeleles. We sell through retailers in 34 States and 19 countries, and our exports have grown to be approximately 20 percent of our business. To maintain our quality and reputation, hand-crafting still plays a major part of our instruments process, and we must pay close attention to the species and sourcing of wood and other materials used in our instruments.

With regard to the 2008 amendments, our company, NAMM, and the music products industry are supportive of the goals of this law. While we know of no direct evidence which would indicate that passage of the amendments have resulted in a reduction of illegal logging, we are keenly aware that it is important to promote the legal and sustainable production and harvesting of the wood species which lend so much to the beauty and tonal quality of our instruments.

Collings has always made an effort to exercise caution in our procurement practices, but I believe we are currently better stewards due to the 2008 amendments. Lacey led us to review our vendor compliance program, thereby eliminating some suppliers while continuing to deal with those we believe share our integrity and commitment to legal and responsible practices.

Nevertheless, we do have some concerns about how the 2008 amendments have impacted our business, and our customers, both retailers and musicians. In short, the way it is applied has been increasing our cost.

First is the import declaration process. About 40 percent of our woods come from outside the States. And for every shipment, inbound shipment, a document must be filed with the Animal, Plant and Health Inspection Service. Regardless of who the importer of

record is, a customs broker must assist with the details involved with the imports, and it costs us money each time an import declaration is filed. As with filing our export declarations for instruments that leave our borders that have inlays made of seashell, these filing costs add up. The whole process seems a bit like making taxpayers file a return with every paycheck, instead of annually.

We understand that APHIS is currently receiving almost 40,000 declarations each month, and processing these imposes a substantial cost and burden on the Agency. Even the reported effort toward the electronic filing I don't think will substantially reduce the costs to us or those of the government. There must be a more efficient way to accomplish this, and we believe that the importer of covered products should be required to maintain records pertaining to what materials they import and where they come from, and that such information should be available to enforcement agencies on request. But the document should not have to be filed with every shipment. We think this would be cost effective, and would allow the government to focus on finding the needle of high-risk imports, without having to look through the entire haystack of all imports.

As indicated, we have a due-care process that should assure us of receiving only raw materials which comply with Lacey's requirements. However, because of the broad reach of Lacey to cover a myriad and still undefined array of foreign laws, it could still be possible for our company or others to come into possession of material with questionable provenance. We are experts at making guitars, not foreign laws. We and our industry colleagues have a great concern that we could do everything right, have no actual or inferred knowledge of illegality, exercise required due care, and yet end up with materials or finished goods confiscated.

For many in our industry, that could be a death blow, especially true for the smaller companies, the way we started out, as well as our wholesale and retail customers and working musicians. We are certainly not arguing for a get-out-of-jail-free card for our industry; we simply think that the Lacey Act should provide for a process by which a manufacturer can seek the return of raw materials or finished products in front of an independent party, such as an administrative or court judge, before customs can impound them.

Finally, the 2008 amendments should be modified to exempt from all enforcement raw materials or instruments which were imported or manufactured prior to the effective date of the law. I know that most of our early instruments are still in use, and the same holds true for instruments made by other companies in our industry who have been in business far longer. There are plenty of 100-plus year-old instruments being played and performed with every day. We understand that the government's position that if pre-2008 products are resold after 2008, they are also subject to enforcement actions.

Saying that such actions are not an enforcement priority does little to ease the concern of the music products industry or our customers. We would urge that the law be amended to exempt material harvested and products finished prior to May 22, 2008 from all aspects of the Lacey Act.

In conclusion, Mr. Chairman, we are supportive of the goals and objectives of the 2008 amendments of the Lacey Act. As with any law, we think there have been unintended consequences. And we hope that with what we regard as common-sense proposals, the law could be modified favorably by the Congress. We thank you very much.

[The prepared statement of Mr. McCreary follows:]

**Statement of Steve McCreary, National Association of Music Merchants**

Mr. Chairman, members of the Subcommittee, I am Steve McCreary, General Manager of Collings Guitars, a medium-sized company located in Austin, TX. I am here today on behalf of NAMM, the National Association of Music Merchants. Headquartered in Carlsbad, CA, NAMM has more than 9,000 member companies around the world who make and sell a variety of musical instruments and accessories.

I appreciate the opportunity to be here today to share our industry's views on the 2008 amendments to the Lacey Act, one of our country's most important conservation laws.

Before I do, however, let me tell you a little bit about Collings Guitars, which started in the mid-1970's when Bill Collings began building guitars on his kitchen table with just a few hand tools. Descended from a family of engineers, Bill dropped out of college to pursue building guitars. A decade later, Bill was in Austin, building flattop and archtop guitars in his own small shop. As his reputation for outstanding quality and meticulous attention to detail quickly spread, Bill rented a 1,000-square foot space in 1989 and hired two helpers.

Today, Collings Guitars operates from a 27,000 square foot facility featuring technology that makes parts production more consistent, accurate and safe. Our approximately 90 employees produced more than 2,700 acoustic and electric guitars, mandolins and ukuleles last year. We sell through retailers in over 30 states and about 20% of our business is done outside of the U.S. We are proud that artists such as Lyle Lovett and Pete Townshend own many and perform with our instruments as do musicians in many other well-known bands

Despite our growth, handcrafting still plays a major part in our instrument production and we pay close attention to the type and sourcing of wood and other material used in our instruments. The spruce and maple used on the tops of many of our instruments come primarily from U.S. forests while other woods, used elsewhere in the instruments, come from many countries around the world.

With regard to the 2008 amendments to the Lacey Act, our company, NAMM and the music products industry are supportive of the goals of this law. While we know of no direct evidence which would indicate that passage of the amendments has resulted in a reduction in illegal logging, we are keenly aware that it is important to promote the legal and sustainable production and harvesting of the wood species which lend so much to the beauty and tonal quality of our instruments.

At Collings Guitars, we think we are in a better corporate position because of the 2008 amendments. We always thought we exercised due care in our procurement, but Lacey has led us to review our vendor compliance program, drop some suppliers and continue to deal with those who we believe share our integrity and commitment to legal and responsible procurement.

Nevertheless, we do have some concerns about how the 2008 amendments impact our business and our customers, both retailers and musicians.

First is the import declaration process. About forty percent of our woods come from outside the United States and for every shipment a document must be filed with the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture. We are importer of record for slightly less than half of our foreign wood and procure the rest from sources we believe are reputable suppliers.

Regardless of who brings in the shipment, however, customs brokers assist with the details involved in importing and while these brokers perform a valuable role in the supply chain, it does cost us money each time a Lacey import declaration is filed. As with filing export declarations for shell inlays, which are non-endangered species, these costs are generally passed on to our customers. We understand that APHIS is currently receiving some 40,000 declarations each month and processing these imposes a substantial cost and burden on the agency as well. Even a reported effort toward electronic filing will not substantially reduce our costs or those of the government.

There must be a more efficient way to accomplish this. We think that importers of covered products should be required to maintain records pertaining to what materials they import and where they get them from, and that such information should be available to enforcement agencies on request, but that documents should not have to be filed with every shipment. We think that is more cost-effective and would allow the government to focus on finding the “needle” of high-risk imports, without having to look at the entire “haystack” of all imports.

As I indicated, we think we have implemented and follow a due care process that will assure us of receiving only raw materials which comply with the Lacey Act’s requirements. However, because of the broad reach of Lacey to cover a myriad—and still undefined—array of foreign laws, it could still be possible for our company to come into possession of material with questionable provenance.

We and our industry colleagues have great concern that we could do everything right, have no actual or inferred knowledge of illegality, exercise required due care and yet end up having materials confiscated. For many in the industry, that could be a death blow. That’s especially true for artisan luthiers—the way Bill Collings started out—as well as our wholesale and retail customers and working musicians.

We are certainly not arguing for a “get out of jail free card.” We simply think that the Lacey Act should provide for a process by which an alleged law violator can seek return of his raw materials or finished products in front of an independent party like an administrative or court judge.

Finally, the 2008 amendments should be modified to exempt, from all enforcement, raw materials or instruments which were imported or manufactured prior to the effective date of the law. I know that many of our company’s early instruments are still in use, and the same holds true for instruments made by other companies in our industry who have been in business far longer. Even instruments which are more than 100 years old are still being played today.

We understand that it is the government’s position that if these pre-2008 products are resold after 2008 they are subject to enforcement actions. Saying that such actions are not an enforcement priority does little to ease the concern of the music products industry and our customers. We would urge that the law be amended to exempt material harvested and products finished prior to May 22, 2008 from all aspects of the Lacey Act.

In conclusion, Mr. Chairman, we are supportive of the goals and objectives of the 2008 amendments to the Lacey Act. As with any law, we think there have been unintended consequences and we hope that what we regard as common sense proposals to modify the law will be favorably considered by the Congress.

Dr. FLEMING. Thank you, Mr. McCreary.

Next up is Mr. Snapp—you are Travis R. Snapp—for 5 minutes on behalf of the International Wood Products Association.

**STATEMENT OF TRAVIS R. SNAPP, MANAGING DIRECTOR,  
BENCHMARK INTERNATIONAL, CHIEF OPERATING OFFICER,  
BENCHMARK HOLDINGS, INTERNATIONAL WOOD PRODUCTS  
ASSOCIATION**

Mr. SNAPP. Good morning, Mr. Chairman, and members of the Committee. My name is Travis Snapp, And I am the Chief Operating Officer at Benchmark Holdings. I am pleased to be testifying on the Lacey Act before the House Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs today. I am here as a member of the International Wood Products Association. IWPA is the leading international trade association for the North American imported wood products industry, representing 200 companies and trade organizations. IWPA has also been active in the Lacey Act Coalition, a broad group of domestic manufacturers, retailers, and distributors, from small family businesses to multi-national corporations, that are greatly impacted by this law.

My company, Benchmark International, has certainly been impacted by the Lacey Act. Originally founded over 60 years ago as Pittsburgh Testing Labs, Benchmark International is one of the

oldest wood product certification and testing agencies in operation today. We provide independent, third-party certification of wood products, materials testing, research and development, international regulatory compliance program management, and engineering services.

I would like to speak to you about my professional experiences with the Lacey Act as a product and process certifier. I first became involved with the Lacey Act in 2008, when Congress amended the statute to include plant and plant products. Benchmark International immediately began working on a proprietary Lacey compliance verification program. This LCV program is designed to provide independent, third-party audits to assist manufacturers and importers in demonstrating due care, which the Lacey Act defines as the degree of care that a reasonably prudent person would exercise under the same or similar circumstances.

Under this program, Benchmark International offers the necessary training, detailed recordkeeping, onsite investigation, and verification to ensure that a company has exercised due care when sourcing raw materials for products or importing finished goods from abroad. Our program gives downstream customers a high degree of confidence in the products they purchase. Since Benchmark began offering the LCV program in 2009, we have had 33 manufacturing facilities from around the world request to enroll in our program.

However, due to the complexity of supply chain, and the broad scope of the Lacey Act, I have been forced to turn 29 of these 33 facilities away from our program. To be very clear on this point, this is not to imply that there is illegal material running rampant in supply chains. Rather, it demonstrates that supply chains are complex, making it difficult to identify every chip of wood used to produce a finished good, to the extent the Lacey Act requires.

Several manufacturing facilities, if enrolled in our program, would have required two to three full-time staff working 40 hours per week, just to keep track of the raw material stream. This complexity is not confined to the manufacturing facilities that have approached me. Companies in the United States and around the world utilize raw materials from a variety of sources, both domestic and foreign.

It isn't just the raw materials that make it difficult to certify to Lacey. The vast number of foreign laws included under Lacey are unmanageable in scope. Benchmark International contracts six legal firms overseas who track only the laws related to wood exporting, processing, concessions, and cutting in a mere six countries. That limited scope alone accounts for over 1,000-plus laws that U.S. companies have to comply with when importing wood to the United States. It has cost my clients upwards of \$300,000 since 2009, when we began our program.

These 1,000 laws and regulations do not scratch the surface of what the Lacey Act's true scope includes. When a speeding ticket for a truck transporting logs, an overweight vehicle, or a customs issue between two governments are all considered Lacey Act violations, from my perspective as a certifier, that is unreasonable and unachievable.

My recommendation to this Subcommittee is to clarify the scope of the Lacey Act as it relates to plant and plant products. This can be done by amending the 2008 Amendment to narrow its scope by compiling a list of all foreign laws that fall into the Lacey Act, or by a combination of both. It is imperative that the scope of laws be narrowed to those that actually deal with plant and plant products, that the concept of contraband be clarified so that businesses may have their day in court, and that pre-2008 material be exempted from the Lacey Act declaration requirement.

Thank you, Mr. Chairman and Committee members for the opportunity to appear before you today. I stand ready to answer any questions you may have.

[The prepared statement of Mr. Snapp follows:]

**Statement of Travis Reed Snapp, Chief Operating Officer,  
Benchmark International**

Good Morning Mr. Chairman and members of the Committee. My name is Travis Snapp, and I am the Chief Operating Officer of Benchmark International.

I am pleased to be testifying on the Lacey Act before the House Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs today.

I am here as a member of the International Wood Products Association. Established in 1956, IWPA is the leading international trade association for the North American imported wood products industry, representing 200 companies and trade organizations engaged in the import of hardwoods and softwoods from sustainably managed forests in more than 30 nations across the globe. Association members consist of three key groups involved in the import process: U.S. importers and consuming industries, offshore and domestic manufacturers and the service providers that facilitate trade. IWPA advances international trade in wood products through education and leadership in business, environmental and public affairs.

IWPA has also been active in the Lacey Act Coalition, a broad group of domestic manufacturers, retailers, and distributors. This Coalition has been reaching out to Congress since 2011 with four specific Lacey Act issues they would like addressed. They represent a wide cross section of industries, from small family businesses to multi-national corporations that are greatly impacted by this law.

My company, Benchmark International, has certainly been impacted by the Lacey Act. Originally founded over 60 years ago as Pittsburgh Testing Labs, Benchmark International is one of the oldest wood products certification and testing agencies in operation today. We are a global leader in providing independent third party certification of wood products, materials testing, research and development assistance, international regulatory compliance program management and engineering services.

I would like to speak to you about my professional experiences with the Lacey Act as a product and process certifier.

**Practical Issues with Lacey Act Implementation: The Complexity of Supply Chains and the Scope of Foreign Laws**

I first became involved with the Lacey Act in 2008 when Congress passed an amendment that added plant and plant products to the pre-existing Lacey Act framework. It was immediately clear that this would affect the wood manufacturing sector within the United States and abroad.

As soon as the 2008 Amendments were passed, Benchmark International began working on a proprietary Lacey Compliance Verification Program (LCV). This LCV program is designed to provide independent, third-party audits to assist manufacturers and importers in demonstrating “due care”, which the Lacey Act defines as the “degree of care that a reasonably prudent person would exercise under the same or similar circumstances.”<sup>1</sup>

Under this program, Benchmark International offers the necessary training, detailed record keeping, on-site investigation and verification to ensure that a company has exercised due care when sourcing raw materials for products or importing finished goods from abroad. Our program gives downstream customers a higher degree of confidence in the products they purchase.

<sup>1</sup>Animal Plant Health Inspection Service, United States Department of Agriculture. *Lacey Act Primer*. [http://www.aphis.usda.gov/plant\\_health/lacey\\_act/downloads/LaceyActPrimer.pdf](http://www.aphis.usda.gov/plant_health/lacey_act/downloads/LaceyActPrimer.pdf). Page 17.

Since Benchmark began offering the LCV program in 2009 we have had 33 manufacturing facilities from around the world request to enroll in our program.

However, due to the complexity of the supply chain and the broad scope of the Lacey Act, I have been forced to turn 29 of them away.

To be clear, this is not to imply that there is illegal material running rampant in supply chains. Rather it demonstrates that supply chains are complex and ranging across continents for individual manufacturers, making it difficult to identify every chip of wood used to produce a finished good from plant or plant products to the extent the Lacey Act in its current form requires.

Several manufacturing facilities, if enrolled in our program, would have required 2 to 3 full time staff working 40 hours per week just to keep track of the raw material stream used to produce finished products. This complexity is not confined to the manufacturing facilities that have approached me; companies around the world and in the United States utilize raw materials from a variety of sources, both domestic and foreign.

It isn't just the raw materials that make it difficult to certify to Lacey. The vast scope of foreign laws included under Lacey are unmanageable in scope—Benchmark International contracts 6 legal firms who track only the laws related to wood export, processing, concessions, and cutting in a mere 6 countries. That limited scope alone accounts for over 1000+ laws (and growing), and has cost my clients upwards of 300,000 USD since 2009 when we began our program.

These 1000+ laws and regulation laws do not scratch the surface of what the Lacey Act's true scope includes. When a speeding ticket for a truck transporting logs, an overweight vehicle, or a customs issue between two governments are all considered Lacey Act violations (a felony that is punishable by potential jail time and hundreds of thousands of dollars in fines) from my perspective as a certifier, that is unreasonable and unachievable. It causes uncertainty for American businesses that attempt to operate legally and in compliance with the Lacey Act's intent.

#### **Scope of Foreign Laws: A Workable Solution to Aid in Compliance**

My recommendation to this subcommittee is to clarify the scope of the Lacey Act as it relates to plant and plant products so as to provide assurances for businesses making every effort at due care. This can be done by amending the 2008 Amendment to narrow its scope, by compiling a list of all foreign laws that fall under the Lacey Act, or by a combination of both.

Businesses have been told not to worry, that the government would never prosecute over an infraction as minor as an overweight transport—but a customs misclassification was in fact the subject of a raid and seizure of goods. American businesses, the jobs they support, and the consumers they supply deserve clarity on the scope of foreign laws that fall under the Lacey Act. I would ask Congress to legislate these changes, so that the businesses I certify can have a chance at compliance with the Lacey Act's mandates.

#### **Contraband Should Be Clarified**

Further clarity should be provided for items seized in an alleged Lacey Act violation. Under the Department of Justice's current interpretation of the Lacey Act, material seized is considered "contraband"—as illegal as cocaine. While cocaine is instantly recognizable as illegal *per se*, wood—or finished products produced of or incorporating wood—are not.

This fundamental difference is integral. Because of this designation, items seized under the Lacey Act are deemed contraband. And much as an individual would be unable to petition a court for the return of cocaine, a company is not granted standing in court to petition for the return of their seized goods (assuming they can demonstrate due care).

It is imperative that the companies I certify can know they have some protection under the law should a Lacey Act case be brought against them, or someone in their supply chain.

#### **Clarifying Contraband: A Reasonable Solution**

Not one association or reputable company would ask for those who engage in illegal activity to be given a legal pass—if a Lacey Act violation does occur, if a company or individual has clearly and knowingly traded in illegal material, then I and IWPA would support the appropriated penalties under the law. Illegality need not be rewarded. Just as I sit before you today giving testimony on the implications of the Act as currently written, I would testify against any entity domestic or foreign who knowingly violated the Act.

Ethical companies that have demonstrated their attempt to comply as best they can with the Lacey Act should be accorded a day in court to contest the seizure,

demonstrate the due care they took, and have an avenue of recompense. Designating wood as contraband effectively severs this route, and does not allow the right to a fair trial.

This is a wrong that needs to be righted. Wood should not be classified as contraband; a legislative fix is required to ensure that American businesses have the right to a day in court to demonstrate the measures of due care they performed.

**Pre-2008 Material: How to Perform Due Care?**

Improved clarity should be extended to other areas of the Lacey Act as well. There is still uncertainty with products harvested, imported, and/or manufactured prior to the 2008 passage of the Lacey Act Amendments. To expect any point in the supply chain—importer, distributor, or consumer—to comply with a law in regards to a product produced prior to the law's enactment is unreasonable. Determining the country of origin and/or species in a product pre-2008 can often be difficult, if not impossible. Legislation is necessary to clarify this point, and ensure that antiques and other pre-2008 material can be bought and sold.

**Congressional Action Needed**

Congress should take up Lacey Act reform. I understand firsthand the practical difficulties businesses face that rely upon imported and domestically sourced wood and wood products under the Lacey Act. An unknowable and unmanageable scope of laws, retroactive liability, and the denial of a trial if allegations are made—this law, while well intentioned, has some practical flaws that desperately need legislative attention.

I want to emphasize that I support the goals of the Lacey Act—I don't want illegal logging; I am by nature and profession a conservationist. But in order for this law to function as Congress intended it to—protecting the forests, weeding out the bad actors, and allowing legal trade to continue—fixes are urgently needed. We need a common sense approach to this issue.

It is imperative that the scope of laws be narrowed to those that actually deal with plant and plant products, that the concept of contraband be clarified so that business may have their day in court, and that pre-2008 material be exempted from Lacey Act declaration requirements. Businesses, the jobs they support, and they consumers they serve deserve that.

Thank you, Mr. Chairman and committee members, for the opportunity to appear before you today. I stand ready to answer any questions you might have.

Dr. FLEMING. Thank you, Mr. Snapp.

I now recognize Ms. Birgit Matthiesen for 5 minutes to present testimony on behalf of the Canadian Manufacturers and Exporters.

**STATEMENT OF BIRGIT MATTHIESEN, SPECIAL ADVISOR TO THE PRESIDENT AND CEO, CANADIAN MANUFACTURERS AND EXPORTERS**

Ms. MATTHIESEN. Mr. Chairman, Committee, thank you very much. My name is Birgit Matthiesen And I appear here today on behalf—

Dr. FLEMING. Yes. Let me interrupt you for a second. Be sure and pull that microphone close. You all are going to have to really just share that. Slide it back and forth, and hopefully we can hear you a little better. Thank you.

Ms. MATTHIESEN. Is it better now?

Dr. FLEMING. Yes, much.

Ms. MATTHIESEN. OK. My name is Birgit Matthiesen. I appear today before you on behalf of Jayson Myers, the President and CEO of Canadian Manufacturers and Exporters. As the foreigner in the room, I am doubly honored to be invited to appear before you today, and I thank you very much, sir.

I would also like to think that I am the voice of the hundreds, if not thousands, of American companies engaged in our vibrant cross-border business relationship. These are the companies across

America that are our customers, our suppliers, and our best business partners.

In just three words, I can describe the Canada-U.S. economic relationship: nature, volume, and immediacy. By nature, I mean almost 40 percent of our two-way trade is either intra-industry or intra-company. By volume, a truck crosses our border every 2 seconds. By immediacy, long gone are the days, sir, that these trucks are filled with finished goods destined directly to retail shelves. Today they are more apt to be component parts destined to just-in-time assembly line production facilities all across America.

Let me focus my remarks on the import declaration, since we are, by vast majority, the significant filers of import declarations, either because we are importers of record in Canada, or our business partners are the importers.

Canada, as you know, has one-third of the global boreal forest. More such forest that is federally protected than any other country in the world. Over 90 percent is under public stewardship. Our members, like my colleagues at the table today, strongly support the goals of the Lacey Act. What are our companies doing? Not only do they comply with both U.S. and Canadian regulations, they enforce their own supply chains with very stringent, good-stewardship programs. They do so as good, corporate citizens. But also they do so because their brand names demand them to. As one lumber company in Canada once put it—this CEO once put it, “Sustainability is in our fiber.”

In addition, and across all industry sectors, Canadian companies and their carriers partner with U.S. Customs and Border Protection, voluntarily spending millions of dollars to secure their supply chain against illicit or illegal intrusion.

What are our two governments doing? Canadian environmental and border agencies join with their American counterparts in strong enforcement of the CITES provisions. Just next month, on June 20th, Canadian regulators will once again be in Washington to meet with their American counterparts and American business associations to further the work of important bilateral initiatives such as the Beyond the Border Action Plan and the Regulatory Cooperation Council.

The idea is to focus government resources and to join the resources on the high and unknown elements of our cross-border trade against third-country risks. In both cases, we need to recognize the need to join our forces. The import declaration flies in the face of these efforts. The cost of compliance, including additional IT and reporting and staffing costs before the import declaration is even sent, is a tax on North American manufacturing. The data elements required are near impossible to obtain, and will only be exacerbated when the product coverage expands up the manufacturing supply chain as is currently envisioned in legislation.

There must be a better way, and there is. Currently, and for years now, our NAFTA certificates of origin already attest to the Canadian origin of our shipments. Customs transactions today are electronically sent to CBP and other border agencies well ahead of the arrival of the actual shipment at the physical border. CBP and their APHIS staff have the opportunity to look at what is coming down the road before the shipment is allowed into the United

States. Highly sophisticated risk analysis tools are applied at this point to this data, again, in an effort to seek out any anomalies in global trade patterns to focus more attention.

Gentlemen, Madam, a transactional approach and import declaration for each transaction—and you heard the numbers today—is neither risk-based or good regulatory practice. CME is working closely in both Ottawa and Washington to find new ways to manage our cross-border relationship. Canadian agencies and our business partners are part of the solution, we are not part of the problem. We have to be. The competition from third-country imports in our own backyard here in North America is now stiffer than ever before. Canadian and American companies can and we will compete in the global marketplace. But the import declaration is simply yesterday's thinking and yesterday's enforcement tool.

I was pleased to hear about the North American cooperation that was cited by the panel beforehand. That is exactly the approach we need to take for tomorrow. And I thank you very much, again.

[The prepared statement of Ms. Matthiesen follows:]

**Statement of Birgit Matthiesen, Special Advisor to the President and CEO, Canadian Manufacturers and Exporters (CME)**

Mr. Chairman, Members of the Subcommittee, thank you for inviting me to testify at today's hearing on the Lacey Act. I appear today on behalf of Jayson Myers, President and CEO, Canadian Manufacturers & Exporters.

**Introduction**

CME is the largest business association in Canada representing thousands of Canadian companies across many sectors. More importantly, a significant portion of our members are either Canadian operations of U.S. multinationals, suppliers of component products to U.S. assembly operations, or buyers of U.S. manufactured goods. Our offices are in every provincial capital in Canada as well as our nation's capitol, Ottawa.

I would like to ask that the Committee accept my formal written testimony as part of today's record.

**The business community we have built—together.**

I appear before this panel today as the voice of the Canada-U.S. business partnership—one that is unique in the world. Long gone are the days when a truck traveling across our shared border is filled with finished products destined to retail shelves. Today, almost half of cross-border shipments are either intra-company supplies or component part destined for intra-industry manufacturing plants.

The volume, the immediacy and the nature of our cross-border business partnership has been a key contributor to our shared economic health and will continue to play a vital role as our communities on both sides of the border return to economic health.

So while I am representing CME at this hearing, I like to think that I am also representing our U.S. business partners and the thousands of workers in the United States who depend on our vibrant business relationship.

**Canada is not part of the problem, rather we are part of the solution.**

An American or Canadian truck crosses our land border approximately every two seconds. Hundreds of these trucking companies and their customers have voluntarily partnered with U.S. and Canadian border agencies to bolster and secure their cargo supply chains. Programs such as Customs-Trade Partnership Against Terrorism (C-TPAT), and Partners in Protection (PIP) in Canada.

In addition, their truck drivers and rail crews have been fully vetted by CBP and other agencies under the bilateral Free and Secure Trade (FAST) program. In both directions, our trucking and rail shipments arrive at ports of entry where Canadian and U.S. customs officials work in partnership every day to mitigate commercial or security risk to our communities. There is no other trading partnership that comes close to what U.S. and Canadian companies together have pledged with our border agencies.

### **Our forests**

Canada has one-third of the global boreal forest in a band that stretches from coast to coast. Canada also has more boreal forest that is federally protected than any other country in the world. This is in addition to the fact that 93% of Canada's forests are under public stewardship. The area of certified forest in Canada is greater than the combined area of all other country certifications; representing almost 40% of the world's certified forests. This certification system complements Canada's comprehensive and rigorous forest management laws and regulations.

### **What our companies are doing**

Our member companies have implemented stringent due diligence standards on their entire supply chain. They must, because they know that any misstep would damage their corporate standing and their commercial access to U.S. and Canadian markets. Further, Canadian companies involved in cross-border shipments of wood and plant products are well known to U.S. agencies. They send thousands of the same and repetitive shipments to the same U.S. customer and supply chain each and every day. These are hardly fly-by-night or unknown entities, but brand name prominent companies in both countries.

To them, their sustainability efforts are their competitive advantage. Or as one CEO put it, "*sustainability is in our fiber*".

This responsibility extends to our members' supply chain by their conducting reviews and verification of purchased inputs and requiring a compliance standard throughout their supply chain to guard against illegally logged or improperly harvested forests.

If any compliance concern is detected, companies immediately cease their purchasing from suppliers, period.

In short, Canadian companies and our US business partners know the value of good stewardship.

For our businesses to survive we must keep unnecessary clogs out of our cross-border supply chains and to recognize by regulation and policy the safeguards either or both countries together have put in place to protect our communities from illegally harvested wood, plants, or related products from third countries.

### **What our two countries are doing—together**

Next month Canadian regulators will be in Washington to meet with their American counterparts and American business leaders on the next steps towards regulatory equivalence between our two countries.

Launched in 2011, the U.S. and Canada Regulatory Cooperation Council aims to eliminate redundant or obsolete regulations that burden our integrated cross-border supply to partner our resources at the North American perimeter.

The statement at its launch tells that story—"The President and the Prime Minister have taken this initiative because they believe that their citizens deserve smarter, more effective approaches to regulation that enhance the economic competitiveness and well-being of the United States and Canada, while maintaining high standards of public health and safety and environmental protection."<sup>1</sup> Cooperation on regulatory inspections not only raises the comfort level for U.S. and Canadian enforcement agencies, it raises the comfort level for our consumers and our families.

Also in 2011, our two countries launched the ambitious "Beyond the Border" Action Plan that also aims to partner border enforcement resources against external risks, harmonize cargo data requirements and reduce transactional compliance costs on our intra-North American supply chain.

One of the key initiatives under the Border Action Plan is an import management approach that contemplates stepping away from the now obsolete transaction-by-transaction import process to an account-based system that reports import shipments on a periodic even annual basis. Participating companies will share more information on their global supply chains with Customs authorities in exchange for periodic import reporting. To be clear, this does not mean a reduction of scrutiny, or a risk to security—it means better security. Customs authorities can better allocate precious resources to target the high-risk elements of international trade, while simultaneously reducing costs for our best corporate citizens.

On the multilateral front, Canada and the United States are joined in their commitments made in 2011 at the Asia-Pacific Economic Cooperation (APEC) work to implement appropriate measures to prohibit trade in illegally harvested forest products.

<sup>1</sup> [http://www.whitehouse.gov/sites/default/files/us-canada\\_rcc\\_joint\\_action\\_plan3.pdf](http://www.whitehouse.gov/sites/default/files/us-canada_rcc_joint_action_plan3.pdf).

In Canada, our *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* (WAPPRIITA) is the legislation through which Canada enforces and administers its responsibilities under the Convention on the International Trade in Endangered Species of Wild Flora and Fauna (CITES), an international agreement to protect endangered species. Canada is one of more than 150 countries which have signed the Convention. The Canadian law stipulates the federal permit requirements for the international trade of wildlife, their parts, and products made from them.

How does this work? CITES operates through an import/export permit system which require that our companies

- Obtain CITES Permits before an import or export occurs.
- Verify that Customs or the federal department of authority validated the CITES permits at the time of export and/or import. Without validation, permits will not be accepted. Also, a copy of the permit will be retained by Canada Customs and will be forwarded to Environment Canada for compliance purposes.
- Ensure all valid cities documents accompany the shipment. Note: CITES-listed wildlife may be subject to regulations by other Acts of Parliament or provincial and territorial legislation. Other government agencies should be contacted, particularly the Canadian Food Inspection Agency (CFIA) when importing or exporting live animals or plants.
- Advise Environment Canada of wildlife imports in advance, to speed the inspection process.
- Comply with the International Air Transport Association (IATA) Regulations and the CITES Guidelines for Transport and Preparation for Shipment of Live Wild Animals and Plants when shipping live specimens.

#### **The Lacey Import Declaration**

A transactional Lacey Import Declaration is unnecessary and a tax on North American competitiveness. A better approach might be Blanket Plant declaration similar to the existing U.S. regulations covering importing chemical substance.<sup>2</sup>

In our public comments submitted to the U.S. Department of Agriculture, CME expressed unwavering support for the goals of the Lacey Act—that of combating illegal harvesting and trafficking of wood and plant products. But given that the vast majority of Lacey regulated shipments originate in Canada, the border compliance requirement, specifically the transactional import declaration, must be revisited.

In our view, not only because of the commercial costs but because we believe that only through combined government efforts based on sound and proven risk management principles can we protect our industries and our communities from the scourge of illegally harvested plant products.

In a time when governments on both sides of our border are reducing their operational budgets, it is important that agencies be able to target high-risk shipments and to act quickly. If those same agencies are buried in paper import declarations—mostly from Canada—they have fewer resources to go after the much higher or unknown risk elements.

#### **Beyond the horizon**

The current implementation of the Lacey Act declaration is limited to a few tariff chapters but the underlying statute clearly indicates the intent of Congress at the time was that all products containing plant materials would be subject to the a declaration requirement.

When the import declaration requirement is pushed farther upstream in the manufacturing chain, it will become impossible to comply with. As an example, a manufacturer of plastic auto parts which contain inputs from a myriad other components, such as resin, will not be able to determine the origin of the plant that the resin was made from, let alone the cultivar and species, or weight and value.

In addition, the nanotechnology industry today—in both our countries—is developing exciting new products from plant fibers. These industries, among others, are the job-creators of tomorrow. It is this innovation that will spur North American manufacturing competitiveness in the years ahead. Applying the Lacey import declaration to these products of the future will be impossibility.

In terms of costs, under the current product coverage for the Lacey Import Declaration, the broker cost borne by US importers is raised by 5–7 times—imagine what any future application of the declaration might mean for the U.S. business community. This cost is without a doubt a tax on our NA manufacturing sector at a time when our communities can least afford additional burdens.

<sup>2</sup> 19 CFR 12.12.

**A better way**

CBP and USDA at the border already have at their disposal highly sophisticated risk targeting tools, armed with data carriers and shippers must provide hours if not days before the truck or rail shipment even physically arrives at the land border. It is the success of these tools and the risk management approach to cross-border trade that allows these agencies to know what will be arriving, from where, and at which ports of entry. It allows them to target the unknown or less-known elements of what is coming into the United States—be it a carrier, a shipper, a commodity, or even an anomaly of shipping patterns. CBP officers at ports of entry are highly trained in the use of the information and determine which shipments should be given more scrutiny at ports of entry.

CME member companies enjoy an exceptionally high import compliance performance rate. They fully support efforts to stem illegal logging of endangered forests around the globe. They have and will continue to work with U.S. and Canadian agencies—in short, these companies are not part of the problem but welcome the opportunity to be part of the solution.

Our business community is not asking for any country carve-out of the Lacey Act regulations but only reasonable changes to the import declaration.

1. First and foremost, we ask that a transactional import declaration be reconsidered and that a blanket declaration tied to the Customs transaction be adopted.
2. Second, that the data required to meet Lacey import requirements reflect an understanding of business practices and business confidentiality concerns. We ask that data regulations be reasonable and implemented in such a way that the regulated community can be able to comply.
3. Third, that the certification that the Lacey-regulated shipment does not contravene any logging regulations in third country be shelved. It is an impossible task for the industry, now and certainly when the regulated HTS coverage is expanded.

On the Canada-U.S. front at least, the cumbersome Lacey import declaration is not the solution.

**It is yesterday's thinking and yesterday's enforcement tool.**

Thank you and I look forward to any questions you may have.

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Dr. FLEMING. Thank you, Ms. Matthiesen. I got it right this time. Thank you.

The Chair now recognizes Mr. Jameson S. French for 5 minutes to provide testimony on the 2008 Lacey Act amendments.

**STATEMENT OF JAMESON S. FRENCH, PRESIDENT AND CEO,  
NORTHLAND FOREST PRODUCTS**

Mr. FRENCH. Great. Thank you very much, Mr. Chairman. My name is Jameson French. I am from New Hampshire. My family has been in the hardwood industry since the 1880s, so we are on the fourth generation. The fifth is coming along. Just for the record, I have operations in Virginia, as well as in New Hampshire. Back in the good days of 2007, we had 75 employees. We dropped down to 55 during the devastating recession, and I am happy to tell you that we have gotten back up to 63 now.

I am representing both my company, but also as a member of the Hardwood Federation that is the largest hardwood trade association in the U.S. We represent about 10,000 businesses in every State in the country. A lot of those businesses, most of those businesses, are small, family owned businesses in rural areas that provide very important jobs and economic development opportunities in those districts.

Before I get into the—some of the other key points I wanted to make, I just wanted to make a clarification, Congresswoman Carol Shea-Porter mentioned all those companies, and you talked about them not being importers. Many of those companies on that list

and many of those trade associations include importing companies, and I could go into that later on.

It is very important to note that a healthy, sustainable forest means a healthy, sustainable forest industry. It is not just about the forest products, it is also about the environment, recreation, and wildlife. We are a very long-term industry. As my dad says, he is growing trees for his great-grandchildren. The U.S. is a fabulous wood basket for the world, and will continue to be so.

I take great pride, as an exporter of wood products, that the U.S. leapt ahead of the rest of the world back in 2008 and took a very big step by amending the Lacey Act to address illegal logging. It sent a message out to the world that we—where we were less effective in some other areas of environmental protection, but we were a leader. And since then, the European Commission, that estimates about 20 percent of the wood coming into Europe has been illegally secured, has passed very strict regulations that came into effect this year. Australia has also passed similar regulations.

I would just like to remind everybody that this was a very bipartisan amendment when it came through. I am very proud to say that both my Senators, Senator Gregg and Senator Sununu at the time, Republicans from New Hampshire, were cosponsors, along with Senator Alexander, Senator Collins, and several other Republicans. It was a bipartisan effort, and we had substantial hearings. There was a hearing before this Committee, I believe. There were consensus with multiple industry groups. It was a very deliberate and very thorough process.

As you probably know, the economic down turn hit the industry very hard. We have been very, very dependent on the recovery of the industry because of exports. And just a few very important statistics that are in my testimony, but I should just say that the exports were at the highest level in 2012 at \$1.6 billion. And in 2008 the U.S. share of the global hardwood trade was 13 percent. Since that time, coinciding with the enactment of Lacey, the share has grown and it reached 20 percent for the first time. And over the last 4 years, the U.S. hardwood exports have risen by more than 70 percent. During that same period, exports from all other leading hardwood-producing countries, with the sole exception of Thailand, have been flat or declining.

In 2012, China's trade statistics recorded a 5 percent increase in the imports of U.S. hardwood, while the imports of hardwood from all other sources declined by 6 percent. I really believe that China, because of our Lacey Act, is starting to deal with the problems that they have with illegally traded wood.

In 2012, the U.S. hardwood export value was more than double that of Malaysia, the world's second-largest hardwood producer. So the U.S. industry has been helped. I have some very specific quotes in my testimony from Tom Talbot in Wisconsin and from Orn Gudmundsson in Kentucky. I won't read them again, but Orn is a wood importer himself, and he believes that the Act does not impose undue burden on himself, and it helps the import—the leveling the playing field, and it makes his customers overseas more interested in buying legal American wood products, low-risk products.

So, we strongly urge—the Hardwood Federation and most of the members of my industry strongly urge that the Lacey Act be fully implemented, and that we do what we can to fully fund APHIS and Fish and Wildlife to make sure it is enforced. And I think it would be a really bad mistake to reopen the statute.

Thank you very much for your attention. I look forward to your questions.

[The prepared statement of Mr. French follows:]

**Statement of Jameson S. “Jamey” French, President and CEO of  
Northland Forest Products**

Mr. Chairman, Members of the Subcommittee, I am Jameson French, President and CEO of Northland Forest Products, a hardwood lumber processor, exporter and distributor based in New Hampshire with operations in Virginia. My family has been in the hardwood lumber business since the late 1800s. I am here before you today to represent the views of both my company and as a member of the Hardwood Federation, the largest hardwood industry trade association, representing thousands of hardwood businesses in every state in the country. Companies in the hardwood industry are predominantly small family-owned businesses dependent upon a sustainable supply of healthy timber resources, both imported and domestically sourced. They serve not only the domestic market, but a strong and growing export market. The Federation and its members believe it is critical to keep American companies operating and our citizens employed by protecting forest resources and increasing consumer demand for hardwood products, and assuring fair competition worldwide.

The Hardwood industry includes many multi-generational families that care deeply about long term healthy and sustainable forests, whether in North America or around the world. Without forests there will be no forest industry, let alone forests that pull and sequester carbon from the atmosphere, provide recreational activities and give shelter and habitat to wildlife.

A strong forest products industry supports healthy and valuable forests. In 2012, the U.S. Department of Agriculture Forest Service released a study showing the correlation between an active forest products industry and expanding forests in areas of the world with the most active forest products industries, including North America, Northern Europe and Scandinavia. The Lacey Act is a valuable tool for the Hardwood industry in terms of both creating healthy and sustainable forests and supporting the U.S. forest products industry.

I think it is also important to note that the U.S. is held in high esteem around the world for taking the first step in addressing this global problem. Now, there is a growing movement around the world as others follow our work to reduce illegal logging: The European Commission estimates that 19% of lumber imports to the European Union are illegally sourced. The European Union, as well as other countries, are viewing this as a serious problem and also enacting Lacey-type laws to address sourcing. Some key examples include:

- The European Union passed their Timber Regulation in 2010 and fully implemented it in March of 2013;
- The Australia passed the Illegal Logging Prohibition Act and the government has committed \$1 million to work with regional governments and industry on a number of measures to combat illegal logging;
- The Philippines is also ramping up their enforcement against illegal logging.

The Hardwood Federation was the first industry group to recognize illegal logging as a serious threat. We were one of the first associations along with 49 other trade associations, non-profits and unions that supported passage of the Lacey Act Amendments as part of the 2008 Farm Bill. We did so for reasons that were both environmental *and* economic. Purveyors of illegally harvested timber have the potential to inundate our markets with products priced at levels that are simply out of reach for U.S. producers. In fact, illegal logging costs our industry billions of dollars each year by suppressing global prices by as much as 16 percent. By putting law-abiding U.S. producers at a competitive disadvantage, illegal logging costs us real jobs here in America.

Simply stated, the case for bolstering the century-old Lacey Act to address illegal logging was so compelling that the 2008 amendments were enacted under the Bush administration with strong bipartisan congressional support. The U.S. Forest products industry is a considerable economic force. The amendments were passed after

public hearings and extensive negotiations among affected parties. The U.S. importing companies we represent are willingly bearing the costs of complying with the Lacey Act and applaud the U.S. government agencies such as the USDA Animal and Plant Health Inspection Service for implementing an effective program of compliance given minimal resources.

The industry produces approximately \$200 billion in products annually and employs nearly 900,000 men and women in good paying jobs. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 47 states. Our industry, like others, has been challenged over the last few years by economic and regulatory uncertainties. However, there are key benefits we are realizing since the passage of Lacey.

First, it is important to note that the U.S. has the largest supply of sustainable, legally sourced hardwoods in the world. With a growing emphasis on worldwide enforcement against illegal practices worldwide, American hardwoods have benefited as the preferred choice.

Market forecasts show that the legality movement, which was prompted by enactment of Lacey, will reduce wood supplies from countries where there is a significant risk of illegal logging. Recent statistics show that this heightened awareness around the world is providing a real opportunity for legal operators in the United States.

- U.S. hardwood lumber exports in 2012 were at their highest ever level last year, at \$1.6 billion;
- In 2008, the U.S. share of global hardwood lumber trade was 13 percent. Since that time—coinciding with enactment of Lacey—that share has steadily grown and in 2012, reached 20% for the first time;
- Over the last four years, U.S. hardwood lumber exports have risen by more than 70%;
- During the same period exports from all other leading hardwood lumber producing countries, with the sole exception of Thailand, have been flat or declining;
- In 2012, China's trade statistics record a 5% increase in imports of U.S. hardwood lumber while imports of hardwood lumber from all other sources declined by 6%;
- In 2012, U.S. hardwood lumber export value was more than double that of Malaysia (\$790 million), the world's second largest exporter of hardwood lumber.

In addition to these macroeconomic figures, I would like to share a few examples of how the Lacey Act has helped some small businesses in my industry:

- Tom Talbot, the CEO of Glen Oak Lumber and Milling in Montello, Wisconsin notes that in the last 2½ years, his business in American basswood window products has soared. The increase is directly attributable to national distributors' demand for legally sourced wood and accurate documentation.
- Orn Gudmundsson, President of Northland Corporation hardwoods based in Kentucky states "As a wood importer myself, I do not believe the Act imposes undue burdens on us, nor does it seek to stop the use of imported wood or wood products. Furthermore the inclusion of wood in the Lacey Act has had an enormously positive impact on U.S. hardwood lumber exports. Manufacturers overseas are increasingly relying on U.S. hardwood lumber, due in part to our reputation for legally sourced and sustainable timber. Many Southeast Asian manufacturers who wish to avoid wood from questionable sources have increasingly turned to U.S. hardwoods. About 50% of my company's exports to Southeast Asia are probably returned to the U.S. as finished or semi-finished product. If we abolished the Lacey Act these manufacturing jobs would not magically reappear in the U.S. rather the U.S. lumber they are made from would be likely replaced by illegal local wood."

As a member of the Hardwood Federation and a representative of the ten thousand (10,000) businesses we represent, I urge Congress to allow the Lacey Act to be fully implemented. We currently await the interagency report to Congress on aspects of Lacey Act implementation, enforcement and its effectiveness. In the meantime, we recommend that Congress provide full funding for Lacey Act implementation so that computer systems and other critical infrastructure needed to make this law fully effective are in place. We strongly oppose Congressional actions aimed at re-opening the statute and diminishing enforcement.

It is important to note that delivering on Lacey Act objectives is not a process without growing pains as the private sector and the government learns from each other about implementation realities. That is why 57 industry trade associations and environmental groups, including the Hardwood Federation, the International Wood Products Association, the American Forest and Paper Association, the Na-

tional Association of Manufacturers and the National Retail Federation signed onto a consensus statement recommending areas to streamline and enhance implementation that can be made administratively to the Lacey Act. We look forward to continuing to work with our co-signers and the Administration on these technical fixes.

The increased awareness of the need for transparency, risk management and legal sourcing is precisely the intent of the Lacey Act. This law is important for protection of the environment and the competitiveness of the U.S. forest products industry. This Act promotes our ability to maintain a growing consumer demand for a U.S. sustainable supply of healthy timber resources which in turn supports local economies situated in predominantly in rural areas across this great nation.

Thank you for your consideration of our industry's perspective on this issue. The Lacey Act is critical to U.S. hardwood jobs and we urge the Committee to assure that the statute is allowed to continue to be fully implemented as originally envisioned.

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Dr. FLEMING. Thank you, Mr. French.

The Chair now recognizes Mr. Marcus Asner for 5 minutes to provide his perspective on the 2008 Lacey Act amendments.

**STATEMENT OF MARCUS A. ASNER, PARTNER, ARNOLD AND PORTER, LLP**

Mr. ASNER. Thank you, Mr. Chairman. I have been involved with the Lacey Act for over a decade, both as a Federal prosecutor, when I handled one of the largest Lacey Act cases in history, and now, in private practice, when companies come to me for advice on how to comply with the Lacey Act.

I think that everybody in this room agrees that illegal logging and illegal trade is bad for America and it is bad for the world. It hurts legitimate U.S. companies and it hurts consumers. It harms the environment and let's don't forget it hurts victims. Illegal logging and trade impinges on the rights of property owners, the very people and States whose trees were stolen.

The Lacey Act is a key weapon in the fight against illegal logging and illegal trade. It protects victims of crime. It helps fight corruption, it promotes the rule of law, and it enhances our national security. And it helps level the playing field for American companies. And that ends up protecting American jobs.

Now, some of the witnesses, in their testimony today and in their written testimony, talked about due care. The Lacey Act due care standard is crucial. Companies are in the best position to police their own supply chains, and they need the freedom to do that. As Mr. McCreary points out, Lacey has led companies like Collings Guitar to review their compliance programs. They drop risky suppliers, and they deal with legitimate vendors. But let's be clear, there is nothing new about due care, even in the wood industry. And as a consumer, I frankly expect that legitimate companies will sell me legal wood and legal paper. I don't, frankly, think that is too much to ask. In fact, in my view, Lacey helps legitimate companies—like yours, sir—because it makes sure that corrupt or indifferent companies play by the same rules.

Now, some of the witnesses have suggested that an innocent owner defense to forfeiture should be enacted, and I have a problem with that. I think it is inconsistent with widely used Federal forfeiture procedures. I think it also has a tendency to undercut the current effect of the Act and, more importantly, it undercuts the fundamental property rights of the victims of illegal logging.

One of the witnesses suggested that wood can get forfeited without any due process, apparently using Gibson as an example. But that is just flat wrong. It is not the law, and that is not what happened in Gibson. That is something that we explained at length in a BNA article that I had submitted for the record. But let me be blunt about this. Everybody gets their day in court. And suggestions to the contrary, relying on Gibson, are just flat wrong.

Now, don't get me wrong. I am very sensitive to the fact that forfeiture laws, at least in theory, can lead to harsh results. But I think that the Lacey Act deals with that already. There is an explicit procedure in the Act called the remission procedure, that is specifically designed to handle those cases.

Now, I also disagree with some of the statements made about foreign law. We all deal with foreign law all the time. And Lacey is clear. It talks about six specific types of plant-related offenses. So any statement that a speeding violation somehow qualifies as a Lacey Act offense is just flat wrong. That is not the law.

Now, there was a mention earlier about the Honduras lobster case. And there is a suggestion that it was somehow improper. But any suggestion that people like David McNab, who was at the center of that, went to jail for some technicality is, again, flat wrong. McNab was a criminal. He was guilty of violating Lacey, he was guilty of smuggling, he was guilty of money laundering. He engaged in a massive scheme to smuggle over 1.6 million pounds of illegal lobster into the United States. And that has a devastating effect, including a devastating effect on the population in Florida.

Legitimate companies in every industry, not just wood, already make sure they buy and sell legal goods. And companies have been navigating foreign laws forever. Businesses are in the best position to ask the relevant questions and to make sure that goods are legal, and they are also in the best position to protect themselves by demanding their suppliers warranty and guarantee the wood they are supplying.

A final point. Some say the declaration requirement is burdensome. But I think it actually forces importers to examine the supply chains and to ask the right questions. And I was very cheered by some of the comments that people from—the woman from APHIS said today, that they are working through some of the hiccups. But as a former law enforcement person, I think it also helps law enforcement fight illegal logging.

So, let me be clear. The Lacey Act is clear to me. It helps fight crime, it helps protect American companies and jobs. It protects victims. And it promotes the rule of law and helps protect national security.

Thank you for your time, and I would be happy to address any questions you have.

[The prepared statement of Mr. Asner follows:]

**Statement of Marcus A. Asner, Arnold and Porter LLP**

**Introduction**

Mr. Chairman, Ranking Member, and members of the Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs, thank you for inviting me to appear before the Subcommittee today to address the topic of the 2008 Amendments to the Lacey Act.

I am a partner in the New York office of Arnold & Porter LLP where I routinely advise companies on Lacey Act and other environmental and criminal matters. Al-

though I am advising several clients on legal matters relating to the Lacey Act, I am appearing today in my personal capacity and not on behalf of Arnold & Porter or any client.

For nine years (2000–2009), I served as an Assistant United States Attorney (AUSA) in the Southern District of New York where I was Chief of the Major Crimes Unit from 2007 to 2009. When I was an AUSA, I led the investigation and prosecution of *United States v. Bengis*, one of the largest Lacey Act cases in history, involving the smuggling of massive quantities of illegally harvested rock lobster from South Africa. Since I joined Arnold & Porter in 2009, I have counseled clients on a wide variety of Lacey Act issues, including assisting clients in complying with the 2008 Amendments. I have written extensively on the Lacey Act, and I have been invited to speak at numerous domestic and international meetings concerning environmental crime. In the past year or so, for example, I have spoken on Lacey Act issues at the World Fisheries Conference, the Forest Legality Alliance, INTERPOL, and the Boston Seafood Show.

Today, I will explain my thoughts on how the 2008 Lacey Act Amendments have contributed to reducing the international trade in illegal plants and plant products, and in the process have served American businesses and consumers and helped the environment. I also will address some of the concerns raised by critics of the 2008 Amendments.

### **Discussion**

The 2008 Lacey Act Amendments prevent illegal plants and plant products from flooding the U.S. market, disrupt criminal organizations, and reduce corruption in foreign countries, which in turn levels the playing field for legitimate businesses and improves our national security. The Lacey Act supports U.S. consumers who have an interest in a sustainable supply of natural resources and in worldwide ecological health, which plays a key role in U.S. and worldwide economic and social stability. It also protects the victims of environmental crimes.

I want to emphasize upfront that I am well aware of the challenges companies face as they determine how to meet the requirements of the Lacey Act, and understand both sides of the debate over how best to shape Lacey Act requirements. I regularly advise clients in various industries, so I know firsthand that compliance can be challenging, especially at first, and especially for small businesses with limited resources seeking to navigate foreign legal systems. Companies that never before had to concern themselves with issues of provenance in their supply chains now are having to develop compliance programs to make a good faith effort to ensure that the goods they bring to the United States are legal.

Despite the challenges faced by lawful importers, I believe that the Lacey Act is a vital enforcement tool that *protects* U.S. interests in the aggregate. From my perspective as someone who has been involved in Lacey Act enforcement and compliance for over a decade, the 2008 Amendments are serving U.S. and global interests by helping to reduce the trade in illegal wood and wood products.

Moreover, in my experience from the last few years, companies are overcoming the challenges, setting up compliance programs, and learning to become more adept at complying with the 2008 Amendments to the Lacey Act. That companies are becoming better at compliance does not surprise me. In other areas, United States companies long have faced laws that regulate overseas behavior. Seafood importers have had to comply with the Lacey Act for decades, and many U.S. companies have to deal with Committee on Foreign Investment in the United States (CFIUS) regulations and the Foreign Corrupt Practices Act. Experience in these other areas teaches that complying with new laws and regulations can be burdensome at first, but that, over time, companies learn and become better at working within the new regulatory framework.

### **Benefits of the 2008 Lacey Act Amendments**

Passed in 1900, the Lacey Act is the United States' oldest wildlife protection law. Its original goals were to address issues including the interstate shipment of unlawfully killed game, the introduction of harmful invasive species, and the killing of birds for the feather trade. The Act has been amended several times and broadened to combat trafficking in illegal wildlife, fish, and—as of 2008—plants and plant products. During its long tenure, the Lacey Act has been successful in the areas of wildlife and fish. In light of the enormous problems of illegal logging and unsustainable harvesting, along with the related human toll (such as the toll of corruption and forced labor) and environmental impacts (such as deforestation, destruction of biodiversity, wildlife displacement, erosion, climate change, and loss of local livelihood), the 2008 addition of protections for plants and plant products was a natural and welcome extension of the Act.

The Lacey Act is an important tool for law enforcement in the ongoing effort to combat sophisticated criminal organizations and to protect legitimate businesses and U.S. consumers. Lacey Act prosecutions have been used to disrupt large-scale criminal organizations with illegal behavior extending beyond fish, wildlife, and plant violations. When I was a prosecutor, I experienced firsthand how the Lacey Act can be used as a tool to (1) dismantle criminal operations and deter illegal activities that are having economic and environmental impacts; (2) protect U.S. interests; and (3) protect the victims of environmental crimes. I will discuss each of these benefits in turn.

*Dismantle Criminal Operations and Deter Illegal Activities*

I first became involved with the Lacey Act around 2002 when I started working on the investigation of the Bengis international criminal organization. The Bengis organization engaged in a massive scheme to smuggle into the United States and sell to U.S. consumers (at a significant profit) rock lobster that had been illegally harvested in South Africa. The scheme, which spanned over a decade, had a devastating impact on the South African rock lobster population. The Bengis scheme involved (among other things) numerous violations of South African fishing and customs laws, bribery of South African fisheries inspectors, submission of false shipping documentation, smuggling of contraband into the United States, sale of illegal seafood to U.S. consumers, circumvention of U.S. immigration laws, spoliation of evidence, and the use of United States banks to transfer criminal proceeds. The United States and South Africa worked together closely on the investigation and prosecutions, which ultimately led to the dismantling of the Bengis organization. In the United States, five members of the organization were arrested; all ultimately pleaded guilty and the main players were sentenced to prison. The defendants also forfeited \$7.4 million to the U.S. In 2011, the Court of Appeals for the Second Circuit ruled that South Africa is a victim entitled to restitution for the defendants' crimes, and in 2012, a magistrate judge in the Southern District of New York recommended that South Africa be awarded \$54.9 million in restitution from the defendants.

The *Bengis* case provides just one example of how the Lacey Act can serve as a powerful enforcement tool in the fight against criminal activity in cases where actors import into the United States illegal goods covered by the Act. It is important to remember, however, that the Lacey Act also protects innocent actors. A person who innocently imports illegally harvested wood is innocent under the Lacey Act.<sup>1</sup> She only would be guilty of a felony if she actually *knew* the wood was illegal.

In cases where a person, in the exercise of due care, *should have known* that wood she imported had been stolen, the Lacey Act establishes a middle ground—a misdemeanor. In my experience, misdemeanor prosecutions under the Lacey Act are rare. Prosecutors typically focus their limited resources on more serious felony investigations and prosecutions. In this, as in any other lawful industry, legitimate businesses and law-abiding citizens understandably take pains to ensure that they are buying legal goods, whether those goods are wood, seafood, wildlife, or some other commodity such as food, diamonds, or electronics. It is in this respect that the due care standard in the Lacey Act serves an important role in reinforcing lawful behavior, and in leveling the playing field between legitimate companies that invest resources to try hard to do the right thing, and companies that are utterly indifferent to whether the goods they are importing and supplying to the American consumer are legal or illegal.

I am sensitive to the fact that some companies find the due care standard to be confusing and would prefer that “due care” be defined using a checklist or a set of bright line rules that would apply across all fact patterns and industries. While I understand why these comments are being made, I believe that much of the anxiety about the due care standard is misplaced. Legitimate companies in a wide variety of industries routinely exercise due care in policing their supply chains, because they take seriously the goal of providing consumers with legal goods. In my view, the flexible “due care” standard is actually better for companies because it enables them to mitigate risk in ways that are appropriate for their particular operations and supply chains. Moreover, there is nothing particularly new about the due care standard. Like the similar “reasonable person” standard relied upon elsewhere in U.S. law, the due care standard is a necessary and common element in the American legal system, arising in a wide variety of situations, ranging from the concepts of negligence in tort law, to negligence-based Clean Water Act violations. The Lacey Act’s due care-based standard has functioned effectively for many years. In fact, sea-

<sup>1</sup>Of course, the fact that the person is innocent in this example does not change the fact that the wood in fact was stolen. Under well-established U.S. property law, stolen property ordinarily will be returned to the rightful owner, even if the person possessing the wood is innocent.

food importers have been working with the due care standard under the Lacey Act ever since 1969.

Requiring that companies exercise “due care” in selecting and managing their imports plays a significant role in deterring illegal activity. The standard places the responsibility on law-abiding companies to take a critical look at and understand their own supply chains, and it also prevents unscrupulous companies from devising ways to circumvent, perhaps through technicalities, any due care “checklist” or bright line rules that otherwise might be devised. In my own practice, I often counsel clients on ways to create their own compliance programs, so they can make a good faith effort to ensure that their supply chains are legal and can demonstrate due care in those efforts. The Compliance Program outlined in the Gibson Guitar Criminal Enforcement Agreement has provided a useful model, and various industries are creating their own models from which individual companies can draw. In circumstances where they deem additional protections are needed, clients are further protecting themselves by demanding and obtaining warranties and indemnification from their suppliers. These are good developments. As a result of the 2008 Lacey Amendments, I find that companies increasingly are focused on actively monitoring their own supply chains and creating compliance programs that enable them to ensure that the paper, lumber, and other plant products they supply to the American consumer come from legal sources. This is transforming a market in which honest, legitimate companies (who worked hard to ensure the legitimacy of their supply chains) previously were at a competitive disadvantage to companies who were allowed to get away with a “no questions asked” approach to the legality of their supply.

Nor is the focus on supply chains limited to the Lacey Act. Supply chain due diligence increasingly has become a priority for companies in all sectors. In addition to the health and safety and counterfeiting issues with which we are all familiar, and the conservation and law enforcement goals of the Lacey Act and similar enactments, Congress has acted repeatedly since the 2008 Lacey Act amendments to require more transparency in supply chain issues. For example, there have been new statutory and regulatory requirements to prevent U.S. Government contractors from using human trafficking victims when performing government contracts.

#### *Protect U.S. Interests and Reduce Corruption*

According to a 2012 UNEP and INTERPOL report, “illegal logging accounts for 50–90 per cent of the volume of all forestry in key producer tropical countries and 15–30 per cent globally. Meanwhile, the economic value of global illegal logging, including processing, is estimated to be worth between U.S. \$30 and U.S. \$100 billion, or 10–30 per cent of global wood trade.”<sup>2</sup> Not only is the U.S. one of the world’s leading producers of products like wood flooring and hardwood plywood, but it is also one of the largest consumers.<sup>3</sup>

The mere presence of illegally procured wood in the international marketplace affects the competitiveness of legitimate U.S. producers. The United States’ GDP of timber-related manufacturing was valued at \$77 billion in 2009.<sup>4</sup> According to a 2004 report, illegal logging depresses U.S. prices by about 2–4% which translates to about \$1 billion in annual losses to the U.S. market from lower prices and reduced market share.<sup>5</sup> Evidence presented in the *Bengis* case revealed that illegal operations are able to sell larger quantities of goods at lower prices than their legitimate competitors.<sup>6</sup> This illegal advantage in turn adversely affects competitors’ business and customer relations. Meanwhile, overharvesting activities seriously affect 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 unsustainable practices. By reducing the amount of illegally harvested wood and other plant products in the

<sup>2</sup> UNEP and INTERPOL, *Green Carbon, Black Trade: Illegal Logging, Tax Fraud and Laundering in the World’s Tropical Forests* (2012), available at [http://www.unep.org/pdf/RRALogging\\_english\\_scr.pdf](http://www.unep.org/pdf/RRALogging_english_scr.pdf).

<sup>3</sup> USITC, *Wood Flooring and Hardwood Plywood: Competitive Conditions Affecting the U.S. Industries* at 1–1 (Aug. 2008), available at <http://www.usitc.gov/publications/332/pub4032.pdf>.

<sup>4</sup> U.S. Census Bureau, *Statistical Abstract of the United States* at 563 (2012) (Table 883), available at <http://www.census.gov/compendia/statab/2012edition.html>.

<sup>5</sup> Seneca Creek Associates, LLC and Wood Resources International, LLC, “Illegal” Logging and Global Wood Markets: The Competitive Impacts on the U.S. Wood Products Industry at ES–2, 26 (Nov. 2004), available at <http://www.illegal-logging.info/uploads/afandpa.pdf>; Pervaze A. Sheikh, Cong. Research Serv., R42119, *The Lacey Act: Compliance Issues Related to Importing Plants and Plant Products* 12 (2012), available at <http://www.fas.org/sgp/crs/misc/R42119.pdf>.

<sup>6</sup> Government’s Memorandum of Law in Opposition to Defendants’ Joint Motion for a Depature from the Applicable Sentencing Guidelines Range at 15–17, *United States v. Bengis*, No. 1:03-cr-00308-LAK (S.D.N.Y. May 26, 2004).

international marketplace, the Lacey Act benefits U.S. companies and consumers. By reducing the demand for illegal and unsustainably harvested goods, the Act also helps to protect the global supply of natural resources upon which American consumers depend.

The Lacey Act also helps reduce corruption and promote the rule of law in foreign countries, which in turn helps to level the playing field for U.S. companies and enhances our national security. There is a close link between corruption and natural resources crime. In his *Statement for the Record on the 2012 Worldwide Threat Assessment of the U.S. 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.<sup>7</sup>

The U.N. Office on Drugs and Crime’s report, *Illegal Logging in Indonesia: The Link Between Forest Crime and Corruption*, notes:

Illegal logging [in Indonesia] relies on corruption to stay in business. It depends on the complicity of officials throughout the entire production chain from forest to port, including forest rangers, local government, transport authorities, police and customs. Organized criminal groups are involved in transporting illegal timber, as well as endangered species, out of the country and across multiple borders . . .

Environmental crime, such as this illegal logging in Indonesia, is becoming increasingly organized and transnational in nature and can be seen, just as drug and firearm trafficking, as one of the most significant areas of trans-border criminal activity, threatening to disrupt societies and hinder sustainable development.<sup>8</sup>

Corruption related to environmental crimes presents a threat to the United States’ interests generally, and to U.S. companies specifically. By providing an enforcement tool for federal prosecutors on the one hand and encouraging the creation of compliance programs that help identify issues in the supply chain on the other, the Lacey Act helps to reduce the specter of corruption, and ultimately fosters an environment favorable to legitimate American businesses.

#### *Protect Victims of Environmental Crimes*

Penalties under the Lacey Act protect victims by deterring the theft of fish, wildlife, and plants and plant products. Moreover, just as property laws protect owners’ rights by requiring the return of stolen art or an autographed baseball stolen from your home, the Lacey Act protects the rights of victims of illegal harvesting and trade, whether such victims are in the U.S. or abroad.

The Lacey Act helps ensure that victims of Lacey Act crimes receive compensation. If someone snuck onto my land in Irving, Texas, cut down my trees, and then sold them to an unwitting buyer in Oklahoma, I would want my trees back, even if the gentleman in Oklahoma had purchased the timber innocently. The Lacey Act provides a mechanism by which I could get my trees back and the trespassing thieves could be prosecuted. When coupled with a charge of conspiracy under Title 18, the Lacey Act supports compensation to victims in the form of restitution under 18 U.S.C. §§ 3663 & 3663A. The *Bengis* case illustrates this point. The Court of Appeals ruled in that case that South Africa should be awarded restitution as compensation for the lobster stolen as part of the scheme. By protecting the property rights of victims of environmental crimes, the Lacey Act provides justice to victims and deters future criminal activity. I will discuss this aspect of the Lacey Act further below in connection with the discussion of the “innocent owner” defense.

<sup>7</sup> *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, 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.

<sup>8</sup> U.N. Office on Drugs and Crime, *Illegal Logging in Indonesia: The Link Between Forest Crime and Corruption* (2010), available at <http://www.unodc.org/unodc/en/frontpage/2010/June/illegallogging-in-indonesia-the-link-between-forest-crime-and-corruption.html>.

*Responses to Concerns*

I am aware of a number of concerns that have been voiced about the Lacey Act, many of which appeared in the various changes that were proposed last year in the Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act. The RELIEF Act, among other things, would have altered the Lacey Act's forfeiture provision to include an "innocent owner" defense, removed or limited some of the Act's provisions for plants and plant products imported before 2008, narrowed the categories of foreign laws that trigger violations and modified the declaration requirements. I am sympathetic to the challenges that legitimate businesses, particularly small companies, face in complying with the Lacey Act, especially when they are operating in foreign countries with unfamiliar legal systems. I expect that some of the same concerns may be raised in this hearing, so I would like to focus on some of these proposals in my testimony today.

*Forfeiture and the Proposed "Innocent Owner" Defense*

According to press reports, following the well-publicized seizures of wood at Gibson Guitar's facilities, a common complaint was that Gibson's wood was seized and held even though Gibson purportedly had not "had its day in court to defend itself,"<sup>9</sup> and that Gibson was the victim of an abuse of governmental power. However, as my co-authors and I explained in an article published in Bloomberg BNA's Daily Environment Report, if you look at the law and what happened in the Gibson proceedings, it becomes clear that Gibson in fact did have its day in court, exactly as contemplated in the law.<sup>10</sup> In addition, based on the facts that emerged, Gibson had illegally imported highly protected wood, ignoring the results of their own due diligence, and the actions taken by the government in response were reasonable.<sup>11</sup> Gibson is therefore a prime example of the proper functioning of the Lacey Act. The Gibson case aside, however, a more fundamental point is that adding an innocent owner defense to the Lacey Act would be inconsistent with widely-used federal forfeiture procedures, would undermine the deterrent effect of the provisions, and potentially would defeat the fundamental property rights of the victims of environmental crimes. If such an amendment were to be enacted, those in possession of stolen wood would have unique rights to keep that wood despite the illegality of its procurement, which is fundamentally at odds with the law that applies across the board in other stolen property contexts.

*Seizure and Forfeiture Under the Lacey Act*

It is well settled that the federal government may seize property upon a showing of probable cause that the property is illegal. The process is straightforward. Someone who believes that her property has been wrongfully seized may file a motion in federal court asking the court to review the evidence and determine whether the property is contraband or should be returned.<sup>12</sup> Even if that person does not pursue the return of the seized property in this manner, the government generally must follow a formal forfeiture process in order to keep it. Goods seized pursuant to the Lacey Act may fall into one of two categories of contraband. Those involving violations of procedural requirements, such as failing to obtain proper permits, are considered "derivative contraband." On the other hand, those for which possession or exportation is banned are considered "contraband *per se*."<sup>13</sup> For example, a country like Madagascar bans the harvest of ebony and the export of any ebony products

<sup>9</sup>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/>.

<sup>10</sup>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](http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP.BloombergBNA%27sDailyEnvironmentReport_090412.pdf).

<sup>11</sup>Criminal Enforcement Agreement Between U.S. Dep't of Justice and Gibson Guitar Corp. (July 27, 2012), available at <http://www.fws.gov/home/feature/2012/USvGibsonGuitarAgreement.pdf>.

<sup>12</sup>Specifically, the person seeking the return of their property may file a motion in federal court pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure. See *United States v. 144,744 Pounds of Blue King Crab*, 410 F.3d 1131 (9th Cir. 2005) (holding that goods seized under the Lacey Act are contraband).

<sup>13</sup>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 v. Salazar*, 677 F. Supp. 2d 1203, 1210–11(N.D. Cal. 2009).

in unfinished form except when the supplier has special authorization from the government. In that situation, unfinished Malagasy ebony seized from someone in the United States who imported that ebony from a supplier who did not have that special authorization is contraband *per se*.

The forfeiture procedures that apply to goods seized under the Lacey Act are the same Civil Asset Forfeiture Reform Act (CAFRA) procedures that govern forfeiture actions under a wide variety of laws.<sup>14</sup> The government must provide notice and an opportunity for a hearing at which the forfeiture may be contested. If the party fails to timely respond, the property is deemed administratively forfeited. If the party elects to file a claim within the 60-day period, the government must commence judicial forfeiture proceedings, during which the party may present evidence and argue that the property should be returned.<sup>15</sup> The government must demonstrate by a preponderance of the evidence that the property is subject to forfeiture,<sup>16</sup> and that the government had probable cause to believe that the property was subject to forfeiture in the first place.<sup>17</sup> These procedures were followed in Gibson, and normal forfeiture proceedings in federal court were ongoing when the Criminal Enforcement Agreement was reached.

In addition to this judicial avenue of challenge, the law provides an administrative appeal process whereby a party can appeal directly to the agency that seized the goods, seeking remission or mitigation of forfeiture.<sup>18</sup> Under the Fish and Wildlife Service's regulations, for example, a party may file a petition seeking remission or mitigation of administrative forfeiture with Solicitor of the Department of Interior.<sup>19</sup> If the Solicitor finds that there are sufficient "mitigating circumstances," the Solicitor may remit or mitigate the forfeiture upon reasonable terms and conditions.<sup>20</sup> As a result, not every contested seizure will require the involvement of federal courts.

#### *Innocent Owner Defense*

Some have suggested including an "innocent owner" defense to forfeiture. Proponents have argued that companies that unknowingly possess illegally harvested wood should be able to obtain the return of that illegal wood (regardless of its legality) because they were unaware, despite exercising due care, that the wood was illegal. While I am sympathetic to the truly innocent owner in such a situation and recognize that some importers could face forfeiture under difficult circumstances, I am also sympathetic to crime victims. I am concerned that such a defense would not only undermine the effectiveness of the Lacey Act, but it also would be inconsistent with basic U.S. property principles.

My concern is that providing an innocent owner defense for the purchaser or importer of illegal goods and allowing the "innocent owner" to keep what is not lawfully hers not only decreases companies' incentives to ensure that their goods are legal, but it also deprives lawful owners of their right to have their property returned. If a thief steals my autographed baseball and sells it to an innocent collector who has no idea that it was stolen, that does not change the fact that it is still my baseball and I have a right to get it back. The illegal intervening activity does not extinguish my property right in the baseball. We naturally feel sorry for the collector, of course, who was duped into buying the baseball from the thief, but that does not mean he should get to keep my baseball; instead, his recourse is to seek compensation from the thief and make sure that he has a valid supplier next time. The same concept applies to goods imported in ways that violate the Lacey Act. The individuals, states, or countries whose resources have been illegally obtained have a right to the return of their property or to monetary compensation for property that was lost. The intervening illegal activity does not extinguish those property rights, regardless of who knew what along the way. It is the importer's responsibility to know its suppliers and put measures in place to ensure that its goods are legal. Just as a legitimate art gallery requires evidence of provenance before purchasing paintings or artifacts, or a seller of name-brand shoes needs comfort that it is not buying counterfeits, companies that are dealing in goods covered by the Lacey Act are responsible for knowing their supply chains and, if appropriate, demanding contractual warranties to protect themselves.

<sup>14</sup> 18 U.S.C.A. § 983.

<sup>15</sup> See 18 U.S.C.A. § 938(a)(3), (a)(4)(A) (contemplating claims pursuant to Supplemental Rules); Fed. R. Civ. P. Supplemental Rule G(5).

<sup>16</sup> See 18 U.S.C.A. § 983(c)(1).

<sup>17</sup> See 19 U.S.C.A. § 1615.

<sup>18</sup> See 16 U.S.C.A. § 3374(b).

<sup>19</sup> 50 C.F.R. § 12.24.

<sup>20</sup> 50 C.F.R. § 12.24(f).

The strong incentive in the Lacey Act to use due care is causing this positive shift in the marketplace. Introduction of an innocent owner provision would have the opposite effect of encouraging companies to know as little as possible about their supply chains. In addition, basic property rights are fundamental to the law of our country. Any proposed changes to the Lacey Act must be consistent with these long-standing legal principles. An innocent owner defense that deprives the rightful owner of his or her property clearly is not.

Indeed, if the committee were inclined to consider any changes to the Lacey Act, I think it would make most sense to *strengthen* the Act's protections of victims and property rights, by making it easier for victims to recover for Lacey Act violations. One simple idea would be to expand the list of crimes covered by the federal restitution statutes, 18 U.S.C. §§ 3663 & 3663A, so that it explicitly would cover the Lacey Act. That fix would help facilitate the return of stolen articles to their rightful owner in cases where the evidence establishes a substantive Lacey Act violation, but fails to support a charge under Title 18 (for example, where the defendant acted alone and therefore did not violate the federal conspiracy statute, 18 U.S.C. § 371). Congress also could support the rights of crime victims further by creating a rebuttable presumption that, once articles have been shown to violate the Lacey Act and are forfeitable, such articles will be deemed to be the property of the state or country of origin, absent a showing of superior title. The state or country where the fish, wildlife, plant or plant product was illegally taken would be deemed a "victim" entitled to restitution.

#### *Plants and Plant Products Imported Before 2008*

Some have expressed concern that the Lacey Act might cover plants and plant products that were harvested before the Lacey Act was amended in 2008, noting that innocent owners of antique musical instruments or furniture technically face exposure under the Lacey Act. I am sympathetic to such concerns. Of course, as I explained above, truly innocent owners of pre-2008 plants or plant products cannot be prosecuted under the Lacey Act. Helpfully, the U.S. Fish and Wildlife Service further has clarified that "individual consumers and musicians *are not* the focus of any U.S. Fish and Wildlife Service law enforcement investigations pertaining to the Lacey Act, and have no need for concern about confiscation of their instruments by the U.S. Fish and Wildlife Service."<sup>21</sup> More fundamentally, however, as with the "innocent owner" proposal discussed above, I am concerned about how any change addressed to pre-2008 articles would square with our general obligation under the U.S. legal system to protect the rights of property owners. I am equally concerned that any such change would have the unintended effect of excusing illegal activity and perpetuating the presence of illegal goods in the market, all to the detriment of American interests. For example, it would be hard to be sympathetic to someone who knowingly imported wood that was illegally harvested from a World Heritage Site in 2007 who now wants to profit from its sale. Moreover, because of difficulties in dating wood, constructing a "pre-2008" exception could inadvertently help criminals launder wood that in fact was harvested and imported after 2008, because defendants could demand that the United States affirmatively prove in a criminal case that the wood is harvested or imported after 2008. Accordingly, while I understand why these issues have been raised, I again urge the committee to be cautious in proposing any such change to the Lacey Act.

#### *Scope of Foreign Laws*

Some have expressed concern over the scope of foreign laws that could trigger a Lacey Act violation. Again, I believe that much of the anxiety about the scope of foreign laws is misplaced. The categories of foreign laws at issue in the Lacey Act are set out clearly in the Act. Legitimate companies in a wide variety of industries routinely must navigate local and foreign laws. Seafood companies complying with the Lacey Act have been navigating foreign laws for decades. Moreover, the fact that a particular foreign law may be ambiguous, unclear or difficult to discern, bears on the due care analysis and may suggest that a company did not knowingly import illegal goods (which is what happened with some of the wood at issue in Gibson). More fundamentally, however, in my experience, legitimate businesses take seriously their obligations to comply with local and foreign laws. They ask adequate questions and, to gain comfort with their compliance with U.S. law, they track their due diligence in such a way that they can demonstrate their good faith if questions arise later. In this respect, businesses that work with foreign suppliers are in the

<sup>21</sup>U.S. Fish & Wildlife Service, *Where We Stand: The Lacey Act and our Law Enforcement Work* (Sept. 22, 2011) (available at <http://www.fws.gov/news/blog/index.cfm/2011/9/22/Where-We-Stand-The-Lacey-Act-and-our-Law-Enforcement-Work>).

best position to ask the relevant questions and require that their suppliers make sure the goods are legal.

#### *Declaration Requirement*

Finally, some concerns have been raised that the declaration requirement is burdensome and creates a collection of paper that serves no purpose. The declaration requirement is one of the key elements of the 2008 Amendments because it forces importers to examine their supply chains, ask questions, and obtain information to ensure that everything is legal. While it has been reported that there currently is a backlog in processing some of the declarations filed by paper means, approximately 80% of the declarations are filed and processed successfully by electronic means. More fundamentally, the declarations provide information that protects innocent companies and helps in the investigation and prosecution of criminal organizations. Indeed, the defendants' paper trail in *Bengis* provided crucial evidence leading to the dismantling of the criminal scheme.

The declaration requirement is requiring companies to ask new questions and gather new information about the plants and plant products they have been using for years. This can be a difficult and slow process, which is why APHIS has been working with industries to phase in enforcement and providing resources to help companies understand and comply with the declaration requirement.<sup>22</sup> In addition to setting up a website dedicated to Lacey Act compliance and resources, APHIS has issued guidance to address potential difficulties in identifying the genus and species of certain categories of plants and plant products. For example, the guidance includes a provision stating that items manufactured prior to the 2008 Amendments for which, despite the exercise of due care, it is impossible to identify certain information, the importer may identify the genus as "Special" and the species as "PreAmendment."<sup>23</sup> APHIS has also stated that it does not require a declaration for most personal shipments or for musical instruments transported for performances.<sup>24</sup>

To further ease compliance with the declaration requirement and improve enforcement capabilities, APHIS requires funding that will allow it to streamline the process so that submitting the declarations and accessing the information in real time is more efficient for industry and the agencies alike. Already with the limited funding APHIS received for the first time last year, it soon will be piloting a web-based interface designed to offer a viable alternative to submission of the 20% of declarations that are still being filed by paper means.

Fully funding APHIS, the Fish and Wildlife Service, and other key agencies so they can effectively implement and enforce the Lacey Act will ensure that it is less burdensome to companies and that it achieves the goals of curbing illegal trade as envisioned in the law.

#### **Conclusion**

The Lacey Act provides an important tool that helps enforcement officials fight crime, corruption, and the theft of plants and plant products for the benefit of American interests. I have advised companies in various industries on Lacey Act compliance, including clients in the paper industry, book publishing, and the cosmetic industry, and I am cognizant of the challenges faced by serious law abiding American companies that are trying to do the right thing. Still, the fact that compliance is challenging does not mean that we should ignore our supply chains. We owe it to our country, our legitimate businesses, and American consumers to get this right. We especially owe it to our children and grandchildren who will be facing worldwide shortages in natural resources and greater environmental degradation if we fail to invest the time and energy to make sure we protect our forests, fish and wildlife from the threat of illegal harvesting.

Thank you again for inviting me to appear today. I would be happy to answer any questions.

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Dr. FLEMING. Thank you, Mr. Asner.

Finally, we have Mr. Erik Autor for 5 minutes to provide his perspective on the 2008 Lacey Act.

<sup>22</sup> See Elinor Colbourn and Thomas W. Swegle, *The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber*, STO36 ALI-ABA 365, 373-77 (Apr. 26, 2012).

<sup>23</sup> APHIS, Lacey Act Plant and Plant Product Declaration Special Use Designations (Sept. 19, 2012), available at [http://www.aphis.usda.gov/plant\\_health/lacey\\_act/downloads/lacey-act-SUD.pdf](http://www.aphis.usda.gov/plant_health/lacey_act/downloads/lacey-act-SUD.pdf).

<sup>24</sup> APHIS, Lacey Act Amendment: Complete List of Questions and Answers (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).

**STATEMENT OF ERIK O. AUTOR, ESQ., PRESIDENT AND CEO,  
AUTOR GLOBAL STRATEGIES LLC/TOTAL SPECTRUM LLC**

Mr. AUTOR. Mr. Chairman, members of the Subcommittee, thank you for inviting me to testify at today's hearing on the Lacey Act. While I am a former representative of the retail industry, I appear today on behalf of myself, and speak only as someone who has been actively involved in the policy discussions on the Lacey Act amendments since their passage in 2008.

The purpose of the 2008 Lacey Act amendments is to prevent illegal logging and harvesting of plants in both the United States and abroad which pose serious threats to the environment and legitimate commerce and products derived from wood in plants. These aims are laudable, and supported by American business.

However, the law, as written and enforced, has had several unintended consequences that unnecessarily burden compliance and enforcement, needlessly engender unpredictability, threaten American businesses and jobs, and deviate from the law's core objectives. To address those unintended consequences, Congress should make four modest common-sense reforms to the law that will improve and facilitate enforcement and compliance, and reduce unnecessary burdens on legitimate commerce, while preserving the law's integrity and objectives.

Other witnesses have already discussed in detail three of these reforms: addressing pre-2008 harvesting and production; providing a legal procedure in seizure and forfeiture actions for owners who can demonstrate due diligence; and refining the scope of foreign laws and regulations subject to the Lacey Act.

Therefore, given our limited time, I will focus the remainder of my statement on the fourth issue with the Lacey Act amendments, relating to the requirement that imports containing wood or plant material must be accompanied by a declaration filed upon importation with USDA's Animal and Plant Health Inspection Service. This requirement has created three significant problems for both government and business.

The first is that the term "upon importation" is a layman's expression with no legal meaning in the technical parlance of customs law. Rather, the process of making entry is the key action with respect to an imported product, which is the point at which it legally, rather than just physically, enters U.S. customs territory. The most common types of entry for commercial goods are consumption entries and warehouse entries.

The second problem with the import declaration is that it has failed to facilitate compliance for businesses by imposing unnecessary costs and higher regulatory burdens compared to other laws regulating imports. In particular, technical limitations with the electronic system for filing import declarations have not been able to accommodate large amounts of data that must be submitted on each shipment for even fairly simple products. As a result, importers have had to resort to breaking up single shipments into multiple entries or file paper declarations. Both these options significantly complicate and delay import transactions, and force importers to incur much higher customs brokerage fees, merchandise processing fees, and other administrative costs.

The third problem is that the import declaration requirement has compromised, rather than enhanced enforcement efforts by the Federal Government. Even though the law is not yet fully implemented, APHIS calculates that it already receives approximately 9,200 declarations per week, or about 40,000 a month. The Agency faces this crush of paper with few resources and little ability to examine declarations, undertake any risk-based analysis, and has been unable to add new tariff lines under the new U.S. harmonized tariff schedule to the declaration requirement, as mandated by the statute.

Congress should correct these problems which unnecessarily cost industry and government \$56 million annually by replacing the requirement for filing a declaration upon importation for each shipment of imported merchandise with a declaration on demand. The on-demand system is currently used in other laws regulating imports, including safety certifications for imported products under the Consumer Product Safety Improvement Act, and is more consistent with the paperless system Customs and Border Protection uses in its enforcement activities. It requires importers to collect and maintain the same information currently required on the import declaration, but to produce that information at the request of Federal enforcement agencies.

This system will allow the enforcement agencies to identify and focus on higher-risk shipments by more efficiently separating the wheat from the chaff. It will also relieve businesses of the cost and burdens incurred by constantly having to file declarations, even for low-risk shipments that are merely being sent, unread, to warehouse for storage. An on-demand declaration system would in no way undermine the Lacey Act, but will actually support better enforcement and compliance.

Finally, I must caution that, to the extent opposition to any changes to the Lacey Act amendments may be motivated by exploiting the problems with this law to burden or disrupt legitimate imports, it is inappropriate and consistent with U.S. legal obligations under the rules of the World Trade Organization and contrary to the intent of Congress that this law operate or be used as a non-tariff trade barrier against legally harvested plants.

In conclusion, I don't question the need for a law like the Lacey Act amendments, nor would I suggest changes that I thought would undermine the law. I just believe this law needs to be improved to make it more effective by correcting the problems I have discussed. Congress specifically contemplated possible changes to the law, once it had a chance to see how it would operate. After 5 years, Congress has ample evidence that these modest and targeted reforms are warranted and should be adopted. Thank you.

[The prepared statement of Mr. Autor follows:]

**Statement of Erik O. Autor, Esq., Total Spectrum LLC and  
Autor Global Strategies LLC**

Mr. Chairman, Members of the Subcommittee, thank you for inviting me to testify at today's hearing on the Lacey Act. While I am a former representative of the retail industry, I appear today on behalf of myself and speak only as someone who has been actively involved in the policy discussions on the Lacey Act Amendments since their passage in 2008 as part of the Food, Conservation, and Energy Act.

The purpose of the 2008 Lacey Act Amendments is to prevent illegal logging and harvesting of plants in both the United States and abroad, which pose serious

threats to the environment and legitimate commerce in products derived from wood and plants.

While these aims are laudable and supported by American business, the amendments were added to the 2008 farm bill largely without the benefit of the normal legislative process of full public comment, and debate and consideration in Congress. The unfortunate consequence is that this law, as written and enforced, has had several unintended consequences that unnecessarily burden compliance and enforcement, needlessly engender unpredictability, threaten American businesses and jobs, and deviate from the law's core objectives.

To address those unintended consequences, Congress should make four modest, common-sense reforms to the law that will improve and facilitate enforcement and compliance and reduce unnecessary burdens on legitimate commerce, while preserving the law's integrity and objectives.

First, Congress should correct an omission in the 2008 amendments to prevent retroactive application of the law to plants or plant products imported, processed, or manufactured prior to the law's effective date of May 22, 2008. As a general principle, penal statutes should not be applied retroactively, especially when it could subject individuals and companies to potentially severe legal consequences with no prior notice or ability to comply with the law. This reform is particularly important to ensure that enforcement actions will not be taken against antiques and used products, or musical instruments containing wood or plant products harvested, in some cases, years before 2008, the provenance of which is impossible to determine.

Second, the Lacey Act Amendments were written in a way that could trigger enforcement and penalties from violations of an almost unlimited and largely unknowable set of criminal and civil foreign laws, regulations, and ordinances at the national, sub-national, and local level. Consequently, the public has little guidance or notification as to the legal responsibilities under this law, which raises a serious legal question whether the law, as currently written, is unconstitutionally vague.

Congress should mitigate this problem by clarifying that the 2008 Amendments apply only those foreign laws that are directed at the protection, conservation, or management of plants or the ecosystems of which they are a part. For example, it is simply inappropriate to initiate a Lacey Act enforcement action based on a violation of a foreign law restricting the export of certain products that is intended not to protect the environment, but rather to protect manufacturing in that country from foreign competition.

Congress can also direct the Administration to construct a publicly-available database of applicable foreign laws. These changes will also ensure that enforcement of the law is properly focused on and consistent with its environmental goals, will provide companies greater predictability, and facilitate due diligence in their supply chain management.

A third problem that Congress should address is that the Lacey Act Amendments, as currently constructed and enforced, can subject a good-faith owner, purchaser, retailer, or other party in the chain of custody of a plant or plant product, to penalties through no fault of their own and despite best efforts to comply.

The Departments of Interior and Justice have stated that "people who unknowingly possess a musical instrument or other object containing wood that was illegally taken, possessed, transported or sold in violation of law and who, in the exercise of due care would not have known that it was illegal, do not have criminal exposure." However, Justice has also stated that the Lacey Act Amendments impose a strict liability standard with respect to possession of such products, which it deems to be contraband. Thus, a company can have its products seized and forfeited regardless of the degree of due diligence that it exercises to comply with the law. Typically, products seized and forfeited are not destroyed, but are auctioned off by the federal government and returned into the stream of commerce.

Generally speaking, wood and plant products are not inherently illegal to possess. Also, it is impossible to know just by looking at a wood product whether it was made from legally or illegally harvested wood. Given these considerations, it is inappropriate to treat wood and plant products as contraband like illicit drugs, unless they involve a tree or plant specifically included under a trade ban, such as the Convention on the International Trade in Endangered Species (CITES).

Congress should address this problem by clarifying that the strict liability provision for seizure of contraband under the civil asset forfeiture statute does not apply to plants under the Lacey Act. As a matter of due process, Congress should also provide those who can demonstrate they have exercised proper due care in compliance with the law, a day in court and a right to petition a federal judge for the return of any goods seized and subject to forfeiture through no fault of their own. This change would not undermine the Lacey Act because it would actually provide an incentive to encourage the highest degree of due diligence, and would offer no loophole

for knowing violators, scofflaws, or even innocent owners who cannot show that they exercised a sufficient degree of due care.

The fourth issue with the Lacey Act Amendments relates to the requirement that imports containing wood or plant material must be accompanied by a declaration filed "upon importation" with USDA's Animal and Plant Health Inspection Service (APHIS). This requirement has created three significant problems for both government and business. The first is that the term "upon importation" is a layman's expression with no legal meaning in the technical parlance of customs law. Rather, the process of "making entry" is the key action with respect to an imported product, which is the point at which it legally, rather than just physically, enters U.S. customs territory. The most common types of entry for commercial goods are "consumption entries" and "warehouse entries."

The second problem with the import declaration is that it has failed to facilitate compliance by businesses by imposing unnecessary costs and higher regulatory burdens compared to other laws regulating imports. In particular, technical limitations with the electronic system for filing import documents cannot accommodate large amounts of data that must be submitted on each shipment for even fairly simple products. As a result, importers have to resort to breaking up single shipments into multiple entries or file paper declarations. Both these options significantly complicate and delay import transactions, and force importers to incur much higher brokerage fees, Merchandise Processing Fees (MPF), and other administrative costs.

The third problem is that the import declaration requirement has compromised, rather than enhanced enforcement efforts by the federal government. Even though the law is not yet fully implemented, APHIS calculates that it already receives approximately 9,200 declarations per week. The agency faces this crush of paperwork with few resources and little ability to examine declarations, undertake any risk-based analysis, and has been unable to add new tariff lines under the U.S. Harmonized Tariff Schedule (HTS) to the declaration requirement as mandated by statute.

Congress should correct these problems, which unnecessarily cost industry and government \$56 million annually, by replacing the requirement for filing a declaration upon "importation" for each shipment of imported merchandise with a "declaration on demand." The on-demand system is currently used with other laws regulating imports, including safety certifications for imported products under the Consumer Product Safety Improvement Act (CPSIA), and is more consistent with the paperless system Customs and Border Protection (CBP) uses in its enforcement activities. It requires importers to collect and maintain the same information currently required on the import declaration but to produce that information at the request of federal enforcement agencies. This system will allow APHIS to identify and focus on higher-risk shipments by more efficiently separating the wheat from the chaff. It will also relieve businesses of the costs and burdens incurred by constantly having to file declarations, even for low-risk shipments, that are merely being sent unread to a warehouse for storage. An on-demand declaration system would in no way undermine the Lacey Act, but will actually support better enforcement and compliance.

As part of this change, Congress should also provide explicit authority to the Secretary of Agriculture to promulgate regulations regarding plant declarations, and permit the Secretary to distinguish among different plants and limit the applicability of the declaration requirement for a particular class of type of plant if the Secretary determines that applying the requirement to such plant class or type would not be feasible, practicable, or effective.

Finally, I must caution that to the extent opposition to any changes to the Lacey Act Amendments may be motivated by exploiting the problems with this law to burden or disrupt legitimate imports, it is inappropriate, inconsistent with U.S. legal obligations under the rules of the World Trade Organization, and contrary to the intent of Congress, that this law operate, or be used as a non-tariff trade barrier against legally-harvested plants.

In conclusion, I do not question the need for a law like the Lacey Act Amendments, nor would I suggest changes that I thought would undermine the law. I just believe that this law needs to be improved to make it more effective by correcting the problems I have discussed. Congress specifically contemplated possible changes to the law once it had a chance to see how it would operate. After five years, Congress has ample evidence that these modest and targeted reforms are warranted and should be adopted.

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Dr. FLEMING. OK. Well, thank you, panel. At this point we will begin Member questioning of the witnesses. To allow all Members

to participate, and to ensure we can hear from all the witnesses today, Members are limited to 5 minutes for their questions. However, if Members have additional questions, we can certainly have a round or two. We really only have two Members at this moment. So that round may go fairly fast.

I now recognize myself for 5 minutes. First of all, panel, it is interesting. I think some very quick conclusions can be drawn from what I have heard with both panels. And number one is there is a consensus that everybody believes that, in general, the Lacey Act is a good thing, that it provides certain protections, and that it is well-intended. I hear some say that nothing needs to be changed about the law. Others say, yes, there is some massive problems. But it seems to be that the more a company relies on imports, the more problematic this law can be.

Also, like many things in government today, we seem to punish good guys and often times the bad guys get away. So, I think we need to be mindful of these things, going forward.

So, with that, I would like to ask Mr. Snapp some questions. Mr. Snapp, could you more fully explain how you had to turn away that 29 companies that you talked about from the Lacey Act compliance verification program?

Mr. SNAPP. Thank you, Chairman. I would be happy to answer your questions. The complexity of supply chains stretched to the product itself. So, if you are looking at an engineered panel, an engineered map-form panel, you have multiple forms of raw material feeding that production facility. So you can have residuals from a saw mill, you can have actual timber harvested. All of those products can come from a very large area. So tracking back downstream to where those materials originated from becomes problematic, at best.

If you have a specified concession, which is what our current program enrollees have, it is much easier. But if you don't have a specified concession, and you are purchasing raw materials from secondary suppliers who may have purchased that material from a third-tier supplier, the ability to backtrack where that material came from is nearly impossible, without a very large workforce.

Dr. FLEMING. OK. Well, that then leads to the second question. What is your annual cost to have six legal firms on retainer to keep track of foreign laws?

Mr. SNAPP. The program that we developed using the legal firms overseas in the country of origin where the material is initially harvested is at a front-loaded cost, because we have to use the attorneys to isolate, identify all of the relevant laws before the program begins. So, the initial two years, the average cost per facility was ranging between \$25,000 and \$40,000. On an ongoing maintenance basis, now that we have identified those laws, the legal firms actually provide oversight and advice on any changes. That cost averages the mills \$10,000 to \$15,000 per year.

Dr. FLEMING. And who ultimately pays that cost?

Mr. SNAPP. The clients pay that cost, sir. And that cost is technically carried down to the end customer. But we have seen significant difficulty for end customers to justify a higher price on a commodity product, based on that investment on legal and our services.

Dr. FLEMING. So if the end user, the customer, the retail customer, simply can't afford or is not willing to pay for that product, then what impact does that have on jobs?

Mr. SNAPP. On the jobs specific to the United States, sir?

Dr. FLEMING. Yes.

Mr. SNAPP. You see a higher cost going into what we call reman facilities, who utilize cut lumber, they utilize engineered panels. If their base cost increases, their finished product cost increases. So if their finished product cost increases, then the consumer price is going to increase. You have alternative products that come from overseas in finished product form that don't have those costs associated with them, which can further undercut those U.S.-produced products, therefore putting more pressure on U.S. jobs.

Dr. FLEMING. So the net result is a transfer of American jobs to foreign countries.

Mr. SNAPP. Correct, sir.

Dr. FLEMING. OK. OK. Ms. Matthiesen, what is it costing your members to comply with the declaration requirement?

Ms. MATTHIESEN. The cost to our members, if they are the importer of record for U.S. import purposes, is currently around \$5 per import declaration. But that \$5, sir, is the cost associated with the actual brokerage transmission of the declaration. And I think, as Mr. Snapp and others have made the case this morning, the backroom costs are even more, the IT and the staffing and this sourcing inquiries through the supply chain. So that cost could run approximately \$6 to \$7 per important declaration.

The other thing I would note, just because I have the opportunity now, is that we are still relatively low on the manufacturing supply chain in product coverage of the Lacey Act. Think of the auto and the auto industry who needs to make a plastic dashboard made of resin, made of plants, and it will be almost impossible.

Dr. FLEMING. Yes. OK, thank you. My time is up. I now recognize Ms. Shea-Porter for 5 minutes.

Ms. SHEA-PORTER. Thank you very much. It is always difficult to think about the economic cost whenever we implement any kinds of new regulations. But thinking also in terms of why and what this is about, and how it does help American businesses, in addition to the environmental health and support that it provides, it is always tough to weigh those. It is tough to weigh those.

So, having said that, I would like to first ask Mr. Asner, I was looking at some of the testimony there, and there is something that we didn't talk about here, but I think it does have an impact. Can you tell us about the environmental crimes such as illicit trade in timber? Who are the players? And does this come back to us in any way?

Mr. ASNER. Look, a lot of these cases are ones that you read about in the paper. And the cases that DOJ focuses on, similar to the case that I focused on when I handled the Bengis matter, these are international conspiracies, they are often very sophisticated conspiracies, and cases like that often deal with cross-border problems. People exploit the fact that it is difficult for law enforcement to communicate across borders. There are devastating impacts locally.

There are also impacts in the United States. There are immigration violations. There is forced labor. And I have read reports also that, for example, the Director of National Intelligence has issued a report talking about how there are connections with corruption, which, of course, undercuts the rule of law, which undercuts our national security.

So, yes, I think that the crime, the underlying crime, is a very serious one. And for the bad guys, they think, whether it is wood or fish or blood diamonds, they think of it as money, and they are willing to violate the rules in order to line their own pockets, and then support whatever ill things they want to take care of.

Ms. SHEA-PORTER. OK, and there is, obviously, associated costs with trying to fight these guys. They are not just the guys who made a little mistake, but there is actually a huge market in there that is creating a huge problem around the world, not just in our country, but other countries.

Mr. ASNER. Yes, absolutely. And just to be clear, people who make a mistake, who make an innocent mistake under the Lacey Act, are not guilty, period.

Ms. SHEA-PORTER. Right. I think we have to keep repeating that.

And then I have another question for you. In your testimony you state that a person who innocently imports wood is innocent under the Lacey Act. Can you explain—first of all, they can have their day in court. Right?

Mr. ASNER. Absolutely.

Ms. SHEA-PORTER. Can you explain what the genesis of this misunderstanding is? I—

Mr. ASNER. Yes. I think it is a lot of looseness, a lot of people who are playing with law, and don't actually understand what the Lacey Act entails.

There are two provisions that have a mental state requirement, and one is a misdemeanor—that is the one that is tied to the due care standard—and then one is a felony, and that is tied to a knowledge standard. Then there is not a penalty, but a consequence of forfeiture. If you possess illegal things under the laws of the United States, you are not allowed to keep them.

Now, I understand—and, by the way, there are very good reasons for that. And one of the reasons is that, hopefully, those illegal things will be taken away and given back to the rightful owner, and that is an important principle, because we believe in property rights here. So there are sympathetic cases. So where, for example, you have something and you can't really trace it back to an owner, in those situations—and the person is truly innocent—in those situations you can invoke the remission statute and ask for an exception to the forfeiture. And that is well documented.

Ms. SHEA-PORTER. OK. Thank you. Thank you for that answer.

Mr. French, I am obviously thrilled to see you here. What is the impact to your business, when illegally sourced material enters the U.S. marketplace?

Mr. FRENCH. This is a big issue about American jobs, and it is one of the reasons that those Lacey Act amendments were referred to by some very conservative members of my association as a jobs act for many States, particularly in the South.

But in my business, if illegal wood comes in, and my domestic customer, who is trying to make a product out of wood, it undercuts their ability to compete in the world marketplace for that manufactured product. So if a toilet seat or a toilet roll holder from China comes in made out of illegal wood and it can be sold at one-tenth the price of the product that could be made out of American wood in America, using American employees, that is a devastating impact on those customers.

And the wood products industry in this country was devastated by this last recession. And the influx of illegal woods was added to that terrible impact.

Ms. SHEA-PORTER. And I had another question for you. Now, we are obviously always concerned about costs for businesses. And clearly, as somebody who has run a business for many years, you look at that bottom line also. But is the cost for compliance smaller than the cost of allowing illegal wood and not finding it?

Mr. FRENCH. Yes. I mean I am not a big importer, myself. We do import some, and we have. But talking to people that have, I think, most imported wood businesses want to have legitimate supply chains. And they work very, very hard. And I think the Lacey Act—the APHIS documents have actually helped these businesses walk themselves through their supply chains and eliminate high-risk areas for purchase. And they are focusing on lower-risk sustainable and legal material.

So, I think that the companies that want to make it work, particularly the importing companies, are going to have less cost than perhaps some people are talking about.

Ms. SHEA-PORTER. Thank you. I will yield back.

Dr. FLEMING. Thank you. Well, let's have another round, shall we? We are having fun.

Mr. AUTOR, now, you heard Mr. Asner make assertions, first of all, that this is a matter of national security, which is news to me. But also he said that innocent people who may perhaps accidentally break some laws have nothing to fear. Perhaps there is no danger to forfeiture, and that sort of thing. Do you agree?

Mr. AUTOR. No, I don't agree.

Dr. FLEMING. Could you pull it a little closer.

Mr. AUTOR. Sorry. We have to distinguish between two—well, first of all, it has been clear that if you have exercised due diligence and have been found to exercise due diligence, that you will not be subject to criminal prosecution. So, in that sense, you are not guilty.

However, under the Civil Asset Forfeiture Act, the mere possession of material that has been found to violate Lacey is deemed to be contraband, like illegal drugs, and is subject to seizure and forfeiture, regardless of your intent.

So, if you are a perfectly innocent owner, you have exercised proper due diligence, and you can demonstrate that you have, you can still be subject to having the material seized and forfeited which, in some cases—and I can point to Gibson Guitar—can amount to millions of dollars. And for a smaller company, that can put them out of business, even though they have been found to do nothing wrong, and they are not subject to any criminal sanctions, whatsoever.

And there is not an adequate procedure under the law to be able to go to a Federal judge and demonstrate that you have exercised proper due care as expected and required under Lacey, and to petition a court to return the merchandise. And this is not the same as illegal drugs or a stolen painting. There is nothing inherently illegal about wood. You can have two identical tables made of hickory or cherry, and it is impossible to determine whether one was from illegally harvested wood or the other was not.

So, I think there is some distinctions to be drawn here. The remission procedure that Mr. Asner mentioned is very limited in petitioners being able to use that procedure. I think that there needs to be a better legal process through the Federal courts for petitioners to be able to show that they have exercised due care.

Dr. FLEMING. So if I am an American company owner, small businessman, as many, I am sure, are, so if I have a \$3 million shipment coming in, and it is confiscated, even though I may not be directly fined, my \$3 million goes out the window and then my business could go bankrupt. So, by default, my business is being punished. Is that really what you are saying?

Mr. AUTOR. I think that is an accurate characterization, yes. You have done nothing wrong, you can demonstrate that you have done everything you can to comply with this law, and yet you can still have the product that you have seized.

And if this is truly to be treated like contraband, like illegal drugs, technically anyone in the chain of possession, including a consumer, could be subject to forfeiture and seizure.

Dr. FLEMING. Well, again, that is very worrisome. Today we are talking about the IRS picking and choosing people to retaliate against, potentially being used as political pawns, putting the heavy boot of the Federal Government on the necks of law-abiding citizens who were innocent, who perhaps made a mistake, maybe didn't check the right box on a form. That is, indeed, very worrisome.

Ms. Matthiesen, we have been talking about, of course, American law. But we will return to Canada here for a moment. Has there ever been an allegation that illegal logging has or is occurring within Canada?

Ms. MATTHIESEN. From my knowledge—and I have asked the question to my sister associations in Canada—no.

Dr. FLEMING. OK. Therefore, do you believe it is fair that your wood products are being treated exactly the same as those countries who have a history of illegal logging?

Ms. MATTHIESEN. Well, it flies in the face of risk management, and it flies in the face of what our two countries and the NAFTA partnership has been doing in the last several years that has created thousands of jobs in the last two decades since we signed NAFTA.

So, queen for the day, the answer would be we would like to have a distinctive and separate approach for Canada, simply because the risk is that much reduced.

Dr. FLEMING. Yes. OK, thank you. I see my time is up. The Chair now recognizes Ms. Shea-Porter.

Ms. SHEA-PORTER. Thank you, and I am still looking around thinking I am at Natural Resources, not any oversight on the IRS. But whatever, having said that.

So I have a couple of questions. I listened very closely to what Mr. Autor said—and I am sorry if I mispronounced your name. And I would like Mr. Asner to tell me. Do you agree with that characterization? Yes or no. And please explain.

Mr. ASNER. No, not at all. Unfortunately, I think Mr. Autor wasn't in the Federal Government for a long time and didn't handle criminal cases.

When goods are forfeited, the government has a right to seize goods before forfeiture, and then you can file a motion under Rule 41(g) of the Federal Rules of Criminal Procedure, and you can get a court hearing to get those back. And that is just black-letter law. And defendants do that all the time.

If the government proceeds to forfeit, what they have to do is give a notice, and then somebody can come in and make a claim to it under CAFRA, which he did mention. It is dripping with due process.

After that, there is then a hearing, and somebody can make a claim, and there can be a claim that it is contraband, the government bears the burden of proving it is contraband or that it is illegally possessed. The other side gets to contest that. And so there is a process that goes through this.

So the mention, for example, of Gibson, there were two categories of wood in Gibson. One, the government actually allowed them to file a petition for remission on. That was the Indian wood. The other ones they had admitted they didn't exercise due care, and that ended up getting forfeited. So I don't know what he is talking about when we are talking about Gibson there. That case is pretty clear.

And then, with respect to the \$3 million example, I mean that is the law, not just in Lacey, that is the law in customs. That is the customs law, and it has been that law for decades, if not 100 years already, that if something comes into the country and you are not allowed to have it, it is illegal, then it gets forfeited. And I understand that it can be a problem for people who are innocent bringing it in. And commercial clients—for example, my clients—we handle that through warranties and guarantees. We force the upstream supplier to guarantee the legality of the goods.

And keep in mind the example of the \$3 million worth of wood, on the other side of that, more often than not, there is a victim whose wood that belonged to. And just as if you steal a piece of art and you sell it to a third party, and that third party then sells it to me unwittingly, I can't complain when the person who is the victim comes to me and says, "I want my art back." I have to give it back. My recourse is with the criminal.

Ms. SHEA-PORTER. OK. Thank you, and I yield back.

Dr. FLEMING. The gentlelady yields back. The Chair would like to ask some follow-up questions.

Mr. Asner, do you represent companies that perhaps could fall under this law?

Mr. ASNER. I do, from time to time, advise companies. It hasn't been a huge business, actually, frankly.

Dr. FLEMING. OK. But you would charge and perhaps make money by representing them having to deal with the issues here discussed today.

Mr. ASNER. I would hope to; that is what we do.

Dr. FLEMING. OK. So as a result of that, you do have a financial interest in some of the issues that go on today that may subject companies to the problems here.

Mr. ASNER. I think, actually, probably my financial interests would be with companies that are opposed to what I am saying today. My interest here is I have been interested in the Lacey Act for about 10 years, if not more, because I was a Federal prosecutor. I am here on my own dime. I just think it is interesting. I think it is important for the country—

Dr. FLEMING. But you would agree, sir—

Mr. ASNER. I think it is important for my children.

Dr. FLEMING. You would certainly agree that the more laws and regulations and the more trouble that companies have with this law, the more they are going to have to hire guys like you.

Mr. ASNER. You know, I think, actually, generally, it is true that the more regulations, the more—

Dr. FLEMING. The more lawyers we have to hire, right?

Mr. ASNER. The more difficult it gets. But on the other hand, it also protects, and it protects the rights of property owners.

Dr. FLEMING. Right.

Mr. ASNER. And we are here to protect property owners.

Dr. FLEMING. OK. Then, Mr. Autor, there was certain assertions here, such as that this law is—how did that go, dripping with—what was the word?

Mr. ASNER. Due process.

Dr. FLEMING. Due process. Dripping with due process. I would like to hear your response.

Mr. AUTOR. Well, I think we need to look at how it is actually being utilized and enforced. And I think that there are serious due process concerns. And ultimately, with respect to the Indian wood in the Gibson Guitar case, the Federal Government acknowledged that it was mistaken. And although Gibson had tried to use the remission process in the case of that wood, it was not successful in doing so. So I think that instance really highlights some of the concerns here.

It is true, as I said, if you are an innocent owner, you are not going to be subject to criminal prosecution, but it is by no means clear—and I don't agree that it is dripping with due process—that you are not going to still be subject to seizure and forfeiture without an adequate recourse to be able to say that “I have done what I can to comply with this law.” And, quite frankly, I think we need better due process to encourage better compliance. We can't just have sticks with this law, we need a carrot, as well. And this is not a loophole for people who are scofflaws or can't demonstrate that they have done proper due process. This is going to be a very narrow remedy.

Dr. FLEMING. Have you ever worked for the Federal Government?

Mr. AUTOR. I have.

Dr. FLEMING. OK. So I thought I heard Mr. Asner say you have not worked for the Federal Government. But you have. A number of years, perhaps?

Mr. AUTOR. I worked for the Federal Government for a total of 8 years.

Dr. FLEMING. OK. That is longer than I have worked for the Federal Government, so I think that is plenty of time.

Anyway, I think that—I mean would you not agree, Mr. Autor, that a law like this gives pause to someone who is legitimately trying to run a business? This is the sort of thing that could keep a business person, a man or a woman, or even a small corporation up at night.

Mr. AUTOR. I think so. I mean the costs—we have identified ways to fix this law. We are not talking about undermining, undercutting, gutting this law at all. But there are definitely ways that we have identified that can lower the costs of compliance and actually encourage compliance, help the agencies enforce this law better, achieve its objectives better, and provide businesses more predictability in how this law is going to be enforced.

Dr. FLEMING. So what we are really talking about is simply some improvements to a very old law that, unfortunately, some things were not contemplated exactly, and innocent people are being caught up in it. I think that is reasonable.

Would you agree, Mr. Snapp?

Mr. SNAPP. Absolutely, Chairman.

Dr. FLEMING. OK. Well, with that I yield back. And if Ms. Shea-Porter would like to ask questions, I will recognize her.

Ms. SHEA-PORTER. Thank you. And I am glad to see you identify yourself as working for the Federal Government, because we are part of that. It is not the government. It is us and others who work there and we try to work together here and get this right.

But Mr. Chairman, I ask unanimous consent to include in the record an article written last year by Representative Blumenauer clarifying the facts in the Honduran lobster smuggling case. He concludes with this important statement that gets to the heart of the importance of the Lacey Act's interaction with foreign laws. He wrote, "I suspect that if foreign fishermen smuggled 400,000 pounds of Maine lobsters or illegally harvested wood from Oregon worth millions of dollars from our country, that I would want them brought to justice, even if—especially if—they fled our jurisdiction." So I ask that be entered in the record.

Dr. FLEMING. Without objection, so ordered.

[The article submitted for the record by Ms. Shea-Porter follows:]

[From the Huffington Post, May, 8 2012]

#### TRUTH TAKES A BACK SEAT IN LACEY ACT HEARING

(By Rep. Earl Blumenauer)

Today, I had the opportunity to testify before the Committee on Natural Resources Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs on two bills that would repeal significant portions of the Lacey Act. The Lacey Act is common sense legislation that protects American workers and industries from illegally harvested or exported materials.

I was severely disappointed, however, that one of the witnesses invited by the majority, Senator Rand Paul of Kentucky, chose to attack the Lacey Act using misleading statistics and half-truths if not all-out lies. At the center of Senator Paul's

testimony was an oft-repeated, yet apocryphal, story about two American fishermen who were unjustly prosecuted under the Lacey Act for transporting their catch in cardboard containers instead of plastic. Senator Paul was outraged that these two fishermen would be subject to monetary penalty, and even jail time, because of this simple mistake.

I would be outraged, too . . . if the story were even remotely true.

The two fishermen were doing far more than carrying lobsters in the wrong containers—they were found guilty by a jury of conspiracy, smuggling, and money laundering. Their convictions were upheld by a U.S. federal district court and also by the 11th Circuit Court of Appeals. This was a textbook case of criminals trying to circumvent the law for 400,000 pounds of lobster worth \$4.6 million.

Therefore it is especially offensive to see a U.S. Senator parroting this “fisherman’s tale”—who can ever believe those—without even getting into the facts. Even worse, Senator Paul then used this doctored story for his personal political goal of gutting the protections that exist for the benefit of American jobs and the environment.

Senator Paul’s testimony was a perfect example of what’s wrong with the political system today. He is more than willing to mislead and confuse public opinion to justify his world view. This is not something unique to Republicans, but happens whenever public figures put their own political goals ahead of the truth and the greater good. Instead of this constant game of spin and counter-spin where the facts take a back seat, we need work together to find compromise solutions that deal with the underlying problems we face, whether those are jobs, civil liberties, national security, infrastructure investment, or protecting the environment.

That’s what I have been working on in regards to the Lacey Act. We have a broad coalition who supports American workers and strong environmental protections with groups such as the League of Conservation Voters, the Hardwood Federation, the American Forest and Paper Association, the Sierra Club, and the United Steelworkers. This varied group is able to work together on this issue because they are willing to put their short-term goals on the back burner and focus on long-term issues in a way that promotes justice, fairness, and an inclusive table with room for all, while dealing head-on with facts.

That is the type of political coalition and system I am proud to be part of.

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Ms. SHEA-PORTER. Thank you, and I yield back.

Dr. FLEMING. OK. The gentlelady yields back. I would like to thank you, panel, for your valuable testimony and contributions today. Members of the Subcommittee may have additional questions for the witnesses. And we ask you to respond to these in writing. The hearing record will be open for 10 days to receive these responses.

Before closing, I ask unanimous consent to submit for the record a Congressional Research Service report on the Lacey Act, “Compliance Issues Related to Improving Plants and Plant Products”; a statement by the American Forest and Paper Association; and a statement from the World Wildlife Fund.

[The statements submitted for the record by Dr. Fleming follows, the report has been retained in the Committee’s official files:]

#### **Statement of the American Forest and Paper Association**

The American Forest and Paper Association (AF&PA) appreciates this opportunity to provide the following testimony on the 2008 Lacey Act Amendments.

AF&PA serves to advance a sustainable U.S. pulp, paper, packaging, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry’s sustainability initiative—*Better Practices, Better Planet 2020*. The forest products industry accounts for approximately 4.5 percent of the total U.S. manufacturing GDP, manufactures approximately \$200 billion in products annually, and employs nearly 900,000 men and women. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 47 states.

### **Why AF&PA Supports the 2008 Lacey Act Amendments**

The U.S. forest products industry is a strong proponent of sustainable forest management practices in the U.S. and around the world and is committed to using forest management and manufacturing practices that meet environmental, social, and economic objectives. Our customers rely on us as the foundation of their supply chain to ensure that the products we sell are produced in a legal and sustainable manner.

Building on its legacy of sustainability, the U.S. forest products industry two years ago set sustainability goals called *"Better Practices, Better Planet 2020."* The initiative recognizes the importance of procurement of our primary wood fiber from sustainable sources. It includes a specific commitment to increase the amount of fiber procured from certified forest lands or through certified fiber sourcing programs in the U.S., and to work with governments, industry, and other stakeholders to promote policies around the globe to reduce illegal logging.

While very little illegal logging occurs in North America, this is not the case around the globe. Conversion of forest land to agriculture is the primary cause of deforestation in developing countries but illegal logging also contributes to over-exploitation and unsustainable forest management. Illegal logging is not just an environmental issue—it is also an economic issue. When illegally sourced forest-based raw materials enter the stream of commerce, a global economic problem is created for U.S. producers of products from legally sourced raw materials.

The scope of global illegal logging and its economic cost was under heated debate a decade ago with many exaggerated claims on the extent of the problem. To better inform the industry's policy on this issue, AF&PA commissioned its own study in 2004 to assess the economic impact of illegal logging on timber production and trade. The report concluded that up to 10 percent of global wood products production and a roughly similar share of global wood products trade are of suspicious origin. The report also estimated that eliminating global illegal logging would increase U.S. wood exports by over \$460 million per year and increase the value of U.S. domestic shipments by \$500–700 million annually.

For these reasons, AF&PA was an active participant in a unique stakeholder coalition comprising the forest products industry, labor, environmental organizations, and importer groups, who worked together for the Congressional passage of the 2008 amendments to the Lacey Act. The 2008 amendments expanded the coverage of the Lacey Act by making it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plants or products—including wood and paper—made of plants that are taken or traded in violation of the laws of a federal, state, or foreign law. The plants or products are considered illegally sourced when they are stolen, taken from officially protected or designated areas, taken without or contrary to required authorizations or on which appropriate royalties, taxes, or stumpage fees have not been paid, or are subject to export bans.

The amendments also require importers to file a declaration identifying the country of harvest, the genus and species of plants contained in the products, and the unit of measure. The declaration requirement, administered by the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture, already applies to imports of solid wood products but has not yet been phased-in to composite wood products or to pulp and paper, among others.

### **Impact of the 2008 Lacey Act Amendments**

The 2008 Lacey Act Amendments brought heightened international awareness to the illegal logging issue and introduced a strong incentive throughout the global supply chain to ensure the legality of forest products. Chatham House, a UK-based nonprofit on international and current affairs, has documented welcome reductions in illegal logging or trade over the past few years and identified the Lacey Act Amendments as part of the reason. Also, the 2008 amendments lead the way for similar illegal logging regulations in other major import markets, including the European Union Timber Regulation and the Australian Illegal Logging Prohibition Act.

Looking at one important segment of the forest products industry, the 2008 Lacey Act Amendments appear to have been an important factor behind the increase in U.S. exports of hardwood lumber and the U.S. exports' share of global exports, particularly sales to China. Market developments for U.S. hardwood lumber is particularly germane in assessing the effectiveness of the 2008 amendments because it competes with tropical hardwood lumber originating from countries where illegal logging has been an issue.

U.S. hardwood lumber exports have increased by more than 70% over the past four years. During the same period, exports from almost all other leading hardwood lumber producing countries have been flat or declining.

Developments in the China market are particularly important indicator since that country is a major destination for U.S. hardwood lumber as well as tropical hardwood lumber and where the lumber is processed and re-exported to the U.S. and other major markets as furniture and other consumer products. According to China's trade statistics, hardwood lumber imports from the U.S. have been rising over the past several years. In 2012, hardwood lumber imports from the U.S. increased 5%, while imports from other sources declined 6%. There is anecdotal information indicating that the pickup in demand for U.S. hardwoods is coming from both domestic customers and from buyers in the Far East who reportedly are looking for hardwoods from reliable and legal sources. Many U.S. hardwood timber mills are small, family-owned businesses so the Lacey Act provides significant economic boost to American rural businesses and jobs.

#### *Implementation of the 2008 Lacey Act Amendments*

Implementation has not been problem free. Our industry has worked within a wide coalition including importers, industry, environmental groups, labor organizations, retailers, and others to develop consensus recommendations to the federal agencies on implementation of the Lacey Act Amendments. The consensus group provided the federal agencies with two sets of detailed documents (in 2009 and 2010) encouraging the agencies to use their rulemaking authority to clarify and streamline the requirements for industry to comply with the Lacey Act. As recently as August 2011, the consensus group submitted a joint statement to APHIS proposing a process for addressing outstanding technical issues.

The following are AF&PA's recommendations:

- First and foremost, the administration was mandated by Congress to produce a report on implementation issues within two years of passage of the 2008 amendments. This report has still not been completed. Without the report, it is difficult for Congress and private sector stakeholders to assess whether the understanding of the outstanding implementation issues are best resolved administratively or by legislative changes. We urge members of this committee to formally request that the implementing agencies provide a date certain for the release of the report so that Congress and the public may have access to the information needed to determine the best course of action for solving the identified problems with implementation.
- We believe that the declaration requirement is an important tool in ensuring that businesses all along the supply chain—harvesting operations, manufacturers, brokers, importers, and retailers—become a part of the solution through joint action. The idea behind the 2008 amendments was not a heavy-handed government system of regulation, but a requirement that put the burden on the supply chain to exercise due care in knowing the source of the raw material.

The implementation of the declaration requirement is a work in progress. Several paper companies that have implemented internal fiber tracking systems have told AF&PA that it will be very difficult to identify the genus and species of the wood fiber they use at their paper mills on a shipment-by-shipment basis. Typically, their wood fiber comes from low-risk North American sources.

AF&PA would support constructive proposals that allow greater flexibility for importers of composite wood and pulp and paper. One option is provide a *de minimis* exemption to cover the odd wood and pulp source where the mill cannot guarantee complete knowledge of the country of harvest or the species. This would provide importers more flexibility and reduce the liability of having to verify and declare 100 percent knowledge of the species and harvest location of imports.

- AF&PA believes that the Lacey Act Amendments should not apply to plants and plant products manufactured or imported prior to the enactment of the amendments. We agree that it is unreasonable to expect importers to obtain complete supply chain information pre-May 2008. Specific language could be developed by stakeholders that would preclude unintended gaps.
- In the wake of the raid on the facilities by officers of the U.S. Fish and Wildlife Service on facilities of Gibson Guitars in 2011, a great deal of concern was expressed by some in the musical instruments industry and by individual musicians about possible confiscation of musical instruments when entering or leaving the country. To assuage these concerns, Federal agencies should issue clear guidance that enforcement action will not be taken against individual consumers. There is no precedent in the Lacey Act's long enforcement history of the government targeting end users of individual products.

- The 2008 amendments reinforce and support the laws of other countries concerning the management and trade of plants and plant products. As stated above, a Lacey Act violation is triggered by laws concerning the way plants and plant products are taken, possessed, transported, imported, or exported. Bans and restrictions on exports of raw materials such as logs and sawwood are common laws in tropical countries and are directly linked to forest management and protection efforts. In countries where corruption is common or where there is weak governance, these laws are an important tool in controlling large exports of illegally logged timber.
- Finally, we believe that adequate funding for federal agencies responsible for carrying out the Lacey Act mandate is critical to ensure the full implementation of the Act. This should include funding for international programs that educate foreign governments and businesses on how to comply with the Lacey Act.

### Conclusion

Given that the U.S. is the largest importer of forest products, with proper implementation and enforcement, the Lacey Act can be an important tool for protecting forests around the world and controlling international trade in illegally logged and traded plants and plant products. By fighting illegal logging, the Lacey Act also is leveling the competition in the international wood market. We understand that many Asian manufacturers of wood products are returning to U.S. hardwood to avoid sourcing from questionable suppliers. This helps in preserving and growing jobs in U.S. communities.

As with any other law, there is room for improvement in the manner the act is being implemented and enforced. We believe the first thing the federal agencies need to do is issue their report on the implementation and operation of the Lacey Act Amendments. If it is determined that the Act doesn't provide sufficient administrative authority and legislative changes are still needed, we would be glad to work with Congress to implement technical changes that would improve the effectiveness of the Lacey Act without diminishing its objectives.

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### Statement submitted on behalf of the World Wildlife Fund

World Wildlife Fund (WWF) appreciates this opportunity to provide written testimony to the House Natural Resources Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs for its May 16, 2013 hearing on illegal logging and the 2008 Amendments to the Lacey Act.

Forests have been at the heart of WWF's work for half a century. Invaluable to wildlife and people, forests house over two-thirds of known terrestrial species and act as an important source of livelihood for over 1.6 billion people. Nonetheless, every year the world loses an area larger than the state of New York to deforestation. An important contributor to this annual forest loss and degradation is illegal logging and the associate trade in illegally sourced wood products. A July 2010 study released by the London-based think tank Chatham House estimated that at the beginning of this century in five of the top ten most forested countries, at least half of the trees cut were felled illegally.<sup>1</sup>

The impacts of illegal logging are devastating. Perpetrators often deliberately target remaining high-conservation-value forests, including protected areas, which contain the highly valuable species that have been over-exploited elsewhere. Economically speaking, illegal timber products depress world timber prices, disadvantaging U.S. companies that produce and sell legally sourced forest products. Studies have estimated that the U.S. wood products industry loses as much as \$1 billion annually from illegal logging.<sup>2</sup>

In 2010 there was rising optimism, with reports noting that illegal logging declined as much as 25% worldwide in the millennium's first decade.<sup>3</sup> However, more recent studies have shown that illegal loggers are becoming more organized and so-

<sup>1</sup> Chatham House. "Illegal Logging and Related Trade: A global Response", prepared by S. Lawson and L. McFaul, 2010.

<sup>2</sup> Seneca Creek Associates, LLC, and Wood Resources International, LLC. 2004. "Illegal" Logging and Global Wood Markets: The Competitive Impacts on the U.S. Wood Products Industry", prepared for American Forest & Paper Association.

<sup>3</sup> Chatham House. "Illegal Logging and Related Trade: A global Response", prepared by S. Lawson and L. McFaul, 2010.

phisticated in their tactics.<sup>4</sup> It is clear that, while the 2008 Lacey Act Amendments contributed to the decline seen in the last decade, cartels involved in illegal logging are learning the loopholes and fighting back. Recent estimates suggest that between 50 and 90% of all logging in key producing tropical countries is illegal, with the economic value of global illegal logging between \$30 and \$100 billion, or 10–30% of global wood trade.<sup>5</sup>

But sobering statistics like these do not mean we throw up our hands, declare the 2008 amendments as ineffectual, and cede the world's forests to illegal loggers. Rather, this is the time to buckle down and provide U.S. government agencies the resources they need to fully implement the Lacey Act. This will not only benefit the wildlife and communities that depend on forests for their immediate survival, but will level the playing field for those U.S. businesses acting honestly. Based on financial data in the Global Trade Atlas, over the last four years, U.S. hardwood lumber exports have risen by more than 70%. In 2012, the U.S. share of global hardwood lumber trade exceeded 20% for the first time—rising from 13% in 2008. Although this cannot be wholly attributed to the 2008 Lacey Act Amendments, there are definite correlations. In addition, recognizing the environmental and economic benefits of the 2008 Lacey Act Amendments, the European Union and Australia have passed similar legislation. WWF urges the Committee to assist stakeholders, including industry, labor, and environmental groups, in strengthening the Lacey Act Amendments and fully implement them across relevant U.S. government agencies.

### **Illegal Logging's Impacts:**

#### *The Russian Far East*

The forests of the Russian Far East (popularly called “the Ussuri Taiga”) support extraordinary biological diversity, including nearly all of the world's remaining Amur tigers (around 450) and Far Eastern leopards (35). These rich temperate forests also support the traditional income generation activities of tens of thousands taiga villagers, such as pine nut collecting, hunting, sable trapping, and forest beekeeping. But the Ussuri Taiga is being pushed to the edge of destruction due to illegal logging by a violent “forest mafia” which conducts industrial-scale timber theft largely to supply Chinese furniture and flooring manufacturers, many whom in turn export to the U.S. and EU. To demonstrate the scale of this criminal activity, WWF Russia conducted an analysis that showed that the volume of Mongolian oak logged for export exceeded the volume authorized for logging by 200%—meaning that at least half of the oak being exported across the border to China was stolen. Further analysis of export data showed that 2010 was a mild year—in 2007 and 2008 the oak harvest was four times as large.

This widespread illegality has four primary negative effects:

- *Ecological.* Illegal logging severs vital taiga food chains by removing the most productive wildlife food sources—Korean pine and Mongolian oak. Pine nuts and acorns are the main food source for wild boars and red deer, which in turn are the primary prey of the Amur tiger. The overharvesting of these tree species became so extreme that Prime Minister Putin completely banned the logging of Korean pine in 2010. But the plunder of oak resources continues unabated and total collapse of this wildlife food resource is imminent. Furthermore, as timber supplies dwindle illegal loggers are moving more and more into ecologically-sensitive forests like riparian buffers and wildlife reserves.
- *Social.* The vast majority of forest villagers receive no economic benefit from illegal logging. Instead, their traditional livelihoods of hunting, nut gathering and beekeeping are under threat. For instance, a sharp conflict has erupted between logging brigades and beekeepers in the Dalnerechensk region over the illegal logging of linden, a key honey species.
- *Rule of law.* Money from foreign purchasers, including the U.S., washes through China to the Ussuri Taiga, where it finances massive corruption in the Russian Forest Service and police. Bribed forest rangers and policemen essentially leave huge swathes of rural Russia at the mercy of a forest mafia that uses intimidation and violence to maintain control.
- *Economic.* In 15 years illegal logging has nearly tapped out the timber supply that should have supported legal forest industry for decades. Legal actors cannot compete in a market awash with illegal timber. Hope for economic develop-

<sup>4</sup>Nellemann, C., INTERPOL Environmental Crime Programme (eds). 2012. Green Carbon, Black Trade: Illegal Logging, Tax Fraud and Laundering in the World's Tropical Forests. A Rapid Response Assessment.

<sup>5</sup>INTERPOL/World Bank. 2009. CHAINSAW PROJECT An INTERPOL perspective on law enforcement in illegal logging. INTERPOL General Secretariat, Lyon.

ment in depressed Taiga regions is disappearing as the resource is stolen for export.

WWF Russia works with dedicated forest rangers and village activists to combat illegal logging in the Ussuri Taiga. Their stories demonstrate what's at risk both for the forest and local communities. Men like Anatoliy Kabanets, who has been hounding illegal loggers for 15 years as a forest ranger, policeman, private forest guard and WWF specialist. Anatoliy's work has led to the numerous prosecutions and has successfully driven illegal loggers from key wildlife reserves. But it also cost him his oldest son, who died in a traffic accident believed to be rigged by illegal loggers. Faced day after day by glaring corruption and lawlessness, many others in his place have given in to apathy and cynicism. But Anatoliy is too dedicated to the Ussuri Taiga and the people who need it to walk away.

Or Konstantin Dobrashevsky, a local legislator who organized his neighbors to monitor and report illegal logging of Korean pine, the source of a vital economic resource for the village—pine nuts. In response illegal loggers organized a campaign of intimidation against Konstantin and his neighbors, shooting out the windows of their homes and leaving bullets on their doorstep to be found by their children. Undaunted, Konstantin has continued to use his legislative post to organize illegal logging investigations, audit the actions of the deeply corrupt State Logging Company, and defend the rights of village beekeepers and hunters against illegal loggers. He told WWF Russian “[i]t gets better when they know you aren't afraid of them.”

#### Peru

The mahogany trees of the Amazon are some of the most coveted and expensive woods on earth, with a single tree capable of fetching tens of thousands of dollars by the time it reaches the United States and Europe. For years, Brazil was a leading exporter of mahogany but a 2001 moratorium on logging big-leaf mahogany forced importers to shift their attention to new sources. Peru quickly rose to become the world's largest supplier. Over a decade later, populations of mahogany and another highly sought species, Spanish cedar, have precipitously declined, leaving many of Peru's most precious watersheds without its most valuable trees.

To make matters worse, much of the mahogany harvested was done so illegally. In 2005 alone, 20 of the 24 (83%) exporters of mahogany exported unlawful mahogany trees and products to the U.S. and Europe.<sup>6</sup> This has continued into the present day, with estimates putting illegal activity as accountable for three-fourths of the annual Peruvian timber harvest.<sup>7</sup> Now, the last stands of mahogany and Spanish cedar are nearly all in national parks, territorial reserves, or native Indian lands. This has led to a two-fold problem: loggers have begun to target new tree species with far less protections, and others still have ventured into restricted lands to target the last of Peru's mahogany and Spanish cedar.

Rampant illegal logging prompted U.S. action in 2007 when Congress required a series of reforms by Peru as a prerequisite for a free-trade agreement. This included implementation of a plan on mahogany that would comply with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). But changes have been slow to take effect, with minimal results for many of the remote communities that have watched their forest be decimated by organized illegal logging cartels.

Despite these challenging circumstances, there are positive stories coming out of Peru, including the Consorcio Forestal Amazónico (CFA), holders of Peru's largest individual concession at 180,000 hectares. CFA is complying with Forest Stewardship Standards (FSC) and planning for a sustainable future.<sup>8</sup> Scott Wallace, in an article for National Geographic titled “Mahogany's Last Stand,” notes that CFA is “trying to do things right.”<sup>9</sup> The company's concession may lack a high density of valuable mahogany, but as the article reveals, they are targeting over “20 different species with commercial potential” in a cyclical approach that they hope will allow them to harvest indefinitely. It is the 2008 Lacey Amendments, as well as the newly enacted European Union Timber Regulations (EUTR) and the Australian Illegal

<sup>6</sup> AIDSESEP (2007) *Illegal logging and international trade in mahogany from the Peruvian Amazon*, AIDSESEP, Rainforest Foundation Norway. [http://www.illegal-logging.info/uploads/Mahogany\\_reportEng.pdf](http://www.illegal-logging.info/uploads/Mahogany_reportEng.pdf).

<sup>7</sup> Wallace, S. (2013) *Mahogany's Last Stand*, National Geographic.com April, 2013. <http://ngm.nationalgeographic.com/2013/04/mahogany/wallace-text>.

<sup>8</sup> Global Wood, Consorcio Forestal Amazonico SAC; <http://www.globalwood.org/company/mgodetail.asp?id=22778>.

<sup>9</sup> Wallace, S. (2013) *Mahogany's Last Stand*, National Geographic.com April, 2013. <http://ngm.nationalgeographic.com/2013/04/mahogany/wallace-text>.

Logging Prohibition Bill, that create the market for CFA to sell its legal, sustainable wood thereby encouraging new ways of doing business within Peru's forest industry.

**Economically Speaking: WWF's Work With The Global Timber Industry:**

Every business is in the forest business. Whether a company uses wood in its production or consumes wood fiber in paper or paper products, every company depends on the forest industry in some form or another. WWF believes that if companies practice sound forest management and responsible wood sourcing, it is possible to supply the world's needs for timber while also conserving the biodiversity of the world's last, great forest areas in places such as the Amazon, Borneo, the Congo Basin and the Russian Far East.

WWF's Global Forest & Trade Network (GFTN) works with companies from all across the global forest products supply chain that are willing to lead the industry in responsible forest management and trade. First established in 1991, GFTN assists almost 300 companies world-wide in understanding the forest origin of their wood products, and implementing responsible sourcing action plans.

Through its fieldwork and its collaboration with GFTN participants, WWF has witnessed first-hand how the 2008 Lacey Act Amendments have positively changed the practices of U.S. companies and their suppliers, strengthening their sourcing practices and leveling the playing field for U.S. companies that produce and sell legally sourced forest products. Attached to our testimony you will find a factsheet on Lacey that describes the law, its effects on industry, and includes quotes from different American companies that publicly articulate the positive impacts of the Lacey Act.

**Conclusion**

By motivating companies to ensure that the timber used in their products is legally and responsibly harvested, the 2008 Lacey Act Amendments are a key driver in the global fight to stop illegal logging. But as crime cartels become more organized and sophisticated, so too must the legislation that prevents the systematic destruction of our most precious natural resources. The 2008 Lacey Act Amendments were a step in the right direction, and progress like this should be further supported by the U.S. Congress. Creating protected lands is not enough; without active enforcement measures to prevent illegal logging, many of the world's most biodiverse habitats will be lost. WWF urges the Committee to assist stakeholders, including industry, labor, and environmental groups, that have created a consensus document listing next steps for strengthening the Lacey Act Amendments to fully implement these suggestions with the relevant U.S. government agencies.

*About World Wildlife Fund*

WWF is the world's largest conservation organization, working in 100 countries for nearly half a century to build a future in which people live in harmony with nature. With the support of almost 5 million members worldwide, WWF is dedicated to conserving nature and reducing the most pressing threats to the diversity of life on Earth.

ATTACHMENT

**The Lacey Act: Good for Forests, Good for Responsible U.S. Businesses**

**WHY ARE THE 2008 LACEY ACT AMENDMENTS SO IMPORTANT?**

As one of the world's largest producers and consumers of forest products, the United States plays a key role in deterring illegal logging and associated trade. A 2010 Chatham House study estimated that illegal wood and paper imports into the U.S. could represent almost 4% of all U.S. wood and paper imports, valued at \$4 billion.<sup>1</sup> Deforestation and forest degradation caused by illegal logging often results in devastating impacts to local communities, wildlife, and ecosystem services such as clean air and water. Illegal logging also disadvantages U.S. companies that produce and sell legally sourced forest products. Traders of illegal timber can flood the market with cheap products, creating an unlevel playing field. The Lacey Act is important in maintaining a fair market in which responsible U.S. companies can compete.

<sup>1</sup>Chatham House. 2010. *Illegal Logging and Related Trade: Indicators of Global Response*. Prepared by S. Lawson and L. MacFaul.

### WHAT DOES THE LAW SAY?

The 2008 Amendments to the Lacey Act of 1900 represent the first piece of U.S. legislation to combat the trade of illegal plants and plant products including timber, wood, and paper products. The law addresses illegal logging in three ways:

- It prohibits all trade of plant and plant products that are illegally sourced from any U.S. state or foreign country;
- Requires a declaration of the country of origin of harvest, value, volume, and species name of all plants contained in imported products; and
- Establishes penalties for violations of this law including forfeiture of goods and vessels, fines, and jail time.

### HOW DOES ILLEGAL LOGGING AFFECT INDUSTRY?

Studies have estimated that the U.S. wood products industry loses as much as **\$1 billion** annually from illegal logging.<sup>2</sup> The World Bank estimates annual global economic loss from the illegal trade to be approximately \$10 billion, and losses due to tax evasion and royalties on legally sanctioned logging are valued at approximately \$5 billion.<sup>3</sup> Illegal logging depresses global prices for timber and timber products by up to 16%.<sup>4</sup> These lower values in price weaken the U.S. forest industry's ability to compete in the global marketplace and threaten the industry's job security.

### INDUSTRY SUPPORT FOR RESPONSIBLE FORESTRY AND TRADE

In addition to strong support from the NGO community, the Lacey Act Amendments have garnered widespread support from U.S. businesses that believe in the importance of legal timber trade. Many U.S. companies continue to publicly articulate the positive impacts of the Lacey Act in reducing illegal logging, raising awareness and attention on the part of companies about the forest origin of their wood products, and supporting the U.S. economy, jobs, and their businesses.

The following quotes are from companies that participate in WWF's Global Forest & Trade Network (GFTN), expressing their support for this important tool that reinforces their commitments to responsible forestry and trade.

*Hewlett Packard Company (NYSE: HPQ)*

"Having the Lacey Act compliance requirements in place supports HP's efforts towards achieving our responsible sourcing goals."—*Engelina Jaspers, Vice President, Environmental Sustainability*

*Domtar Corporation (NYSE: UFS)*

"Domtar strongly believes that illegal logging is a serious global problem with detrimental environmental and economic consequences and we support the efforts of governments to continue working on this very important issue. A successful implementation of the Lacey Act should help level the playing field for all companies, recognizing the importance of using only legally and responsibly harvested wood."—*Lewis Fix, Vice President, Sustainable Business and Brand Management*

*Williams-Sonoma, Inc. (NYSE: WSM)*

"The Lacey Act legislation has been pivotal in helping us deliver on our commitment to eliminate unwanted and unknown wood from WSI's supply chain, by motivating our suppliers to ensure that the timber used in their products is legally and responsibly harvested."—*David Williams, Sustainable Development Analyst*

*Tetra Pak Inc.*

"The Lacey Act is an important tool that supports global companies like Tetra Pak that have long been committed to doing what's right for the environment. The Lacey Act complements our efforts to reduce illegal logging and warrants a code of conduct which is implemented wide across all players in the wood and timber market."—*Elisabeth Comere, Director, Environment and Government Affairs*

*IKEA*

"Wood is one of IKEA's most important raw materials, which is why we have been working on sustainable wood sourcing for more than a decade. Harmonized inter-

<sup>2</sup>Seneca Creek Associates, LLC, and Wood Resources International, LLC. 2004. "Illegal" Logging and Global Wood Markets: The Competitive Impacts on the U.S. Wood Products Industry. Prepared for American Forest & Paper Association.

<sup>3</sup>The World Bank. 2006. Strengthening Forest Law Enforcement and Governance: Addressing a Systemic Constraint to Sustainable Development.

<sup>4</sup>Chatham House. 2010. Illegal Logging and Related Trade: Indicators of Global Response. Prepared by S. Lawson and L. MacFaul.

national legislation against the unlawful trading and handling of harvested wood is an important tool to curb illegal logging and a stepping stone towards sustainable forestry. Additionally, when fully and efficiently implemented, it will provide a common approach for all businesses to adhere to.”—*Anders Hildeman, Global Forestry Manager, IKEA*

**ABOUT WORLD WILDLIFE FUND**

WWF is the world’s leading conservation organization, working in 100 countries for nearly half a century to build a future in which people live in harmony with nature. With the support of almost 5 million members worldwide, WWF is dedicated to conserving nature and reducing the most pressing threats to the diversity of life on Earth. Visit [www.worldwildlife.org](http://www.worldwildlife.org) to learn more.

**ABOUT GFTN**

The Global Forest & Trade Network is WWF’s initiative to eliminate illegal logging and drive improved forestry in the world’s most valuable and threatened forests, by engaging with companies across the forest products supply chain that are committed to legal and responsibly sourced forest products. First established in 1991, GFTN assists almost 300 companies world-wide in understanding the forest origin of their wood products, and implementing responsible sourcing action plans. GFTN seeks to strengthen market conditions that help conserve forests, while providing economic and social benefits for the businesses and people that depend on them. With combined annual sales of \$70 billion, trading by GFTN participants represents 20% of all forest products bought or sold internationally every year. For more information on WWF’s Global Forest & Trade Network visit [gftn.panda.org](http://gftn.panda.org).

Dr. FLEMING. As I indicated at the beginning of this hearing, this is just the first in a series of hearings on the Lacey Act. And it is likely that a second oversight hearing will be held within the next 2 months.

I want to thank Members and staff for their contributions to this hearing. And thereby being no further business, the Subcommittee is hereby adjourned.

[Whereupon, at 12:31 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

**Statement of the National Wildlife Federation**

The National Wildlife Federation appreciates the opportunity to submit the following statement for the record of the oversight hearing on the 2008 Lacey Act Amendments:

The National Wildlife Federation (NWF) is America’s voice of conservation, protecting wildlife for our children’s future. With 47 state affiliates and over four million members and supporters across the country, including hunters, anglers, gardeners, and other outdoor enthusiasts, NWF has been in the forefront of national and international efforts to conserve wildlife and natural habitats including forests, for the last 77 years. Illegal logging has long been one of the major threats to the world’s remaining forests, particularly in developing countries. Damage includes thefts from national parks and other protected areas, loss of habitat for many endangered species, and conflicts with local communities who are dependent on forests for their livelihoods. NWF believes that a range of tools are needed to help save the world’s remaining tropical rainforests and other natural habitats, and we continue to support the Lacey Act Amendments of 2008 because they provide an important such tool. Significantly, the Lacey Amendments resulted from a major bi-partisan effort to promote both forest conservation and fair treatment for companies who work to eliminate illegal wood products from their supply chains.

NWF has worked for years to promote sustainable forest management, and to provide incentives for best practices in the industry. Members of our staff have held leadership positions on the board of a key organization in this space, the Forest Stewardship Council (FSC), which established voluntary “sustainability standards” for forest products around the globe through consensus between industry and civil society. FSC offers not only clear environmental and social standards, but also a chain of custody system, that can be relied upon by businesses to demonstrate their sustainability credentials. But honest firms, and market mechanisms like the FSC, have a hard time competing when significantly cheaper, illegal wood enters the sup-

ply chain in global commerce. The Lacey Act Amendments help to level this playing field—they make it illegal to trade in and to import to the U.S. forest products that were harvested or traded illegally in the country or state where they came from. This provides an excellent complement to the FSC’s private sector certification standards.

NWF’s analysis of recent market data reveals that the Lacey amendments have begun to demonstrate the benefits that they promised, even though they are not yet fully implemented: they are bolstering forest conservation efforts by countries beset by criminal logging enterprises; and they are leveling the playing field, and, in some cases, providing an advantage to industry actors who obey the law. One reason for this success is that the leadership shown by the United States in amending our century old Lacey Act has encouraged other countries to step up with their own measures. Soon after passage of the Lacey Act Amendments, the European Union established its own Timber Regulation and the Australian Parliament passed the Illegal Logging Prohibition Act. Other nations are considering similar steps and/or improving enforcement of laws against illegal logging. These laws in the U.S. and other major wood consuming countries are helping to back up the efforts of developing countries and emerging economies who are struggling against “forest mafias”. It would be a shame for the U.S. to undercut these valiant measures to fight corruption, violence and theft, just as they are ramping up and showing results.

We are pleased that many U.S. based forest products producers and manufacturers joined NWF in support of the 2008 Lacey Act Amendments, and the reasons are not hard to understand: they have a hard time competing with the illegal loggers who undercut them by stealing the trees, or evading the payment of fees to land owners or the costs of good land management. Recent trade figures suggest that the timber industries of countries like the U.S., who have laws such as Lacey in place, are gaining market share: for example, the imports of hardwood lumber from the U.S. to China rose in 2012 by 5%, while imports to China from other areas declined by 6%. Since these imports are mostly for processing and re-export to consuming nations, this is one indication of the power of legality requirements, such as Lacey, to influence the trade. Market mechanisms have the potential to discourage illegal logging and to push for further transformation of the wood products industries toward legal and sustainable production for the long term. Having taken the lead on this market improvement, the United States should not abandon the hardworking companies, many of them small businesses, who are obeying the law.

Some firms have complained about the costs of compliance with the Lacey Act, and we have worked with a coalition to help smooth out some of the wrinkles of early implementation. There may be additional improvements which can be made in the documentation system, and we will continue to collaborate on those.

We believe that FSC certification is a useful tool to help determine legal provenance of wood sourcing. But in general, we think that industries can be expected to understand their own supply chains, and to assure that they are not trafficking in illegal goods—this is a normal cost of doing business, and timber products should not be treated any differently. The Lacey Act is part of the American tradition of rewarding honest businesses which follow the rules, since it promotes increased transparency about where products come from. While not yet fully implemented, the Lacey amendments are on the right track—they should be fully put in place, with full funding for the modest electronic data management systems and equipment that will make them more effective and efficient.

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[From Hardwood Floors Magazine, October/November 2012]

WITH GIBSON SETTLEMENT, ‘DUE CARE’ IS SLIGHTLY MORE CLEAR

(By Marcus Asner, Samuel Witten & Katherine Ghilain)

**The Criminal Enforcement Agreement that Gibson Guitar signed with the Department of Justice (DOJ) brings some clarity to the Lacey Act’s mandate that companies . . .**

While not a binding legal precedent for other cases, the compliance program included in the Criminal Enforcement Agreement that Gibson Guitar recently signed with the Department of Justice (DOJ) brings welcome clarity to the Lacey Act’s mandate that companies exercise “due care” when identifying the source of a wood product.

The Criminal Enforcement Agreement resolved a nearly three-year investigation and set of legal proceedings concerning wood that was allegedly illegally harvested and/or exported from Madagascar and India. Gibson promised to pay a \$300,000

penalty and a \$50,000 “community service payment,” cooperate in Lacey Act investigations and prosecutions, and drop forfeiture challenges with respect to some of the wood previously seized by DOJ.

Perhaps most significant for the many industries directly affected by the Lacey Act—including wood flooring importers, manufacturers, distributors and installers—was the rigorous Lacey Act Compliance Program that Gibson was required to implement as part of the agreement. The compliance program provides some welcome clarity on the contours of the Act’s much-discussed “due care” requirement.

The Lacey Act requires that companies exercise “due care” in identifying the source of their goods, but does not spell out what has to be done to meet this standard. According to DOJ, “due care means that degree of care which a reasonably prudent person would exercise under the same or similar circumstances,” and it “is applied differently to different categories of persons with varying degrees of knowledge and responsibility.” The standard is generally high in a commercial context. With few precedents for guidance, both regulators and affected industries naturally will look to the Gibson outcome for guidance and to supplement industry customs and standards.

### **Gibson’s Program**

As explained in section 2.3 of the Gibson Compliance Program, the Lacey Act due care requirement is designed to “minimize the risk of purchasing plant products that were harvested or traded illegally.” To comply with this expectation, the program requires Gibson to follow these steps before buying any wood or wood product:

1. Work with suppliers to ensure they can implement Gibson’s policies, which include procuring wood from either recycled sources or forests where legal harvest and chain of custody can be verified, and obtaining copies of all relevant import and export documentation and business or export licenses;
2. Ask questions to gather information about suppliers and the source of the wood and wood products to determine whether the products meet Gibson’s requirements for known/legal wood products;
3. “. . . Conduct independent research and exercise care before making a purchase,” which may include everything from Internet research to consulting with U.S. or foreign experts or authorities and making site visits;
4. Request sample documentation from suppliers to evaluate Lacey Act compliance and document validity;
5. Make a determination prior to making a purchase based on all of the information collected;
6. Maintain records of these efforts; and
7. Decline to pursue the purchase if there is any uncertainty of legality.

Section 3 of the Compliance Program sets forth Gibson’s policies with respect to wood procurement, verification of foreign law and certifications/licenses, risk determinations, supply chain audits, employee training, record retention, and internal disciplinary actions for non-compliance.

### **Industry Implications**

Gibson’s Lacey Act Compliance Program is binding only on Gibson and it is not meant as an official DOJ pronouncement of what “due care” is supposed to mean in other cases. That said, in the absence of other notable precedents, Gibson’s program, as a practical matter, helps articulate the industry standard for due care.

Companies engaged in the trade of wood should see the compliance program as a useful guide that may well help protect them from liability. There is no “silver bullet” solution to meeting the due care standard. But companies nevertheless would be well served to implement compliance programs reflecting procedures set out in Gibson’s program, tailored to their own circumstances and supply chains. Adopting an appropriately adapted Gibson-style program will give a company a decent argument that it exercised “due care” and therefore complied with the requirements of the law, if it ever unwittingly ends up with some illegal wood and the feds come knocking. DOJ tries to take a consistent approach to enforcement, so the Gibson agreement, and particularly the compliance program, has practical precedential value, even if it is not binding as law on other companies and industries.

International attention on illegal harvesting and environmental commerce is likely to increase. That, in turn, will heighten companies’ exposure to civil and criminal enforcement actions under the Lacey Act. Wood products companies would be wise to review their policies and procedures and ensure that they have in place comprehensive programs like Gibson’s. This will help insulate them from Lacey Act liability and help further the sustainability of the natural resources that are critical to their operations.

The documents listed below have been retained in the Committee's official files.

- Bloomberg BNA, Daily Environmental Report™, Gibson Guitar, Forfeiture, and the Lacey Act Strike a Dissonant Chord
- Congressional Research Report for Congress, The Lacey Act: Compliance Issues Related to Importing Plants and Plant Products

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## OVERSIGHT HEARING ON “THE 2008 LACEY ACT AMENDMENTS.” PART 2

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Wednesday, July 17, 2013  
U.S. House of Representatives  
Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs  
Committee on Natural Resources  
Washington, D.C.

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The Subcommittee met, pursuant to notice, at 2 p.m., in room 1324, Longworth House Office Building, Hon. John Fleming [Chairman of the Subcommittee] presiding.

Present: Representatives Fleming, Runyan, Sablan, Shea-Porter, and Lowenthal.

Dr. FLEMING. The Subcommittee will come to order. The Chairman notes the presence of a quorum.

### STATEMENT OF THE HON. JOHN FLEMING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Dr. FLEMING. Good afternoon. Today the Subcommittee will continue its oversight examination of the Lacey Act, by focusing on the provision of that law that requires American citizens to comply with the laws of foreign Nations.

Article I of our Constitution stipulates that “all legislative powers herein granted shall be vested in a Congress of the United States.” While I am not a constitutional expert, I find nothing in that landmark document that allows the Congress to delegate law making authority to foreign countries. However, that is essentially what the Congress did in 1935, when the Lacey Act was amended to prohibit the importation of all wildlife taken contrary to a foreign law. If I had been a Member of the 74th Congress—by the way, I wasn’t even born then—I would have voted against the provision, because it is simply wrong to force American citizens to comply with laws of other Nations.

Regrettably, the 2008 amendments have significantly compounded this problem. Instead of having to comply with a limited number of foreign laws by expanding coverage to include plant and plant products, this has triggered literally tens of thousands of foreign laws.

In addition, because of the Federal court decisions, the term “foreign law” has now been greatly expanded to include foreign regulations, foreign resolutions, and foreign decrees and, thanks to the 2003 *U.S. v. McNab* case, “other such legally binding provisions that foreign governments may promulgate.”

Based on testimony we received, there is no data base of those foreign laws and, frankly, the Federal enforcement agencies have no idea how many were triggered by the 2008 Amendments. Yet, we are allowing our Federal courts to send our constituents to overcrowded Federal prisons for violating laws enacted not only by the British Parliament but also the National People’s Congress of the

People's Republic of China, the National Assembly of Venezuela, and the National Congress of Honduras.

This is truly madness, and I agree with the Heritage Foundation that this "violates one of the fundamental tenets of Anglo-American common law: that men of common intelligence must be able to understand what a law means. No one should be forced to run the risk of conviction and imprisonment for making a mistake under foreign law."

It is one thing for an American living abroad to comply with the laws where they are living. It is quite another to convict one of our citizens living here for violating the laws of one of the 192 countries recognized by the United Nations. The Lacey Act demands that you know every law, civil and administrative, as well as criminal, of every foreign land. This is simply wrong.

During the course of today's testimony, I am interested in finding out from our distinguished panel of witnesses the legislative history explaining the rationale for requiring compliance with foreign laws, why the Congress has never provided a definition for the term "foreign law," and why this provision is even necessary in the Lacey Act, that we are willing to sacrifice the freedom and liberty of our citizens.

[The prepared statement of Dr. Fleming follows:]

**Statement of The Honorable John Fleming, Chairman, Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs**

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Dr. FLEMING. At this time I am pleased to recognize the distinguished Ranking Member, the gentleman from the Commonwealth of the Northern Marianas, Congressman Sablan, for any opening statement he would like to make.

**STATEMENT OF THE HON. GREGORIO KILILI CAMACHO  
SABLAN, A DELEGATE IN CONGRESS FROM THE TERRITORY  
OF THE NORTHERN MARIANA ISLANDS**

Mr. SABLAN. Thank you very much, Mr. Chairman. And good afternoon, everyone.

The title of today's hearing poses a question that is simple enough to answer. We expect people from other countries who are visiting or operating a business in the United States to follow our laws. And so, of course, those countries should expect the same from Americans traveling or working within their sovereign territory. With that, we should all be able to call it a day and move on to more pressing business.

The question posed by the Majority misses the point of the Lacey Act's foreign law provisions, which is to protect Americans from unwittingly buying seafood stolen from the waters of another country, or guitars made from illegal wood. It also ignores the interests Americans have in protecting wildlife abroad, and the fact that the Lacey Act is one of the most effective tools we have for doing that.

Finally, the Lacey Act does not require U.S. citizens to comply with foreign laws. But, instead, bans trade in illegally harvested wildlife and plants.

So, as we speak, the illegal timber trade is funding al-Qaeda-linked terrorists. Ivory is helping Joseph Kony and the Lord's Resistance Army to continue to commit atrocities and destabilize Central Africa. And sophisticated criminal networks with helicopter, night vision goggles, and automatic weapons are profiting from killing the last rhinos on the planet.

We should not muddy the waters by distorting the intent and effect of one of our strongest conservation laws. Rather, we should hold a hearing to ask what we can do to help this global criminal assault on the wildlife and habitats that Americans cherish, and that developing countries need to feed their people.

Unfortunately, this Committee's Majority has ignored our requests for such a hearing. And that is a shame, because we should all benefit from hearing different perspectives on the kind of serious crime the Lacey Act works to deter and punish. But the Majority did not invite the Department of the Interior to discuss how additional resources for conservation, education, and natural resources law enforcement could turn the tide against criminal deforestation in South America. They did not invite the Department of State to learn about diplomatic efforts to curb demand for elephant ivory, rhino horn, and shark fin in East Asia. And they did not invite the Department of Defense to learn whether bringing a stop to poaching in Africa could make the United States a safer place.

They did, however, choose to ignore all of this, all some very real challenges we face.

We will not ignore these challenges. We have a responsibility on this Committee to address, head on, the threats to natural resources that Americans value. And we will not shirk that responsibility.

The Lacey Act is a good and legitimate law, one of which we should be proud. That includes the foreign law provisions which have been on the books for more than 80 years. Every constitutional challenge to the Lacey Act has failed. But if the Majority wants to bring another one, then they should pursue that in the courts, not in our Committee. If Majority Members want to introduce legislation that would damage the Lacey Act, they are welcome to do so. But I would expect it would meet a similar fate as that of last year's anti-Lacey Act bills. In the meantime, we will do our best to highlight the depth and breadth of transnational wildlife and timber crime, and hope that they will join us together—join us so that we can take on those problems together.

I welcome all of our witnesses, and I look forward to your testimony.

And, Mr. Chairman, I ask for unanimous consent to enter into the record four items.

The first is a United Nations Secretary General's report from May 2003 that references the link between poaching and other transnational organized criminal activities, including terrorism.

The second is a statement from the U.S. Director of National Intelligence, James R. Clapper, during the worldwide threat assessment hearing in the Senate Select Committee on Intelligence on March 12, 2003. His testimony states that illicit trade in wildlife, timber, and marine resources constitute a multi-billion-dollar industry annually, and that these criminal activities are linked to insurgent groups and transnational organized crime organizations.

The third is President Obama's Executive Order from July 1, 2013, which states that combating wildlife trafficking is in the national interests of the United States, because poaching operations have expanded beyond small-scale opportunistic actions to coordinated slaughter commissioned by armed and organized criminal syndicates.

And finally, the fourth is a recently released report on the global security implications of the illegal wildlife trade from the International Fund for Animal Welfare, which demonstrates that we urgently need to increase our attention and resources to fully understand the pathways of the illegal wildlife trade and connections to all the illicit activities, such as arms trafficking, corruption of—militancy and terrorism, all of which threaten our global security. Mr. Chairman, I thank you very much.

Dr. FLEMING. Without objection, so ordered.

[The information submitted for the record by Mr. Sablan has been retained in the Committee's official files:]

Dr. FLEMING. The gentleman yields his time.

[The prepared statement of Mr. Sablan follows:]

**Statement of The Honorable Gregorio Kilili Camacho Sablan, Ranking Member, Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs**

Thank you, Mr. Chairman.

The title of today's hearing poses a question that is simple enough to answer. We expect people from other countries who are visiting or operating a business in the United States to follow our laws, so of course those countries should expect the same from Americans traveling or working within their sovereign territory. With that, we should all be able to call it a day and move on to more pressing business.

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As we speak, the illegal timber trade is funding Al Qaeda-linked terrorists. Blood ivory is helping Joseph Kony and the Lord's Resistance Army to continue to commit atrocities and destabilize central Africa. And sophisticated criminal networks with helicopters, night vision goggles, and automatic weapons are profiting from killing the last rhinos on the planet. We should not muddy the waters by distorting the intent and effect of one of our strongest conservation laws. Rather, we should hold a hearing to ask what we can do to help stop this global criminal assault on the wildlife and habitats that Americans cherish and that developing countries need to feed their people. Unfortunately, this committee's majority has ignored our request for such a hearing.

That is a shame, because we could all benefit from hearing different perspectives on the kinds of serious crime the Lacey Act works to deter and punish. But the majority did not invite the Department of the Interior to discuss how additional resources for conservation, education, and natural resources law enforcement could turn the tide against criminal deforestation in South America. They did not invite the Department of State, to learn about diplomatic efforts to curb demand for elephant ivory, rhino horn, and shark fin in East Asia. And they did not invite the Department of Defense, to learn whether bringing a stop to poaching in Africa could make the United States a safer place. They did, however, choose to ignore all of the very serious and very real challenges we face.

We will not ignore these challenges. We have a responsibility on this committee to address head on the threats to natural resources that Americans value, and we will not shirk that responsibility. The Lacey Act is a good and legitimate law—one of which we should be proud. That includes the foreign law provisions, which have been on the books for more than 80 years. Every constitutional challenge to the Lacey Act has failed, but if the majority wants to bring another one then they should pursue that in the courts, not in our committee. If majority members want to introduce legislation that would damage the Lacey Act they are welcome to do so, but I expect it would meet a similar fate as that of last year's anti-Lacey Act bills. In the meantime, we will do our best to highlight the depth and breadth of transnational wildlife and timber crime, and hope that they will join us soon so that we can take on these problems together. I welcome all of our witnesses, and I look forward to your testimony.

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Dr. FLEMING. A notice to our panel. First of all, thank you for being here today. We are going to be called for votes in the next few minutes. What we are going to try to do is get through as much testimony as we can. And then we will recess for votes and come right back. So we want to be sure we are sitting on the edge of our seats to hear your testimony today.

We will now hear from our panel of witnesses, which includes Ms. Kristina Alexander, Legislative Attorney, American Law Division, Congressional Research Service; Mr. Alexander von Bismarck, Executive Director, Environmental Investigation Agency; Mr. Marcus A. Asner, Arnold and Porter; Mr. Reed D. Rubinstein, Partner, Dinsmore and Shohl, representing the U.S. Chamber of Commerce; Mr. Paul J. Larkin, Jr., who is a Senior Legal Research Fel-

low at the Heritage Foundation; and Mr. Paul D. Kamenar, a former Senior Executive Counsel, Washington Legal Foundation.

Your written testimony will appear in full in the hearing record, so I will ask that you keep your oral statements to 5 minutes, as outlined in our invitation letter to you, under the Committee Rule 4(a).

Our microphones are not automatic. And also, be sure the tip is close enough. You have to, I guess, share a little bit of microphone today. So be aggressive about shifting it so it can get there close to you and we can hear you.

We will move forward, then. Ms. Alexander, you are now recognized for 5 minutes.

Ms. ALEXANDER. Good afternoon, Mr.——

Dr. FLEMING. Oh, let me interrupt you just for a second. One thing I left out, our lighting system. You are on the green light for 4 minutes, and then yellow for a minute. And when it turns red, if you haven't completed, be sure and go ahead and wrap up. Your full testimony in writing will be submitted for the record, so we will have it all.

Thank you. I now open it up to you, Ms. Alexander.

**STATEMENT OF KRISTINA ALEXANDER, LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS**

Ms. ALEXANDER. Good afternoon, Mr. Chairman, members of the Subcommittee. My name is Kristina Alexander. I am a legislative attorney with the Congressional Research Service. I am here to introduce the Lacey Act and explain its legislative history regarding the ban on trade of plants and animals taken in violation of foreign law.

The Lacey Act has a 113-year history that I will now review in 5 minutes.

It was enacted in 1900 and has been amended many times since. Speaking generally, it is against Federal law to buy or sell plants or animals that were taken or traded in violation of State, Federal, tribal, or foreign law. When enacted, the Lacey Act was designed to prevent killing wildlife in violation of one State's laws and escaping prosecution by selling game in another State. In 1900, it applied to game that was killed in violation of the laws of a State, territory, or district. Thus, the Lacey Act has always been a two-part law: a violation of the Federal law is predicated on the violation of another law.

In 1900, Congressman John Lacey acknowledged that his legislation would require those who sold game to understand the laws of the jurisdiction from which the game originated. At the start, the Lacey Act regulated just wild animals and birds. Fish were separate. A companion law, the Black Bass Act of 1926, addressed the illegal trade of fish. It shared the same structure as the Lacey Act: a violation of Federal law could be found if underlying law were violated. At the time, the predicate acts included violations of State, territorial, and district law.

In 1930, Congress enacted the Tariff Act, which prohibited importing wildlife if taken in violation of the laws of a foreign country, unless a certificate were issued. Congress's discussion of the

Tariff Act gives perhaps the fullest congressional treatment of banning wildlife imports taken or exported contrary to the laws of a foreign nation: "By law and treaty, the United States has recognized the desirability of the protection and conservation of wildlife. Certain practices of a commercial nature involving violations of laws of other countries, though not of laws of the United States, are entirely contrary to the intent and purpose of this policy of conservation."

There was some initial dissent to this law, however. In September 1929, the Senate opposed legislation that required compliance with foreign law. Senator Smoot of Utah expressed concern not regarding any imposition on U.S. citizens, but about interfering with the sovereignty of other countries. An amendment removed the wildlife trade language, but 6 months later the wildlife ban was included in the Act.

In 1935 the Lacey Act was amended to make violations of foreign law a predicate act, as well. The legislative record surrounding the 1935 amendment is not rich with explanation. In fact, the total remarks are as follows: "It is proposed also to extend the operation of the Lacey Act to foreign commerce and game and other wildlife."

In 1969, a comprehensive wildlife law was enacted which amended the Lacey Act to include more types of animals, and amended the Black Bass Act to make foreign law violations a predicate act for fish. The law also prohibited importing species in violation of foreign law that were at risk of becoming extinct.

The legislative history for adding foreign laws to fish trade is more substantial than in 1935, perhaps because the 1969 change was part of a larger bill. A House report describes the purpose of the Black Bass amendment as assisting in reducing commercial traffic in fish illegally taken in a foreign country. The Senate Committee describes the international purpose as both reducing demand for poached wildlife, as well as promoting reciprocity among other countries that might prohibit the sale of wildlife taken illegally in the United States.

Testimony before Congress in the 1960s addressed the foreign law provision of the Lacey Act. Witnesses indicated that it would be difficult to know of and comply with laws of foreign countries when importing species. However, there is no discussion by a Member of Congress in the debate on the 1969 amendments on any difficulties in making it a violation of U.S. law to violate a foreign law.

A trade protocol similar to that required by the Lacey Act is in place for the Convention on International Trade of Endangered Species of Wild Fauna and Flora, known as CITES, which entered force in 1975. While CITES does not explicitly require compliance with foreign law, it does require that for certain listed species, U.S. importers must have a valid export certificate. That export certificate would demonstrate compliance with foreign law. CITES, in contrast to the Lacey Act, provides a list of species for which an export permit is required.

The Black Bass Act and the Lacey Act were combined in 1981. At that time some plants were added, and in 2008 the plant provisions were amended. In terms of the plant provisions, therefore, the predicate violation of foreign law has always existed.

Mr. Chairman, that concludes my prepared statement. I am happy to answer any questions you or others may have.  
[The prepared statement of Ms. Alexander follows:]

**Statement of Kristina Alexander, Legislative Attorney, American Law Division, Congressional Research Service, Library of Congress**

Mr. Chairman and Members of the Subcommittee:

My name is Kristina Alexander. I am a Legislative Attorney with the Congressional Research Service. I am here to introduce the Lacey Act and explain its legislative history regarding the restriction on trade in plants and animals taken in violation of foreign laws.

The Lacey Act was enacted in 1900 addressing imports of injurious species and wildlife trafficking between states. My testimony is limited to the wildlife trafficking provisions of the Lacey Act, which, generally speaking, make it a violation of federal law to buy or sell plants or animals that were taken or traded in violation of state, federal, tribal, or foreign law. More specifically, with regard to foreign law, the Lacey Act makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish, wildlife, or plant taken, possessed, transported or sold in violation of any foreign law.<sup>1</sup> In the case of plants, the underlying foreign law must protect or regulate plants.

The Lacey Act of 1900 was intended to prevent hunters from killing wildlife in violation of one state's laws and escaping prosecution by selling the game in another state. It was unlawful to transport the dead bodies of wild animals or birds from one state to another if the animals or birds were killed in violation of the laws of the "State, Territory, or District in which the same were killed."<sup>2</sup> Thus, a Lacey Act violation has always been predicated on a violation of another law. In 1900 those predicate acts were limited to the laws of a state, territory, or district. The sponsor of the act, Congressman John F. Lacey, acknowledged that the law would require those who sold game to understand the laws of the jurisdiction from which the game originated in order to avoid violating the Lacey Act.<sup>3</sup>

Initially, the Lacey Act regulated trade of "wild animals and birds," while the Black Bass Act of 1926 addressed illegal trade in fish.<sup>4</sup> The Black Bass Act shared the same structure as the Lacey Act, making it a federal offense to violate the laws of a State, Territory, or the District of Columbia with respect to fish.

In 1930, Congress passed the Tariff Act of 1930, which prohibited importing wildlife that was taken in violation of foreign law.<sup>5</sup> The Tariff Act of 1930 specifies that unless a certificate is issued, a "mammal or bird, or part or product thereof" may not be imported into the United States if the laws of the country of origin "restrict the taking, killing, possession, or exportation to the United States."<sup>6</sup> During debate on the Tariff Act in September 1929, the Senate opposed legislation to require compliance with a foreign law. Senator Smoot of Utah questioned whether the provision amounted to undue interference with the enforcement rights of other countries:

The House bill contained a new provision prohibiting the importation of wild mammals or birds unless accompanied by the certification of an American counsel that such articles have not been acquired or exported in violation of the laws of the country from which they come. . . . The provision partakes of the nature of an attempt to enforce the laws of foreign countries in respect to matters of their internal policy. While it may not be proper to encourage violation of foreign laws, it would seem to be beyond the proper purpose of a tariff bill to adopt the amendment proposed by the House bill.<sup>7</sup>

<sup>1</sup> 16 U.S.C. § 3372(a)(2). Other prohibited acts are described in 16 U.S.C. §§ 3372(a)(1)–(4). For a fuller analysis of the Lacey Act, see CRS Report R42067, *The Lacey Act: Protecting the Environment by Restricting Trade*, by Kristina Alexander.

<sup>2</sup> Lacey Act, ch. 553, 31 Stat. 187, 188 (1900).

<sup>3</sup> 56 Cong. Rec. 4,873–74 (1900). Mr. Lacey: "It will simply do this: Suppose the closed season in Virginia commences on the 1st of December, and the closed season in Georgia is the 1st of October. Now, it will be lawful to ship animals and birds from Virginia into the District of Columbia and Baltimore longer than it would be from Georgia, because the closed season is different; and the man that receives and handles them must know that he is dealing in something that has not been killed in violation of the State law from which the game comes."

<sup>4</sup> Black Bass Act, ch. 346, 44 Stat. 576 (1926).

<sup>5</sup> Tariff Act of 1930, ch. 497, 46 Stat. 590, 741 (codified as amended at 19 U.S.C. § 1527).

<sup>6</sup> 46 Stat. 741; 19 U.S.C. § 1527.

<sup>7</sup> 71 Cong. Rec. 3,628 (Sept. 14, 1929).

A 1929 House Report provides additional insight regarding the ban, centering not around trade obligations, but around the stated purpose of wildlife conservation:

By law and treaty the United States has recognized the desirability of the protection and conservation of wild life. Certain practices of a commercial nature involving violations of laws of other countries, though not of laws of the United States, are entirely contrary to the intent and purpose of this policy of conservation. Many foreign countries have passed and are passing laws for the protection of wild birds and mammals either directly or through prohibition of exportation of such articles. In view of the policy of our Government in these matters, it is believed that we should not countenance disregard of the laws of these countries by permitting the importation of birds or mammals taken or exported in violation of such laws . . .<sup>8</sup>

While a Senate amendment removing the foreign law provision from the House bill was approved, six months later, a foreign law provision substantially similar to that in the House bill was included in the bill that became the Tariff Act of 1930.<sup>9</sup>

In 1935, the Lacey Act was amended to add violations of foreign laws as predicate acts. At that time, it became a federal crime to capture, kill, take, ship, transport, carry, purchase, sell, or possess wild animals or birds “contrary to the law of any State, Territory, or the District of Columbia, or foreign country or State, Province, or other subdivision thereof” in which the game was captured, killed, taken, delivered, or knowingly received for shipment, transportation, or carriage, or from which it was shipped, transported, or carried.<sup>10</sup> The legislative record surrounding the 1935 amendment provides little explanation regarding the foreign laws amendment. The only germane published remarks were in a House Report: “It is proposed also to extend the operation of the Lacey Act to foreign commerce in game and other wildlife.”<sup>11</sup>

Subsequent amendments to the Lacey Act expanded the law’s reach. In 1948, federal law was added to the list of predicate acts.<sup>12</sup> Amendments of 1969 extended the act’s coverage to wild mammals, wild birds, amphibians, reptiles, mollusks, or crustaceans “or the dead body or parts thereof.”<sup>13</sup>

Also in 1969, the Black Bass Act was amended to include foreign law violations among its predicate acts.<sup>14</sup> The legislative history for this amendment is more substantial than for the 1935 change to the Lacey Act, possibly because the 1969 change was part of a larger bill to ban importing species at risk of becoming endangered. A House Report by the Committee of Merchant Marine and Fisheries describes the Black Bass Act amendment as enabling the United States to “assist in reducing commercial traffic in black bass or other fish illegally taken in a foreign country.”<sup>15</sup> The Senate Committee on Commerce described the international purpose:

By prohibiting the sale in the United States of wildlife protected by a foreign government, the demand for poached wildlife from that country will be sharply reduced. In addition, however, such a law is also designed to promote reciprocity. If we assist a foreign country in enforcing its conservation laws by closing our market to wildlife taken illegally in that country, they may in turn help to enforce conservation laws of the United States by prohibiting the sale within their borders of wildlife taken illegally within the United States.<sup>16</sup>

Congressional hearings for the 1969 amendments addressed the foreign law issue regarding endangered species import bans, as well as the extension of the Lacey Act to other species. Witnesses indicated that it was difficult to know of or comply with laws of foreign countries when importing species. For example, the Director of the National Zoological Park stated:

Often we don’t know which countries animals came from or what borders they have crossed. Let us say that before buying an animal I want to be

<sup>8</sup>H. Rep. 71-7 at 181 (May 9, 1929).

<sup>9</sup>72 Cong. Rec. 5521 (March 18, 1930).

<sup>10</sup>Act of June 15, 1935, P.L. 74-148, § 201, 49 Stat. 378, 380.

<sup>11</sup>H. Rep. No. 74-886 (May 13, 1935).

<sup>12</sup>Act of June 25, 1948, P.L. 80-772, § 42, 62 Stat. 683, 687.

<sup>13</sup>Act of Dec. 5, 1969, P.L. 91-135, § 7, 83 Stat. 275, 281.

<sup>14</sup>Act of Dec. 5, 1969, P.L. 91-135, § 7, 83 Stat. 275, 281.

<sup>15</sup>H. Rep. 90-1102, at 10 (Feb. 21, 1966).

<sup>16</sup>S. Rep. 91-526, at 12 (Nov. 6, 1969).

sure that it was captured and exported legally from its country of origin. There is no way I can do this.

First, it would require a large staff of lawyers and translators to assemble and analyze the enormous mass of national, State, provincial and local and tribal wildlife protection laws for more than a hundred nations.

Next, one would have to collect the regulations, then somehow discover what procedures are followed . . .”<sup>17</sup>

Almost a year later, the Assistant Director of the Zoo testified that “experience has shown that enforcement of this provision of the Lacey Act is next to impossible.”<sup>18</sup> Similarly, a report by the Senate Commerce Committee includes a letter from the Deputy Assistant Secretary of the Interior stating that the proposed endangered species provision, which would require the Department of the Interior to assemble a list of at risk species, would “make enforcement easier, because it is now very difficult to tell whether a particular mammal or bird or part thereof was taken illegally in a foreign country.”<sup>19</sup>

However, there is no discussion in the legislative history of the 1969 amendments by a Member of Congress on any compliance difficulties in making it a violation of U.S. law to violate a foreign law.

A trade protocol similar to the Lacey Act requirements went into effect in 1975, when the Convention on International Trade of Endangered Species of Wild Fauna and Flora, known as CITES, entered into force.<sup>20</sup> While CITES, through its enabling act, the Endangered Species Act, does not explicitly require compliance with foreign law, it does require U.S. importers to have a valid export certificate for certain listed species to demonstrate compliance with foreign law. CITES, in contrast to the Lacey Act, identifies the species for which an export permit is required.

In 1981, the Lacey Act and the Black Bass Act were combined, keeping the name the Lacey Act. Also in 1981, the Lacey Act was amended to add tribal laws as predicate acts,<sup>21</sup> and to cover some plants.<sup>22</sup> In 2008, the plant provisions were expanded to the current language.<sup>23</sup> Accordingly, in terms of plant provisions of the Lacey Act, foreign law violations have always been included as predicate acts.

Mister Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Subcommittee might have, and I look forward to working with all Members and staff of the Subcommittee on this issue in the future.

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Dr. FLEMING. Thank you.  
Next, Mr. von Bismarck for 5 minutes.

**STATEMENT OF ALEXANDER VON BISMARCK, EXECUTIVE  
DIRECTOR, ENVIRONMENTAL INVESTIGATION AGENCY**

Mr. VON BISMARCK. Thank you, Mr. Chairman, Ranking Member, and members of the Subcommittee, for inviting me to appear today. As Executive Director and an investigator for the Environmental Investigation Agency, I have conducted field investigations on every continent into the criminal networks making their living off of stealing the world’s natural resources. In this work I am grateful for the training and experiences I received as a U.S. Marine.

<sup>17</sup>House Committee on Merchant Marine and Fisheries, Subcommittee on Fisheries and Wildlife Conservation, *Fish and Wildlife Legislation, Part 1*, hearing on H.R. 6138, H.R. 8693, H.R. 11618, H.R. 3327, and H.R. 10923, 90th Cong., 1st sess., Oct. 4, 1967, Testimony of Dr. Theodore H. Reed, Director, National Zoological Park.

<sup>18</sup>Senate Committee on Commerce, Subcommittee on Merchant Marine and Fisheries, *Endangered Species*, hearing on S. 2984 and H.R. 11618, 90th Cong., 2nd Sess., July 24, 1968, Testimony of Mr. John Perry, Assistant Director, National Zoological Park.

<sup>19</sup>S. Rep. 90-1668, at 15 (Oct. 10, 1968). Letter of Clarence F. Pautzke, Deputy Assistant Secretary of the Interior.

<sup>20</sup>16 U.S.C. § 1538(c). The United States ratified the treaty in 1974.

<sup>21</sup>Lacey Act Amendments of 1981, P.L. 97-79, § 3, 95 Stat. 1073, 1074.

<sup>22</sup>Lacey Act Amendments of 1981, P.L. 97-79, § 3, 95 Stat. 1073.

<sup>23</sup>Food, Conservation, and Energy Act of 2008, P.L. 110-246, § 8204(b), 122 Stat. 1651, 2053-55. See, 16 U.S.C. § 3371(f) (definition of plant); 16 U.S.C. § 3372 (prohibited activities related to plants); 16 U.S.C. § 3372(f) (plant declarations).

EIA has worked for nearly 30 years to expose environmental crimes and advocate for effective solutions. For example, EIA's investigations led to the international ivory ban in the late 1980s.

I would like to provide an update from the field, if you will, to help illustrate why the respect for foreign laws within Lacey is so critical. A 1-minute video will show the most recent investigations we are conducting. The first undercover clip illustrates the tiger parts trade, where the role of organized criminal networks is becoming clearer. Militant groups affiliated with al-Qaeda, such as the Harakat ul-Jihad-Islami-Bangladesh and Jamaat-ul Mujahedin Bangladesh, designated as foreign terrorist organizations by the State Department, are suspected of poaching tigers in India's Kaziranga National Park to support terrorist activities.

The second clip shows undercover meetings with ivory smugglers who said that 90 percent of the trade is illegal, 30,000 elephants are killed each year by organized crime syndicates, threatening not just animals, but people. The Lord's Resistance Army is slaughtering elephants in the Democratic Republic of Congo's Garamba National Park for ivory to fund its atrocities, which include rape, large-scale massacres, sexual slavery, and abduction. Similar, Somalia's militant group, al-Shabaab, is poaching elephants in Kenya, while the Sudanese Janjaweed militias are reportedly responsible for the recent mass elephant slaughters in Chad and Cameroon.

The final clip was from Madagascar, from EIA's investigation which contributed to the Gibson case. A Chinese trader in a Mercedes was explaining to me how he was friends with the new President of Madagascar, and helped finance his coup with profits from the rosewood and ebony trade. I am aware that the Gibson case has been politicized. Luckily, the facts can ultimately come forward. Gibson purposefully sought out Malagasy wood when others wouldn't, when they knew that cutting had been illegal since 2006. This was unfair to Madagascar, and unfair to other American companies working hard to play by the rules.

If anybody spent a single day in the logging town, you would be convinced of this fact. I posed as a new buyer, and 3 days later I was taken by the Gibson suppliers into the national park to show where they illegally cut the ebony. And Gibson had much better tools to find that out. And, in fact, they did find that out. They did a fact-finding mission. They wrote about it in emails. And they decided that, despite that, to keep buying the wood.

Luckily, the efforts by this company to try to change a law here in Washington while it was being investigated under that law ultimately didn't work. We have seen this kind of thing happen in Indonesia, but I am glad it didn't work in the United States. Because of this Lacey case, Madagascar national parks made it through a turbulent coup bruised, but still intact. Because of this Lacey case, manufacturers in China stopped buying Malagasy wood. Because of this Lacey case, Madagascar's forests still have a chance. And because of this Lacey case, the U.S. has a chance to cement new rules of the road in international commerce, particularly in China.

If we want to imagine the consequences of removing concern for foreign laws from the Lacey Act, we can look to China. The Chinese Government has answered the question posed by this hearing clearly. They say, "No, we generally do not need to follow the rules

of other countries.” As a result, many of their companies steal natural resources around the globe. I cannot imagine that it is the intent of this Committee or this hearing to follow China down a path of rewarding commerce in stolen goods.

The irony is we are at the cusp of encouraging new rules of the road in other countries, as a result of American leadership. China spoke to the U.S. Trade Delegation on Monday about instituting measures to stop the import of illegal wood into its borders. A retreat on this principle of respecting foreign laws will destroy this progress and condemn U.S. companies to having to compete on the basis of who can buy more illegal wood.

Timber smuggling, like the wildlife trade, is about national security. For countries around the world, such as in Madagascar’s case, and for U.S. direct interest, USAID’s Harry Bader, who received the State Department’s USAID award for heroism, says the Lacey Act is a critical counter-terrorism tool, because of its coverage of foreign laws. His counter-insurgency cell in Eastern Afghanistan found that the international sale of cedars was funding attacks on U.S. troops. This trade has fallen entirely now into the hands of insurgents like the Haqqani Network, and the forests are currently being liquidated to prepare for the summer fighting season. That is happening now to replace “ordnance seized or destroyed” by successful coalition operations. Illegal logging similarly supports insurgencies that threaten ongoing U.S.-supported counter-insurgency efforts in the Southern Philippines and Colombia.

Mr. Chairman, I urge you not to follow China, but to lead and support our present chance to set up norms of international trade that dry up the markets for goods that were stolen, that fund drug cartels, human rights abuses, and terrorism. Thank you, Mr. Chairman.

[The prepared statement of Mr. von Bismarck follows:]

**Statement of Alexander von Bismarck, Executive Director,  
Environmental Investigation Agency**

**Introduction**

Mr. Chairman, Ranking Member, and members of the Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs, thank you for inviting me to appear before the Subcommittee today for the oversight hearing, “Why Should U.S. Citizens Have to Comply with Foreign Laws”.

I have investigated and studied global crime in natural resources for over 15 years. As an investigator and the Executive Director of the Environmental Investigation Agency, I have conducted international field investigations on every continent into criminal networks dealing in illegal wood, endangered species and harmful chemicals. Before joining EIA I researched linkages between economics, ecology and human health with the Harvard School of Public Health and the New England Aquarium. I have a masters of science from the London School of Economics in Environment and Development and a BSc from Harvard University in Environmental Science and Public Policy. I am also proud to have served as a U.S. Marine.

The Environmental Investigation Agency, Inc. (EIA), a non-profit 501(c)(3) organization, has worked for nearly 30 years to investigate and expose environmental crimes, and advocate for creative and effective solutions. EIA’s analyses of the trade in illegal timber, wildlife, and ozone-depleting substances have been globally recognized. As an example, our investigative work in the late 1980s provided evidence that led to the international ban on ivory trade.

Since 1999, EIA has also used its undercover methodologies in partnership with local organizations to document the environmental and social impacts of illegal logging, as well as its context of corruption and criminal activity, in countries including China, Peru, Indonesia, Malaysia, Honduras and Russia. Our experience has shown us unequivocally that the illegal logging which causes the most serious environ-

mental and social harm is inextricably linked to international trade, and that any solution will therefore require action and cooperation from both producer and consumer nations.

We were honored to represent a broad coalition of industry, labor and environmental stakeholders when we testified before this subcommittee in 2007 about the need for amendments to the Lacey Act to include coverage of plants and timber taken or traded in violation of foreign law.<sup>1</sup> Since the passage of the 2008 amendments, we have continued to work closely with a coalition of organizations, which represent a majority of affected stakeholders, to identify potential challenges with the implementation of the Act and to propose solutions that protect the environment and promote good governance while minimizing unnecessary regulatory burdens or regulatory uncertainty for legitimate businesses engaged in legal trade.

In my testimony I will highlight the facts on the ground that the Lacey Act is designed to combat, and document how effective implementation of this law is having a positive impact in the United States and around the globe. I will stress that more effective implementation is needed, rather than less. In a world where illegal logging and other poaching of natural resources funds terrorism, destabilizes rule of law and development around the world, and undercuts all law abiding U.S. companies, we should all be supporters of a U.S. law that protects U.S. citizens from unwittingly supporting these crimes.

#### **Constitutionality of the Lacey Act**

First, I would like to state the obvious that the Lacey Act is a U.S. law. The U.S. legislature has on many occasions chosen to pass laws which, in plain English, state that the United States does not support commerce in stolen goods. The Lacey Act is one of these laws; so are laws that prohibit counterfeiting and smuggling, trafficking in stolen property, as well as many customs laws. The Lacey Act essentially prohibits the trade in illegally taken wildlife and plants. When an elephant is poached in Africa, the U.S. government has made it clear that it does not want to provide safe harbor for the buyer that financed that poaching. This has been the case since 1935 and there is no serious question that the laws prohibiting interstate or foreign trade in ivory or other poached goods are constitutional. Without prohibitions against trafficking in illegal wildlife and timber, the U.S. market would become a world leader in rewarding the organized crime that drives this trade.

#### **Environmental Crimes: A Threat to National Security**

Wildlife and forest crime is the 4th largest transnational crime in the world, worth an estimated U.S. \$17 billion annually.<sup>2</sup> In March 2013, the *U.S. Worldwide Threat Assessment*, produced by the U.S. intelligence community, also highlighted the threat of environmental crimes to our national security:

“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.”<sup>3</sup>

Recognizing the importance of this issue and the challenge it poses, on July 1st, President Obama issued an Executive Order to address “the significant threats of wildlife trafficking on the national interests of the United States.”<sup>4</sup>

In 2010, the United Nations Office of Drugs and Crime (UNODC) produced a major report on the *Globalization of Crime: A Transnational Organized Crime Threat Assessment*,<sup>5</sup> which included environmental resources crime as one of the top eight offenders. In the report UNODC noted that:

<sup>1</sup>We refer you to our 2007 testimony, which goes into greater detail than we do here about the devastating impacts of illegal logging around the globe and the need for a robust Lacey Act: <http://eia-global.org/PDF/testimony-ELA-forests-oct07.pdf>.

<sup>2</sup>Haken, J. 2011. Transnational Crime In The Developing World. Global Financial Integrity, Washington, DC, USA.

<sup>3</sup>Clapper, James. U.S. Intelligence Community Worldwide Threat Assessment Statement for the Record. March 12, 2013. Accessed July 16, 2013. <http://www.intelligence.senate.gov/130312/clapper.pdf>.

<sup>4</sup>White House Press Release. July 1, 2013. <http://www.whitehouse.gov/the-press-office/2013/07/01/executive-order-combating-wildlife-trafficking>.

<sup>5</sup>United Nations Office of Drugs and Crime, “Globalization of Crime: A Transnational Organized Crime Threat Assessment,” 2010: [http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA\\_Report\\_2010\\_low\\_res.pdf](http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf).

“Crime has diversified, gone global and reached macro-economic proportions: illicit goods are sourced from one continent, trafficked across another, and marketed in a third. Mafias are today truly a transnational problem: a threat to security, especially in poor and conflict-ridden countries. Crime is fuelling corruption, infiltrating business and politics, and hindering development. And it is undermining governance by empowering those who operate outside the law.”

The top three recommendations from the UNODC report follow:

- Because most trafficking flows are driven more by the market than by the groups involved in them, efforts that target these groups—the traditional law enforcement response—are unlikely to be successful on their own.
- Because transnational organized crime markets are global in scale, global strategies are required to address them, and anything else is likely to produce unwanted side effects, often in the most vulnerable countries.
- Because globalized commerce has made it difficult to distinguish the licit from the illicit, enhanced regulation and accountability in licit commerce could undermine demand for illicit goods and services.

All three of these recommendations are supported by full and effective implementation of the Lacey Act, which has at its heart the intent to ferret out and dismantle international criminal networks profiting from poaching of wildlife and illegal harvest of plants. The United States was also a proponent of a resolution urging member states to formally view the illicit trade in plants and wildlife as a “serious crime,”<sup>6</sup> that was finally adopted by the UN Commission on Crime Prevention and Criminal Justice (CCPCJ) in April 2013.<sup>7</sup> Turning away from that mandate means green-lighting activities of transnational organized crime with our eyes wide open to the threats and consequences.

I will now share with you some illustrative examples of what this transnational crime looks like in practice on the ground, and, where possible, I provide examples of Lacey Act enforcement actions aimed to deter further criminal activity.

#### **Illegal Logging in Afghanistan: Funding Insurgents**

There are many examples around the world where forests offer an important mechanism to both finance and provide a base of operations for insurgents and other elements eager to avoid the rule of law. Current examples include Muslim separatists in Southern Philippines, cocaine cartels in Central America, and insurgents in Afghanistan.

A recent article reporting on the work of the U.S. Natural Resources Counterinsurgency Cell (NRCC) in eastern Afghanistan, established under Task Force Mountain Warrior (TFMW), shows that the illegal timber trade was funding insurgent groups in Afghanistan.<sup>8</sup> Profits from this trade likely funded the killing of U.S. troops on the ground in Afghanistan.

Members of the U.S. counterinsurgency cell found that, “The success of the timber smuggling networks created a sort of forced collaboration, transcending friction points and enabling tribal and politically antagonistic entities to cooperate. Thus, insurgent organizations freely coordinated with corrupt Afghan government officials, local warlords, village elders, and Pakistan government intelligence services in order to gain revenue from harvesting timber.” This led to the conclusion that, “whoever keeps the timber industry working, *have the people’s hearts . . . and their guns.*”<sup>9</sup>

The report further explains that “it is believed that the insurgent effort to dominate the timber trade in Kunar began as a deliberate operation to liquidate valuable forests in order to obtain revenue to procure ordnance, men, and other supplies in anticipation of the 2011 and 2012 fighting seasons . . . a need by insurgent elements to replenish ordnance seized or destroyed by successful coalition operations.”<sup>10</sup>

<sup>6</sup>Biron, Carey L. “Africa: UN Recognizes Wildlife Trafficking As ‘Serious Crime’” All Africa, April 29, 2013. Accessed July 15, 2013. <http://allafrica.com/stories/201304300508.html?viewall=1>.

<sup>7</sup>UN Commission on Crime Prevention and Criminal Justice. 22nd Session, UNODC. April 2013. Accessed July 15, 2013. <http://www.unodc.org/unodc/en/commissions/CCPCJ/session/22.html>.

<sup>8</sup>Harry R. Bader, Clint Hanna, Clint Douglas & John D. Fox (2013): Illegal Timber Exploitation and Counterinsurgency Operations in Kunar Province of Afghanistan: A Case Study Describing the Nexus Among Insurgents, Criminal Cartels, and Communities Within the Forest Sector, *Journal of Sustainable Forestry*, 32:4, 329–353: <http://dx.doi.org/10.1080/10549811.2013.767913>.

<sup>9</sup>Ibid, pg. 340.

<sup>10</sup>Ibid, pg. 343.

Much of this timber was smuggled through Pakistan, where it received fraudulent paperwork intended to make it appear legal and was traded onward to global markets. International buyers not practicing due care will have purchased this timber and thus, knowingly or not, financed the continuation of insurgent and terrorist activities.

The Lacey Act is designed to help the United States fight these insurgent and terrorist operations, and protect U.S. interests, by helping ensure that companies in the business of selling goods in the United States take reasonable measures to know their suppliers. Anybody interested in ensuring that we, as American citizens and consumers, are not unwittingly funding insurgent groups that are killing U.S. servicemen and women overseas, should be working to strengthen the implementation of the Lacey Act, not weaken or dismantle it.

By fully funding the implementation of the Lacey Act, including its declaration requirement and enforcement, leading by example, and encouraging other countries to pass similar measures, the U.S. government can dry up the international profit centers for wood trade that supports terrorism.

#### **Illegal Logging in Peru: Destabilizing a U.S. trading partner**

EIA's April 2012 report on the illegal logging situation in Peru—"The Laundering Machine",<sup>11</sup> analyzed official documents which demonstrate that at least 112 illegal shipments of cedar or mahogany wood—laundered with fabricated papers and signed off on by Peruvian government officials—arrived in the U.S. between 2008 and 2010. These shipments account for over 35% of all trade in these protected species between the U.S. and Peru. Our field investigators found that this pervasive laundering and corruption have been an open secret in Peru's wood trade for years, and that any exporter or importer still relying only on paper permits to claim legality should know better by now.

Illegal timber in the Peruvian Amazon is cut by crews of loggers, often under abysmal and abusive conditions, and stolen from protected areas including national parks, indigenous territories, and other government lands. Migrant workers find themselves trapped in camps located deep in the jungle, and indigenous communities are left with massive debts after intermediaries swindle them out of their valuable trees. These practices are financed by powerful timber barons, some connected to organized crime, who turn a blind eye to the human rights abuses and crimes committed. This timber is then laundered with documents based on false information.

In 2006, the World Bank estimated that the illegal logging sector in Peru generated between \$44.5 and \$72 million dollars annually,<sup>12</sup> while recorded legal profits from timber sales in the same year reached only 31.7 million.<sup>13</sup> By 2011, the government and industry of Loreto, Peru's largest region, estimated that illegal logging was causing the country annual losses greater than \$250 million dollars—1.5 times the value of total timber exports.<sup>14</sup>

#### *Cocobolo, Inc.: The U.S. Department of Interior v. Three Pallets of Tropical Hardwood*

In June 2009, agents of the U.S. Fish & Wildlife Service seized three pallets of tropical hardwood as they entered the Port of Tampa, Florida from Iquitos, Peru. Originating deep in the Amazon, the pallets contained numerous species of decorative woods, including tigrillo (*Swartzia arborescens*), palisangre (*Brosimum rubescens*), and tigre caspi (*Zygia cataractae*). Agents confiscated the wood on grounds that the shipment violated the Lacey Act's declaration requirements.<sup>15</sup> The seizure was supported by substantial evidence that the exporter was using stolen and forged documents. The FWS Agents were acting on information from a Peruvian business owner, who learned that his business had been used as a front to fraudulently ship the wood in question.

The U.S. importer filed a petition for remission of the wood, but the Solicitor's office found that Mr. Crouch, owner of Cocobolo, Inc., failed to take reasonable steps to comply with the regulations and ensure that the shipment was authorized by an export permit that properly documented the required information and was declared

<sup>11</sup> Environmental Investigation Agency. "The Laundering Machine: How Fraud and Corruption in Peru's Concession System are Destroying the Future of its Forests."

<sup>12</sup> Pautrat, L. and I. Lucich. Analisis Preliminar Sobre Gobernabilidad y Cumplimiento de la Legislacion del Sector Forestal en el Peru. 2006.

<sup>13</sup> Fordaq. Peru: Timber exports fall 11% in first quarter. June 6, 2011. Accessed July 14, 2013. [http://www.fordaq.com/fordaq/news/logs\\_softwood\\_plywood\\_26553.html](http://www.fordaq.com/fordaq/news/logs_softwood_plywood_26553.html).

<sup>14</sup> OSINFOR Comunicado: "Gobierno Regional de Loreto, Concesionarios y OSINFOR unidos para promover el desarrollo forestal sostenible con inclusion social." October 2011.

<sup>15</sup> 16 U.S.C. § 3372(f).

appropriately under the Lacey Act upon arrival into the United States. Evidence that the tropical hardwood was stolen to begin with, using forged documents led the Solicitor's Office to conclude that the exporter did not have legal title to the shipment.<sup>16</sup>

This case demonstrates how strict liability forfeiture is implemented by government agencies and that the Lacey Act does provide both legal and administrative remedies to ensure a company gets to 'have its day in court'.

### **Illegal Logging in Russia: Threatening the Last Siberian Tigers and American Business**

In the Russian Far East (RFE) region lie the hardwood forests of the Sikhote-Alin mountain range, home to numerous threatened species, including the world's largest cat, the endangered Siberian (Amur) tiger (*Panthera tigris* ssp. *altaica*). The forests of the RFE are being cut at an alarming rate; last year, nearly 20 million cubic meters of timber flowed across the border into neighboring China.<sup>17</sup> According to the local WWF office in Vladivostok, in 2010, an equivalent harvested volume of approximately 900,000 cubic meters of oak was exported, most of it to China. Data from Russian provincial forest agencies authorized only 452,213 cubic meters of oak to be cut in 2010, indicating that at least 50% of the oak exported into China from Russia was illegally harvested.<sup>18</sup>

Oak, ash, linden, elm and other precious hardwoods are manufactured in China into flooring and furniture, much of which is then re-exported onwards to the U.S., EU, and Japan. All of these products have numerous substitutes from around the world; the U.S. and Europe both export significant quantities of temperate hardwoods to China. However, the high quality and low cost of illegally harvested old-growth Russian hardwoods has historically served to undercut U.S. and European products.

Oak, ash, and other hardwood species from across the northern hemisphere differ little in their utility as raw materials for furniture and flooring. The key factor that has changed since 2008 is that, with passage of the Lacey Act amendments, suppliers in China now have a motivation to use timber from low-risk countries to avoid complications with their U.S. buyers. The Lacey declaration requirement, the PPQ 505 form, is the key element for tracking and promoting shifts such as these. On the PPQ 505 form, U.S. importers must list the species name and country of harvest of the wood in their imports. This is one of the few ways for U.S. importers to distinguish whether the oak in their Chinese-manufactured flooring comes from a high-risk country or a low-risk one, and is thus the key factor motivating a shift in raw-materials sourcing.

#### *Illegal Logging in Madagascar: Undermining a Fragile State*

Over the past ten years, the impoverished island nation of Madagascar has experienced a crisis of rampant illegal logging, which has decimated the world-renowned biodiversity of its national parks, impoverished local communities, and fueled corruption and a coup in 2009. Hundreds of thousands of tons of extremely high value rosewood and ebony have been illegally cut and smuggled out of the country to serve consumer markets, with the vast majority going to China for the high-end domestic furniture market.<sup>19</sup>

In 2009, the U.S. government investigated Gibson Guitar Inc. for importing illegally harvested ebony from Madagascar. In 2012, Gibson acknowledged that it imported ebony from Madagascar despite knowing that harvest of ebony had been illegal for many years. Gibson agreed to pay over \$600,000 in fines and forfeited ebony, and also committed to follow a detailed compliance process for future imports. This action has had a significant impact on sourcing practices within the music industry worldwide and validates the effort of all American companies that invest in sourcing legal wood.

The spotlight the case placed on the illegal Malagasy rosewood and ebony trade also led to crackdowns in China on Chinese importers of these precious woods. As a result of increased international scrutiny of the illegal timber trade, evidenced by laws such as the Lacey Act amendments and the European Union Timber Regulation, China for the first time has publicly acknowledged the problem of illegal tim-

<sup>16</sup> *U.S. Department of the Interior v. Three Pallets of Tropical Hardwood (Crouch)*, INV No. 2009403072 (Office of the DOI Solicitor June 22, 2010.), (Decision in Response to Petition for Remission).

<sup>17</sup> Russian Customs data as reporting in United Nations COMTRADE.

<sup>18</sup> Smirnov, D.Y. (ed.) Kabanets, A.G., Milakovsky, B.J., Lepeshkin, E.A., Sychikov, D.V. 2013. *Illegal logging in the Russian Far East: global demand and taiga destruction*. WWF, Moscow.

<sup>19</sup> EIA and Global Witness, *Investigation Into the Global Trade in Malagasy Precious Woods: Rosewood, Ebony and Pallsander*, October 2010.

ber imports. These actions to curb demand led to a decrease in illegal logging in Madagascar. On Monday, a high level delegation from China met with U.S. counterparts to discuss concrete steps it could take to stop its own role in illegal logging, particularly in Madagascar. U.S. leverage to encourage China to address illegal logging in these discussions stems from the Lacey Act, since it allows us to challenge imports of wood products that are misrepresented or shown to be made from illegal timber.

As in many Lacey cases, the enforcement action involving Gibson Guitar Inc. had positive impacts in fighting the illicit trade that went beyond the case itself; it had the effect of curbing the illegal logging of national parks in Madagascar, having the Chinese patrol more thoroughly the role their businesses play in the illegal destruction of Malagasy forests, and encouraged the global musical instruments industry to more thoroughly examine its sourcing practices. All of these are important elements for challenging international criminal networks, establishing sustainable business practices for the future of the trade, protecting forest resources, and rewarding American guitar companies that are playing by the rules.

#### **Chinese Response to Lacey Act Plant Amendments**

In 2009, following the new Lacey Act amendments, the People's Democratic Republic of China also introduced the "Guide on Sustainable Overseas Forest Management and Utilization by Chinese Enterprises", emphasizing the responsibility of Chinese forestry companies operating overseas to abide by host-country laws and to practice sustainable forest management. In 2011, the government proposed a draft legality verification system. Over the past five years, in a significant shift, Chinese officials have taken a more active role in international forestry discussions, reflecting increased international pressure and focus on issues relating to timber legality.

In addition, recent years have demonstrated dramatic changes in Chinese timber product sourcing practices. Chinese official import data illustrates these trends: while Russia still accounts for 37% of total log and lumber imports by China, the share made up by Canada, New Zealand, and the United States has more than tripled from 10% in 2007 to 33% in 2010 (Please see attached graphic). At a recent conference, Chinese government officials noted that China is importing less wood from high-risk countries due to legality concerns on the part of U.S. and European buyers. This data indicates that laws like the amended Lacey Act are already starting to positively impact supply chains around the world.

#### **The Current Wildlife Poaching Crisis**

The illegal wildlife trade is believed to be equivalent—in both revenue produced for criminals and level of threat to national security—to arms and narcotics trafficking. The links between wildlife poaching, the associated illegal trade, and transnational organized crime are increasingly complex and require more U.S. resources and attention than currently exist, certainly not less. Far greater investment is required to institutionalize intelligence-led, multi-agency enforcement in key source, transit and destination countries in order to identify and apprehend key criminals in the trade chain and disrupt these criminal networks.

##### *Elephants*

Elephants are being slaughtered in large numbers, an estimated 30,000 per year, by organized crime syndicates for their ivory to feed Asian, and particularly Chinese, demand. Though China claims to have a controlled domestic legal ivory market, EIA investigations have shown that up to 90% of the ivory in China is illegal and supplied by poached elephants in Africa.<sup>20</sup> Evidence indicates a growing involvement of organized crime networks, and these syndicates rely on corruption, collusion and protection from different government institutions and private sector operators to thrive.

There is a growing body of evidence that the slaughter of majestic and iconic elephants is supporting crimes against humanity, showing that the illegal wildlife trade threatens not only animals but also people. A recent report, "Kony's Ivory: How Elephant Poaching in Congo Helps Support the Lord's Resistance Army," provides field evidence confirming that the Lord's Resistance Army (LRA) is slaughtering elephants in the Democratic Republic of Congo's Garamba National Park for ivory to fund its atrocities.<sup>21</sup> The LRA is known for vast human rights violations,

<sup>20</sup> Environmental Investigation Agency. "Blood Ivory: Exposing the myth of a regulated market." 2010.

<sup>21</sup> Kasper Agger and Jonathan Hutson. "Kony's Ivory: How Elephant Poaching in Congo Helps Support the Lord's Resistance Army." June 2013. A co-production of the Enough Project, The Resolve, Invisible Children, and the Satellite Sentinel Project (with DigitalGlobe).

including murder and large-scale massacres, rape and sexual slavery as well as abduction. Joseph Kony, the criminal leader of this rebel group, has ordered his followers to bring him elephant ivory to obtain food, arms and other supplies to fuel more rebel unrest and violence. Thus, the illicit ivory trade is serving to help sustain violence and terrorism that the United States has vowed to combat.

Sadly, the LRA is not the only armed group targeting elephants to fund criminal activity. Somalia's militant group al-Shabaab has been implicated in poaching elephants in Kenya while the Sudanese Janjaweed militias are reportedly responsible for the recent mass elephant slaughters in Chad and Cameroon.<sup>22</sup>

As one of the world's largest consumers of illegal wildlife, the U.S. plays a significant role in the international ivory trade.<sup>23</sup> The U.S. is now leading the international community's growing focus on the poaching crisis by recognizing that wildlife crime is serious organized crime—it's now time to act on this recognition by fully implementing its commitment to ending wildlife trafficking.

#### *Rhinos*

Thus far in 2013, more than two rhinos per day have been poached for their horns to feed Asian demand. The Convention on International Trade in Endangered Species (CITES) Secretariat believes the rhino horn trade to be "one of the most structured criminal activities currently faced by CITES."<sup>24</sup> If the current rate continues, more than 900 rhinos will be killed in South Africa this year, easily surpassing last year's record high of 668 poached rhinos. The well-funded and sophisticated criminal poaching networks have thus far overwhelmed the capacity of local enforcement officials to adequately stop the slaughter in range states.

The Lacey Act has made it possible to charge and prosecute those involved in the killing and trafficking of globally threatened rhinos and their parts. As an example, in September 2012, members of an international smuggling ring pled guilty to federal charges for illegally trafficking rhino horn.<sup>25</sup> In addition to charges of money laundering and tax fraud, Vinh Chuong "Jimmy" Kha and Felix Kha and the Win Lee Corporation pled guilty to conspiracy, smuggling and wildlife trafficking in violation of the Lacey Act. The case surfaced as part of the U.S. Fish and Wildlife Service's (USFWS) "Operation Crash," an ongoing nationwide crackdown targeting those involved specifically in illegal killing of rhinos and unlawful trafficking of rhino horn. At sentencing, the defendants were ordered to pay a total of \$800,000 in restitution to the Multinational Species Conservation Fund, managed by the USFWS, to support international rhino conservation efforts.

USFWS Director Dan Ashe commented on the sentencing in this case as follows: "Criminals in this country who are cashing in on this illegal trade should know that the United States will hold them accountable for their crimes and do everything possible to protect wild populations of rhinos."<sup>26</sup>

#### *Tigers*

The role of organized criminal networks in the international illegal trade in skins, bones and other body parts of tigers and other Asian big cats between India, Nepal and China became apparent in 1999 and continues to be documented.<sup>27</sup> Further, militant groups affiliated with al-Qaeda (such as the Harakat ul-Jihad-Islami-Bangladesh (HUJI-B) and Jamaat-ul Mujahedin Bangladesh (JMB), two entities designated as foreign terrorist organizations by the U.S. Department of State and European governments) and based in Bangladesh are suspected of sponsoring the poaching of tigers and other protected species at India's Kaziranga National Park to support terrorist activities.<sup>28</sup> The poaching crisis has been exacerbated by a surge in demand for the use of skins for luxury home décor and for use as bribes and pres-

<sup>22</sup> International Fund for Animal Welfare (IFAW). "Criminal Nature: The Global Security Implications of the Illegal Wildlife Trade." June 2013.

<sup>24</sup> CITES Secretariat, *Species Trade and Conservation—Rhinoceroses: Report of the Secretariat*, SC62 Doc. 47.2.

<sup>25</sup> FWS News Release. "Members of International Smuggling Ring Plead Guilty to Federal; and also Charges of Illegally Trafficking Endangered Rhinoceros Horns." September 14, 2012. Accessed July 17, 2013 <http://www.fws.gov/le/pdf/rhino-horns-news-release-09172012.pdf>.

<sup>26</sup> 7th Space Interactive. "USDOJ: Smuggling Ring Sentenced in Los Angeles for Criminal Trafficking of Endangered Rhinoceros Horn." Found at: <http://7thspace.com/headlines/437930/usdoj-smuggling-ring-sentenced-in-los-angeles-for-criminal-trafficking-of-endangered-rhinoceros-horn.html>.

<sup>27</sup> See, e.g., EIA (Feb 2013), Hidden in Plain Sight: China's Clandestine Tiger Trade; EIA (Oct. 2012), Briefing on Snow Leopards in Illegal Trade—Asia's Forgotten Cats; EIA (Nov. 2011), Key features of the Asian big cat skin and bone trade in China in 2005–2011.

<sup>28</sup> (ref supra to IFAW 2013 Criminal Nature report) at p.12.

tigious gifts in China, which has put not just tigers at risk, but leopards and snow leopards as well.

With as few as 3,200 wild tigers remaining, it is critical that all countries introduce domestic measures to end all trade, in all tiger parts and products from all sources; captive-bred as well as wild. During this year alone, based on poaching incidents and seizures, approximately 24 tigers have been killed in India.<sup>29</sup> Major seizures of parts and products of tigers and other Asian big cats confirm that the illegal trade is ongoing and that more resources and political will are required to end all big cat trade.<sup>30</sup>

#### **Facts of the McNab Case**

Opponents of the Lacey Act repeatedly cite the case of *McNab v. United States of America* and *Blandford, Schoenwetter, and Huang v. United States of America* as an example of over-regulation to validate the push for change to the law. However, they fail to share fundamental elements of the case that illustrate why the violations were so egregious. In this case, the persistent and willful failure to comply with foreign laws led to disastrous ecologic, human and economic consequences. We would like to make some clarifications for the record.

The fishing of lobsters off the Caribbean coast of Honduras and Nicaragua is having increasingly devastating human as well as environmental consequences. It is largely done by indigenous Miskito men who free-dive to deeper and deeper waters to grab lobsters that have become increasingly scarce due to over-exploitation. The average life span of these men is now under 40 as so many die of decompression sickness (also known as “the bends”) because they do not have proper equipment to dive at those depths. These are the lobsters that are then loaded onto boats such as the one McNab operated.

During the period covered by the indictment, the Republic of Honduras had imposed conservation regulations to protect its lobster fishery from over-exploitation and health regulations to ensure safe processing of fishery products. McNab owned and operated a fleet of lobster fishing boats that harvested Caribbean spiny lobster in Honduran fishing waters. The McNab case involved a very large amount of lobster: 400,000 lbs with a value of \$4.6 million.<sup>31</sup>

A number of Honduran laws and regulations were broken by McNab’s fleet throughout its operations, including regulations intended to prevent harvesting of juveniles, illegal transport, failure to report harvest to the appropriate Honduran fishing authorities, and failing to ensure that the lobsters were inspected and processed in Honduras. While one of the underlying laws that McNab’s Lacey violation was eventually based upon involved the packaging material, the extent of McNab’s illegal activity was much more extensive. Even the packaging violation is more meaningful than it might appear, as the incorrect packaging allowed the company to better hide the under-sized lobsters from authorities.

The National Marine Fisheries Service agents (NOAA) repeatedly consulted with Honduran officials and determined through their investigation that Honduran law had been violated by McNab’s company, and by those that bought the lobster in the United States. The Honduran law was changed subsequently due to corruption and bribery in Honduras, and the courts saw it for what it was. This is a case in which the Lacey Act did exactly what it was supposed to do: prevent destruction of a natural resource in violation of the conservation laws of a trading partner.

#### **Conclusion**

U.S. industry and consumers do not want to fund human rights violations in Peru, Kony and the Lord’s Resistance Army in the DRC, insurgents in Afghanistan, the junta in Burma, the extinction of the Amur Tiger in Russia, or the decimation of elephants and rhinos throughout the continent of Africa. This is a limited list of how profit from illicit trade in wildlife, fish and plants has become one of the leading sources of finance for criminal networks. Why is this? It is precisely because there is not enough enforcement and respect for the rule of law that governs the take and trade of natural resources. The Lacey Act is one of the laws working effectively to change this reality.

<sup>29</sup> Wildlife Protection Society of India (WPSI), Tiger Deaths in 2013, <http://www.wpsi-india.org/wpsi/index.php>.

<sup>30</sup> See, e.g., Chetan Chauhan (Feb. 18, 2013), Rich haul of tiger body parts in Nepal shows increased threat to Indian tigers (Hindustan Times, New Delhi), <http://www.hindustantimes.com/India-news/NewDelhi/Rich-haul-of-tiger-body-parts-in-Nepal-shows-increased-threat-to-Indian-tigers/Article1-1013268.aspx>; Phoenix Fund (Feb 2013), Sad statistics from the Amur!, <http://www.rewildingfoundation.org/2013/02/26/sad-statistics-from-the-amur/>.

<sup>31</sup> David Henson McNab vs. United States of America: <http://www.justice.gov/osg/briefs/2003/0responses/2003-0622.resp.html>.

Europe, Australia and perhaps soon Japan are following the United States' lead in this area in order to make sure that their domestic laws also deter the international trade in illegal plant species. Here the U.S. has led by its example of respect for the rule of law.

By the title of this hearing, the subcommittee seems to propose an alternative view that the United States should allow its citizens and businesses to abdicate all responsibility for lawful conduct as soon as their activities move beyond U.S. borders. We don't have to imagine what the consequences of such an approach are: China has no measures similar to the U.S. Lacey Act and consequently is largely responsible for the giant sucking sound of natural resources illegally taken from around the globe. Chinese companies exhibit blatant disregard for the rule of law overseas, bribing officials and smuggling vast quantities of precious wildlife, timber and other natural resources to their factories. The only forces now frustrating these practices are the Lacey amendments and similar laws which close markets to such lawless and destructive practices.

Times have changed in the more than 100 years since the Lacey Act first became law, and Congress has kept apace, through thoughtful amendments over that time, to meet the challenges that globalization and increasingly sophisticated international criminal networks pose to legal trade.

Mr. Chairman, I cannot imagine it is your intention that the United States should cease to lead in the fight against transnational organized crime and the protection of our natural heritage.

Removing coverage of foreign laws from the Lacey Act would fatally undermine this effective tool and reveals a disinterest in conducting responsible trade. In this age of globalized trade—the Lacey Act supports and, in fact, rewards those traders that want to play by the rules. Removing these protections for legitimate business operators would leave them once again vulnerable to be undercut by illegal competitors. American businesses operating overseas and trying to follow the rules would be without a future.

As we are faced with a wildlife poaching crisis raging out of control, ever more sophisticated illegal timber networks, and over 80% of global fishery stocks at risk as they struggle with illegal, unreported and unregulated fishing, there is not a better proven tool than a well-funded and effectively enforced U.S. Lacey Act.

Thank you for your time, and I would be happy to answer any questions.

Dr. FLEMING. Yes, thank you for your testimony.

Well, votes have been called. I am going to go ahead and recess. We will probably be approximately an hour. So don't run far. And we will be back. We are waiting at the edge of our seats for the rest of the testimony and the questions today. Thank you.

[Recess.]

Dr. FLEMING. The Committee is now brought back to order. I think we left off with Mr. Asner next. So, Mr. Asner, you are now recognized for 5 minutes.

**STATEMENT OF MARCUS A. ASNER, ARNOLD AND PORTER,  
LLP**

Mr. ASNER. Thank you, Mr. Chairman. This hearing is focused on the Lacey Act, and it asks a simple question: Why should U.S. citizens have to comply with foreign laws? The answer is simple. The Lacey Act has no such requirement. Lacey does not, in fact, require U.S. citizens to comply with foreign law. In fact, the Act requires only that people in the U.S. comply with the U.S. law, the Lacey Act, which, in turn, prohibits trade in the United States of illegal fish, wildlife, plants, and plant products.

American consumers have a right to buy legal goods, and people who traffic in illegal goods should be punished. If someone steals a truckload of cattle in Ontario and smuggles it into Michigan, no one in this room would quarrel that the person has committed a crime. In fact, the smuggler would have violated a whole slew of Federal laws, including laws that bar interstate transportation of

stolen property, and laws that prohibit the theft of livestock. And if someone steals tons of lobster from South Africa, as the defendants did in the Bengis case that I handled as a prosecutor, and dumps the stolen lobster on unknowing American consumers, all for a huge profit, that person has committed a crime. She has violated the Lacey Act.

In both cases, whether cattle or lobster is stolen, deciding whether the defendant has committed a U.S. crime necessarily will turn, at least in part, on foreign law. To find out whether the cattle was stolen, we have to look to the laws of Canada, and to find out whether the lobster was stolen, we have to look to the laws of South Africa. U.S. courts are well equipped to do this, and have been doing so for as long as anybody can remember.

The invitation also asks about whether the foreign law provision of the Lacey Act is constitutional. Every single circuit court to consider the issue has upheld the Lacey Act as constitutional. Courts addressing the issue have described the contrary argument—and I am quoting—as “patently frivolous, without merit, and neither original nor meritorious.” As the third circuit said, “The Act does not delegate legislative power to foreign governments, but simply limits the exclusion from the stream of foreign commerce to wildlife unlawfully taken abroad.”

The Lacey Act is good for America and protects the rights of victims. Allowing importers to ignore the legality of the goods they sell to Americans will encourage trade in illegal goods, which, in turn, will put legitimate U.S. businesses at a disadvantage, threaten the sustainable supply of resources we need, undermine the rule of law in other countries, and threaten our national security.

The Lacey Act also protects victims, including individuals in countries who had their resources stolen or illegally taken, as the court made clear in Bengis, when it ordered the defendants to pay compensation to South Africa for the lobster that they stole.

Now, some of my colleagues argue in their written testimony that the Lacey Act is unfair and even unconstitutional. I disagree. One argument is that the Lacey Act makes it a crime to violate foreign law, and that it requires Americans to be familiar with tens of thousands of foreign law. That is not accurate. Lacey punishes trafficking in the United States in certain illegal goods, but only if the defendant knew, or should have known, that the goods were illegal.

Another argument is that the Lacey Act holds someone criminally liable for the violation of even the most technical foreign law, rule, or local ordinance, without any evidence of intent. Again, that is not true. If you unwittingly and reasonably find yourself in possession of illegal goods, you are not guilty under the Lacey Act.

Another argument is that no one reasonably can be expected to know the laws of other countries. In fact, the categories of laws triggering the Lacey Act are clear. They are laws governing wildlife, fish, and plants. The seafood industry has been living with Lacey for decades. And, despite the rhetoric, no one is charged with knowing tens of thousands of foreign laws. But if somebody imports rosewood from Madagascar as part of their business, we frankly expect that they would try to find out whether the wood is legal.

Finally, some of my colleagues argue that the Lacey Act can lead to some unfair results, claiming that in McNab, innocent, hard-working, small businessmen trying to make a living were unjustly imprisoned for unknowingly violating Honduran law. I have been involved with the criminal justice system for many years now, both in the prosecution side, and now as a defense lawyer. And I have seen many sad and sympathetic cases. McNab is not one of those cases.

It involved a large, sophisticated, and destructive international scheme that included more than 40 shipments of illegal lobster tails, with a retail value of over \$17 million. Defendants in McNab illegally harvested quantities of under-sized and egg-bearing lobster, purposely misreported their catch to Honduran authorities, packaged the illegal goods in ways that helped them avoid detection, and smuggled their illegal contraband into the United States, where it was sold to unwitting consumers for significant profit.

Innocent, hardworking Americans just trying to make a living don't do things like that. Thank you, your Honor.

[The prepared statement of Mr. Asner follows:]

**Statement of Marcus A. Asner, Arnold and Porter, LLP**

**Introduction**

Mr. Chairman, Ranking Member, and members of the Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs, thank you for inviting me to appear before the Subcommittee today to address the topic of "Why Should Americans Have to Comply with the Laws of Foreign Nations?"

I am a partner in the New York office of Arnold & Porter LLP where I routinely advise companies on Lacey Act and other environmental and criminal matters. Although I am advising several clients on legal matters relating to the Lacey Act, I am appearing today in my personal capacity and not on behalf of Arnold & Porter or any client.

For nine years (2000–2009), I served as an Assistant United States Attorney (AUSA) in the Southern District of New York where I was Chief of the Major Crimes unit from 2007 to 2009. When I was an AUSA, I led the investigation and prosecution of *United States v. Bengis*, one of the largest Lacey Act cases in history, involving the smuggling of massive quantities of illegally harvested rock lobster from South Africa. Since I joined Arnold & Porter in 2009, I have counseled clients on a wide variety of Lacey Act issues, including assisting clients in complying with the 2008 Amendments. I have written extensively on the Lacey Act, and I have been invited to speak at numerous domestic and international meetings concerning environmental crime. In the past year or so, for example, I have spoken on Lacey Act issues at the World Fisheries Conference, the Forest Legality Alliance, INTERPOL, and the Boston Seafood Show. In May, I testified before this Subcommittee regarding "The 2008 Lacey Act Amendments."

Today, I will explain my thoughts on how the Lacey Act's requirement that individuals and companies ensure that the wildlife, fish, and plants in which they are trading are legal under both U.S. and foreign law is a constitutional and effective way of furthering the goals of the Lacey Act and protecting U.S. interests. I also will address some concerns that have been raised about the foreign laws provision of the Lacey Act.

**Discussion**

The Lacey Act is designed to further U.S. interests by keeping illegal fish, wildlife, plants and plant products from flooding the U.S. market, and by protecting our supplies of sustainable natural resources. The Act helps disrupt criminal organizations and fight corruption in foreign countries, which in turn helps level the playing field for legitimate businesses and improves our national security. By making it illegal to "import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation" of the United States or foreign countries, the Lacey Act furthers these goals and protects the victims of environmental crime, both in the U.S. and abroad.

The United States is very much the leader in this area. Other countries, including Australia and Canada, are now using the Lacey Act as a model for their own laws. That other countries are adopting their own versions of the Lacey Act is good for America; if someone pillages our resources and then flees beyond the reach of American law enforcement, we certainly would insist that they be held responsible for their crimes.

This oversight hearing asks: “Why should Americans have to comply with the laws of foreign nations?” To be clear, the Lacey Act does *not* in fact require U.S. citizens to comply with foreign law, nor does it require the U.S. to enforce other countries’ laws. The Act requires only that people in the U.S. comply with a U.S. law (the Lacey Act), which in turn prohibits trade *in the United States* in illegal fish, wildlife, plants, and plant products. American consumers have a right to buy legal goods, and the Lacey Act provides a proper (and constitutional) means to help enforce that right.

Frequently, determining whether particular goods are legal necessarily will turn on the law of a state or a foreign country. The Lacey Act’s “assimilation of [foreign] laws is designed to reduce demand in the United States for species poached in foreign countries and to encourage international cooperation and mutual reciprocal enforcement efforts.”<sup>1</sup> U.S. courts routinely address issues of foreign law, and are well-equipped to do so.<sup>2</sup> In cases where a foreign law is ambiguous or difficult to understand, the Lacey Act’s state of mind (*mens rea* or *scienter*) requirement—that importers act “knowingly” for a felony conviction or with “due care” for a misdemeanor—protects people who unwittingly find themselves dealing in illegal goods.<sup>3</sup> In the context of forfeiture, the remission procedures provided by the agencies charged with enforcing the Lacey Act help protect innocent importers who exercise due care, by giving them an opportunity to argue for the return of seized goods. The case of Gibson Guitar is a prime example; while the wood from Madagascar was clearly illegal and had to be forfeited (as Gibson ultimately conceded), there was some ambiguity in the Indian law, so Gibson was permitted to submit an unopposed petition for remission<sup>4</sup> and obtain the return of the Indian wood.<sup>5</sup>

The Lacey Act’s approach to protecting the legality of U.S. commerce is constitutional. In fact, the approach of referencing state or foreign law is employed in a wide variety of circumstances. Allowing importers to ignore the provenance of products would thwart the laudable goals of the Act and encourage trade in illegal goods, which in turn would put legitimate U.S. businesses at a disadvantage, threaten the sustainable supply of resources upon which American consumers rely, undermine the rule of law in other countries, and threaten our national security.

#### *History of the Lacey Act*

Passed in 1900, the Lacey Act is the United States’ oldest wildlife protection law. Its original goals were to address issues including the interstate shipment of unlawfully killed game, the introduction of harmful invasive species, and the killing of birds for the feather trade. It has been amended several times since 1900. The 1935 amendment expanded the scope of predicate laws to include federal and foreign laws. This amendment was necessary to address the evolution of international commerce stemming from the invention of the automobile and the airplane.<sup>6</sup> While not

<sup>1</sup>*Legal Timber Protection Act: Hearing before the House of Representatives Committee on Natural Resources, Subcommittee on Fisheries, Wildlife and Oceans on H.R. 1497*, 110th Cong. 7 (2007) (statement of Eileen Sobeck, Deputy Assistant Att’y Gen., Env’t & Natural Res. Div., U.S. Dep’t of Justice).

<sup>2</sup>See, e.g., *United States v. Bengis*, 631 F.3d 33, 39–41 (2d Cir. 2011) (looking to South African law to determine property rights); see also Fed. R. Civ. P. 44.1 and Fed. R. Crim. P. 26.1 (rules on how courts interpret foreign law).

<sup>3</sup>See *United States v. Lee*, 937 F.2d 1388, 1394–95 (9th Cir. 1991) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)).

<sup>4</sup>Criminal Enforcement Agreement Between U.S. Dep’t of Justice and Gibson Guitar Corp. at 3 (July 27, 2012) [hereinafter Gibson CEA], available at <http://www.fws.gov/home/feature/2012/USvGibsonGuitarAgreement.pdf>.

<sup>5</sup>See Gibson USA—Electric Guitars, <http://www.gibson.com/press/usa/> (last visited July 15, 2013) (advertising the sale of “Government Series” guitars made from wood reclaimed from FWS in the remissions process); Musician’s Friend, *Gibson Les Paul Government Series Electric Guitar*, <http://www.musicianfriend.com/guitars/gibson-les-paul-government-series-electric-guitar> (last visited Jun. 20, 2013) (describing the commemorative Les Paul guitars and noting that “[i]nterspersed among the general production run of the Government Series, the confiscated and returned components will be ‘golden tickets’ of a sort, rendering these particular guitars instantly collectible”).

<sup>6</sup>H.R. Rep. No. 74–886, at 2 (1935). “The Lacey Act of 1900 (31 Stat. 188) was in large part designed to aid the States by prohibiting shipment in interstate commerce of game and other

the subject of much discussion in the 1935 record, the purpose of the foreign laws provision was elaborated upon in the Senate Report issued in connection with the 1969 Amendments:

On the international level . . . [b]y prohibiting the sale in the United States of wildlife protected by a foreign government, the demand [in the U.S.] for poached wildlife from that country will be sharply reduced. In addition, however, such a law is also designed to promote reciprocity. If we assist a foreign country in enforcing its conservation laws by closing our market to wildlife taken illegally in that country, they may in turn help to enforce conservation laws of the United States by prohibiting the sale within their borders of wildlife taken illegally within the United States.<sup>7</sup>

The Lacey Act was overhauled in 1969, when Congress extended it to cover additional species, increased the maximum penalty, imposed a “knowingly and willfully” standard for criminal violations, and beefed up civil penalties to apply to negligent violations (for violating the “due care” standard). In the 1981 amendments, Congress sought to strengthen the Lacey Act in light of the discovery that the “massive illegal trade in fish and wildlife . . . handled by well organized large volume operations run by professional criminals” was causing “grim environmental consequences” and “severe” economic consequences.<sup>8</sup> The 1981 amendments were designed to bolster enforcement under the Act. Those amendments combined the Lacey Act with the Black Bass Act to create a “single comprehensive law addressing illegal trade in fish, wildlife and rare plants,”<sup>9</sup> making the culpability standard less stringent (“knowingly” instead of “knowing and willfully”), increasing the civil penalties, adding a felony punishment scheme to encourage the DOJ to prioritize Lacey Act cases, and adding the strict liability forfeiture provision.<sup>10</sup> The 2008 amendments adding plants and plant products grew out of the same concerns leading to the strengthening of the Lacey Act in 1981—the “global problem of illegal logging and timber trafficking and the need for stronger enforcement tools to address it.”<sup>11</sup>

#### *Judicial Review of the “Foreign Laws” Provision of the Lacey Act*

The Chairman has asked whether the Supreme Court has ever addressed section 3 of the Lacey Act—the section prohibiting the trade in fish, wildlife, plants or plant products that are illegal according to U.S. or foreign laws or regulations.<sup>12</sup> The Supreme Court has not directly addressed whether the Lacey Act’s use of foreign laws violates Article I of the Constitution. However, every circuit court to consider the issue has upheld the Lacey Act against constitutional challenge.<sup>13</sup> The argument that the Lacey Act’s reliance on foreign laws is unconstitutional has been described as “patently frivolous,”<sup>14</sup> “without merit,”<sup>15</sup> and “neither original nor meritorious.”<sup>16</sup> As the United States Court of Appeals for the Third Circuit explained:

wildlife killed or shipped in violation of their laws. The customary and ordinary means of transportation of game at the time the act was passed were common carriers by rail and water, and the act was limited to shipment by such carriers. Advent of the automobile, and now the airplane, has introduced means of conveyance of game from State to State that have almost completely supplanted the railroads and water carriers. It is proposed to amend the Lacey Act so that it will apply to the present-day vehicles and methods of transportation.” *Id.*

<sup>7</sup>S. Rep. No. 91-526, at 12 (1969).

<sup>8</sup>S. Rep. No. 97-123, at 1 (1981): “The illegal wildlife trade has grim environmental consequences. It threatens the survival of many species of wildlife particularly those which we value because of their aesthetic or commercial values. The economic consequences of this trade are also severe. It directly threatens America’s agriculture and pet industries and indirectly burdens individual taxpayers. Imported wildlife carry diseases that can affect poultry, livestock, fish and pets.”

<sup>9</sup>H.R. Rep. 97-276, at 30 (1981).

<sup>10</sup>S. Rep. No. 97-123, at 2-3. “Providing for a felony penalty scheme for unlawful importations of wildlife is consistent with existing customs law . . . By specifying in this Act that such importations are felonies, notice is given to all wildlife importers who are unaware of the fact that the customs felony law applies to their activities [and] that their illegal activities may subject them to a felony punishment scheme.” *Id.* at 11; H.R. Rep. 97-276 at 20.

<sup>11</sup>Sobeck Statement, *supra* note 1.

<sup>12</sup>16 U.S.C. § 3372(a).

<sup>13</sup>*See, e.g., United States v. Rioseco*, 845 F.2d 299, 302 (11th Cir. 1988) (Lacey Act is not an unconstitutional delegation of legislative power); *United States v. Bryant*, 716 F.2d 1091, 1094-95 (6th Cir. 1983) (same); *United States v. Molt*, 599 F.2d 1217, 1219 n.1 (3d Cir. 1979) (same); *Rupert v. United States*, 181 F. 87, 90 (8th Cir. 1910) (Lacey Act is a proper exercise of Congress’ power under the Commerce Clause); *cf. United States v. Senchenko*, 133 F.3d 1153, 1158 (9th Cir. 1998) (federal regulation, which was the basis for a Lacey Act conviction, did not unconstitutionally delegate legislative power by basing a federal offense on violations of state law).

<sup>14</sup>*Bryant*, 716 F.2d at 1094; *Molt*, 599 F.2d at 1219 n.1.

<sup>15</sup>*Senchenko*, 133 F.3d at 1158.

<sup>16</sup>*Rioseco*, 845 F.2d at 302.

The Act does not delegate legislative power to foreign governments, but simply limits the exclusion from the stream of foreign commerce to wildlife unlawfully taken abroad. The illegal taking is simply a fact entering into the description of the contraband article, just as if importations of wine or automobiles were restricted to bottles bearing an official foreign designation of Appellation controllee or cars bearing indicia of a foreign safety inspection. Congress could obviously exercise its plenary power over foreign commerce in such a manner if it so chose.<sup>17</sup>

Prohibiting the flow of illegally obtained goods in interstate commerce is well within the scope of Congress' power under the Commerce Clause. As the Supreme Court explained long ago:

Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.<sup>18</sup>

Accordingly, the Lacey Act's restrictions on the flow of illegal goods in interstate commerce are well within the scope of Congress' commerce power.<sup>19</sup>

Courts similarly have rejected arguments that the "foreign law" provision of the Lacey Act is unconstitutionally vague.<sup>20</sup> Any concern about the vagueness of a local or foreign law is handled by the Act's scienter or mental state requirements.<sup>21</sup> Put simply, people who unwittingly and reasonably find themselves in possession of illegal goods are not guilty under the Lacey Act. The argument that the foreign law provision of the Lacey Act is unconstitutionally vague—like the commerce power argument—is meritless.

#### *A Wide Range of United States Laws Involve Foreign Law Predicates*

The Chairman also asked about other U.S. laws that reference foreign laws. The concept that American law in some circumstances must look to the laws of other countries is neither new nor unique to the Lacey Act. The fish and seafood industries, as well as the pet trade, have been subject to this requirement under the Lacey Act for decades. In *United States v. Bengis*, for example, the Court of Appeals for the Second Circuit looked to South African law to determine South Africa's property rights in lobster poached from its waters, ultimately concluding that South Africa had a property right in poached lobster, and was entitled to restitution for defendants' illegal poaching and trafficking scheme.<sup>22</sup> Importers of all sorts of goods long have had to make sure that the goods they were importing were not considered stolen property under the laws of foreign countries, at the risk of violating the National Stolen Property Act<sup>23</sup> and similar statutes.<sup>24</sup> Indeed, the fact that foreign law at times may be relevant in the United States is so well established that the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure contain explicit rules on how U.S. courts are to determine issues of foreign law.<sup>25</sup>

Many U.S. statutes look to foreign laws to determine legality.<sup>26</sup> The Tariff Act of 1930, for example, prohibits the importation of any wild mammal or bird, or any

<sup>17</sup> *Molt*, 599 F.2d at 1219 n.1 (citing *United States v. Sharpnack*, 355 U.S. 286, 294 (1958); *Kentucky Whip & Collar Co. v. Illinois Cent. R. Co.*, 299 U.S. 334, 347–49 (1937); *Gibbons v. Ogden*, 22 U.S. 1, 207 (1824)); accord *Lee*, 937 F.2d at 1393 ("Although the Act does depend upon violations of foreign law, . . . 'the [United States] government is not applying the foreign law *per se*, but rather it is looking to the foreign law to determine if the Act's provisions are triggered; if so, then it will apply the Act, and not the foreign law.' Read in this manner, the Act delegates no power to foreign governments, and therefore does not violate article I.")

<sup>18</sup> *Kentucky Whip*, 299 U.S. at 346–47 (quoting *Brooks v. United States*, 267 U.S. 432, 436–37 (1925)).

<sup>19</sup> See, e.g., *Rupert*, 181 F. at 90; *United States v. Romano*, 929 F. Supp. 502, 507–09 (D. Mass. 1996).

<sup>20</sup> *Lee*, 937 F.2d at 1394–95; see also *Bryant*, 716 F.2d at 1095.

<sup>21</sup> See *Lee*, 937 F.2d at 1394–95 (citing *Village of Hoffman Estate*, 455 U.S. at 499).

<sup>22</sup> *Bengis*, 631 F.3d at 39–41.

<sup>23</sup> 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)

<sup>24</sup> See, e.g., 18 U.S.C. § 667 (theft of livestock), § 670 (theft of medical products).

<sup>25</sup> See Fed. R. Civ. P. 44.1; Fed. R. Crim. P. 26.1.

<sup>26</sup> See, e.g., 19 U.S.C. § 1527 (criminalizing importation of wild mammals and birds in violation of foreign law); 18 U.S.C. § 546 (prohibiting smuggling of goods into foreign countries in violation of that country's law); 21 U.S.C. § 960(d)(2) (prohibiting exportation of listed chemicals in violation of foreign laws); 15 U.S.C. §§ 1263–64 (exemptions from restrictions on commerce and trade

part thereof, if “the laws or regulations of [the exporting] country . . . restrict the taking, killing, possession, or exportation to the United States[] of any wild mammal or bird, alive or dead, or restrict the exportation to the United States of any part or product of a wild mammal or bird.”<sup>27</sup> Similarly, it is illegal to export “a listed chemical in violation of the laws of the country to which the chemical is exported,”<sup>28</sup> as well as to export or serve as a broker or trader in an international transaction involving a listed chemical while knowing or having reasonable cause to believe “that the chemical will be used to manufacture a controlled substance in violation of the laws of the country to which the chemical is exported.”<sup>29</sup> Another statute prohibits interstate commerce in certain hazardous substances, with an exception for shipments that are being exported to a foreign country and comply with the laws of the importing country.<sup>30</sup>

*Businesses Should Comply with the Lacey Act*

The Lacey Act helps deter companies from using suppliers that procure goods in an illegal or unsustainable manner. This in turn protects U.S. interests by ensuring a level playing field for legitimate businesses, helping in the fight against foreign corruption that threatens our national security, and protecting our supply of sustainable natural resources. It also helps protect victims, by ensuring that, when possible, the rightful owners obtain either the return of their stolen goods or appropriate compensation.

*Compliance Protects U.S. Interests and Reduces Corruption*

The evils targeted by the Lacey Act affect 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.<sup>31</sup>

The Lacey Act helps reduce corruption and promote the rule of law in foreign countries, which in turn helps to level the playing field for U.S. companies and enhances our national security. There is a close link between corruption and natural resources crime. In his *Statement for the Record on the 2012 Worldwide Threat Assessment of the U.S. 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

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in hazardous substances where the substances are being exported to a foreign country and meet that country’s legal requirements); 21 U.S.C. § 606(a) (exemption from food safety requirements food products for exportation where the product is legal under the foreign country’s laws); 46 U.S.C. § 30306 (creating liability in the U.S. for deaths at sea where, under the law of a foreign country, a cause of action exists for death by wrongful act, neglect, or default). U.S. laws also look to foreign laws for other purposes. *See, e.g.*, 20 CFR § 404.356 (regulation providing that Social Security Administration will look to adoption laws of foreign country where adoption took place to determine whether the person is the insured’s legally adopted child); 18 U.S.C. § 1956(b)(2) (service of process on a foreign person is effective if it accords with the law of the country in which the person is found).

<sup>27</sup> 19 U.S.C. § 1527(a).

<sup>28</sup> 21 U.S.C. § 960(d)(2). Liability extends to anyone who “serves as a broker or trader for an international transaction involving a listed chemical, if the transaction is in violation of the laws of the country to which the chemical is exported.” *Id.*

<sup>29</sup> 21 U.S.C. § 960(d)(4).

<sup>30</sup> 15 U.S.C. § 1264(b)(3).

<sup>31</sup> Exec. Order No. 13,648 (2013), 78 Fed. Reg. 40,621–23 (July 5, 2013).

and military personnel to members of insurgent groups and transnational organized crime organizations.<sup>32</sup>

Corruption related to environmental crimes presents a threat to the United States' interests generally, and to U.S. companies specifically. Companies that turn a blind eye to their supply chains enjoy a competitive advantage that in turn adversely affects legitimate companies' business and customer relations. 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 Act reduces the demand for illegal and unsustainably harvested goods, which also helps to protect the global supply of natural resources upon which American consumers depend. By providing a powerful enforcement tool on the one hand and encouraging the creation of compliance programs that help identify supply chain issues on the other, the Lacey Act helps to reduce the specter of corruption, and ultimately fosters an environment favorable to legitimate American businesses.

#### *Compliance Protects the Victims of Crime*

Penalties under the Lacey Act protect victims by deterring the theft of fish, wildlife, and plants and plant products. Moreover, just as property laws protect owners' rights by requiring the return of stolen livestock or furniture stolen from your home, the Lacey Act protects the rights of victims of illegal harvesting and trade, whether such victims are in the U.S. or abroad.

Victims of environmental crime might be individuals, states, or countries. Individuals from whom fish, wildlife, or plants or plant products are taken are victims who have a right to the return of their goods or compensation in the form of restitution. The intervening illegal activity does not extinguish those property rights. In addition, the states or countries in which the illegal takings occur have a right to enforce their laws, which includes the right to seize illegal property. This right was recognized in *Bengis*, where the Second Circuit Court of Appeals ruled that South Africa should be awarded compensation for the lobster stolen as part of the scheme.<sup>33</sup> As Preet Bharara, the U.S. Attorney for the Southern District of New York, explained recently:

[T]hose who violate the environmental laws of another country by illegally taking fish, wildlife, or plants and then import these items into the U.S. will be required to pay back the victims of their offenses. This Office remains committed to ensuring, no matter how long it takes, that those who would damage another country's environment and seek to profit in the U.S. market will have to remedy their violations of law and repay those foreign governments.<sup>34</sup>

By protecting the property rights of victims, the Lacey Act provides justice to victims and deters future criminal activity. It is the importer's responsibility to know its suppliers and put measures in place to ensure that its goods are legal. Just as a legitimate art gallery requires evidence of provenance before purchasing paintings or artifacts, or a seller of name-brand shoes needs comfort that it is not buying counterfeits, companies that are dealing in goods covered by the Lacey Act are responsible for understanding and controlling their supply chains and, if appropriate, demanding contractual warranties to protect themselves.

<sup>32</sup> *Statement for the Record on the Worldwide Threat Assessment of the U.S. Intelligence Community, Before the S. Select Comm. On Intelligence*, 113th Cong. 5–6 (2013) (statement of James R. Clapper, Director of National Intelligence, 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.

<sup>33</sup> See, e.g., Memorandum Opinion, *United States v. Bengis*, No. 1:03-cr-00308-LAK (S.D.N.Y. Jun. 14, 2013), ECF No. 249 (awarding restitution to South Africa for illegally harvested lobster imported into the United States or intended for shipment to the United States).

<sup>34</sup> Press Release, United States Attorney's Office, Southern District of New York, *Officers of Fishing and Seafood Corporations Ordered to Pay Nearly \$22.5 Million to South Africa for Illegally Harvesting Rock Lobster and Smuggling It into the United States* (June 14, 2013), available at <http://www.justice.gov/usao/nys/pressreleases/June13/BengisArnoldetalRestitutionPR.php?print=1>.

*Responses to Concerns**Scope of Foreign Laws*

Some have argued that the scope of foreign laws triggering a violation of the Lacey Act is too broad. In fact, the categories of foreign laws implicated by the Lacey Act are clear and well-defined. Legitimate seafood companies have been complying with the Lacey Act for decades.

Critics of the Lacey Act frequently point to the case of *United States v. McNab* as an example, claiming that the defendants in that case somehow were convicted unjustly of Lacey Act violations and sent to jail for technical violations. That argument disingenuously misconstrues the *McNab* case. A closer look reveals that law enforcement, relying in part on the Lacey Act, in fact put an end to a large, sophisticated, and destructive international criminal organization engaged in a massive scheme that involved more than 40 shipments of illegal spiny lobster tails from Honduras, adding up to more than 1.6 million pounds of illegal spiny lobster with a retail value of over \$17 million.<sup>35</sup>

As a part of the scheme, Honduran national David McNab and his co-conspirators (among other things) illegally harvested massive quantities of undersized and egg-bearing lobster, misreported their catch to Honduran authorities, packaged the illegal goods in ways that helped them avoid detection, and smuggled their illegal contraband into the United States, where it was sold to unwitting American consumers for significant profit. The co-conspirators intentionally falsified import documents by using a secret code to disguise the true size of illegal, undersized lobster. With at least one shipment, a co-conspirator falsely relabeled cases of Honduran lobster as a product of the United States. After law enforcement intercepted one illegal shipment on its way to Alabama, the co-conspirators tried to evade law enforcement and continue their scheme by shipping illegal lobster tails from Honduras to Los Angeles via airplane. After one of those shipments was caught and seized in Los Angeles, the co-conspirators continued with their illegal smuggling by trying to ship the illegal lobster through Canada.

A jury in Alabama found each of the four defendants in *McNab* guilty of knowingly violating the law by committing one or more of the following crimes: conspiracy, smuggling, money laundering, Lacey Act violations, and false labeling.<sup>36</sup> The defendants' criminal scheme had a devastating impact on lobster populations in Honduras.<sup>37</sup> The scheme impacted the United States' supplies as well; the offspring of lobster populations in areas like Honduras and Nicaragua are, given the current flows in the Gulf, the primary parental source for replenishing lobster stocks in the southeastern United States.<sup>38</sup> Florida's lobster harvests dramatically declined in part because of the illegal harvest of small lobsters and female egg-bearing lobsters in the source fisheries off Central America.<sup>39</sup> The *McNab* defendants were guilty, they were found guilty by a jury, and their convictions were upheld on appeal. The United States Supreme Court denied McNab's petition for a writ of certiorari.

Critics frequently claim that the *McNab* defendants went to jail for violating a Honduran "cardboard box" regulation. That is simply false, as explained above. Moreover, critics' protestations notwithstanding, the Honduran inspection and processing requirements played an important role in Honduras' efforts to combat the illegal lobster trade. By packaging lobster in seventy-pound frozen, unsorted clumps, McNab made it virtually impossible for authorities to inspect for illegal undersized or egg-bearing lobster, which in turn helped the co-conspirators better hide the illegal lobsters from authorities and continue their criminal scheme, all to the detriment of the species, the legitimate fishermen relying on the harvest for their livelihood, and the consumers (including American consumers) of the lobsters. In that regard, the Honduran processing regulations—while seemingly technical—are quite similar to the technical labeling and packaging requirements the United States commonly uses in areas such as food safety, drug safety, and environmental protection. Such requirements provide a common and useful tool in the battle against illegal poaching and logging. Indeed, a wide range of legal regimes employ similar technical processing, declaration, or permitting requirements because such requirements often provide the best way to prevent the abuse and degradation of the environment. The Clean Water Act, which requires that dischargers apply for a permit to

<sup>35</sup> Press Release, NOAA, *McNab to Continue Serving Federal Prison Sentence for Lobster Smuggling* (Mar. 22, 2004), available at <http://www.publicaffairs.noaa.gov/releases2004/mar04/noaa04-r119.html>.

<sup>36</sup> *United States v. McNab*, 331 F.3d 1228, 1234 n.10 (11th Cir. 2003).

<sup>37</sup> Press Release, NOAA, *supra* note 35.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

release pollutants into the waters of the United States,<sup>40</sup> provides one example; the permitting requirements help regulators ensure that the water bodies are adequately protected from excessive pollution. The Lacey Act's foreign laws provision acknowledges the importance of the laws and regulations designed to promote resource conservation through these vitally important, indirect measures.

#### *Database of Foreign Laws*

Some have suggested that the government should create a list or database of the foreign statutes that could trigger Lacey Act violations, and that only laws on that list could support a prosecution under the Lacey Act. However, creating such a database would be both inefficient and unproductive. 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 the company in court, for consumers seeking comfort that they are purchasing legal goods, or for the victims who had their resources stolen. In an enforcement action, 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.

#### *Alleged Ambiguity of Foreign Laws*

Some have raised concerns that an ambiguous foreign law could result in a criminal conviction and/or the forfeiture of goods. That argument misunderstands the Lacey Act.

*Mens rea/scienter.* For an importer to be found guilty of a felony under the Lacey Act, the government must show that she imported fish, wildlife, plants, or plant products that she *knew* were illegal. In cases where a person, in the exercise of due care, *should have known* that wood she imported had been stolen, she is guilty of a misdemeanor.<sup>41</sup> Where a foreign law is ambiguous or indecipherable, the government will be hard pressed to prove either knowledge or the absence of due care, and most likely would never bring such a case. As the Ninth Circuit Court of Appeals explained in *Lee*:

[The Lacey Act] scienter element prevents the Act from criminally punishing those who violate the Act's provisions but are reasonably unaware that they are doing so. The protections inserted by Congress prevent the Act from "trap[ping] the innocent by not providing fair warning," and therefore mitigate any potential vagueness of the Act.<sup>42</sup>

*CAFRA and Remission.* The Civil Asset Forfeiture Reform Act ("CAFRA"), incorporated by reference in the Lacey Act, explicitly contemplates a process under which a person may file a claim for the return of seized property. After the seizure, the government must provide notice to the person from whom the property was seized. That person may either: (1) file a claim in court contesting forfeiture; or (2) submit a petition straight to the agency that seized the property.<sup>43</sup> The second option commonly is referred to as "remission." The federal departments charged with enforcing the Lacey Act, including the Departments of Justice, Interior, and Agriculture, and the National Oceanic and Atmospheric Administration, all have regulations permitting people to petition for remission and seek the return of goods that otherwise would be illegal to possess under the Lacey Act.<sup>44</sup> The petitioner sets forth the reasons why the goods should be returned and the agency determines whether, in light of the particular circumstances, mitigation is warranted or the goods should be re-

<sup>40</sup> 33 U.S.C. § 1342.

<sup>41</sup> The "due care" standard serves an important role in reinforcing lawful behavior and in leveling the playing field between legitimate companies that strive to ensure the legality of their operations and those companies that are indifferent as to the legality of the goods they are importing and supplying to the American consumer. The "due care" standard's fact-specific and flexible nature helps protect companies that are taking measures to ensure their goods are legal. Not only does the due care standard allow companies to tailor their compliance programs to their own supply chains, but it also takes into account the foreign laws under which the companies are operating so that ambiguous laws do not subject innocent, diligent companies to unfair liability.

<sup>42</sup> *Lee*, 937 F.2d at 1395 (internal citations omitted).

<sup>43</sup> See 18 U.S.C. § 983(a).

<sup>44</sup> See 50 CFR § 12.24 (FWS, Department of Interior); 7 CFR § 356.7 (Department of Agriculture); 15 CFR § 904.506 (NOAA); 28 CFR § 9.4 (DOJ).

turned.<sup>45</sup> In fact, that is what happened in Gibson. Gibson conceded that the Madagascar wood was illegal and that wood was forfeited. However, as noted above, because the Indian law was ambiguous with respect to whether the Indian wood Gibson had imported was legally exported “finished” wood or illegally exported “unfinished” wood, the government allowed Gibson to file an unopposed petition for remission to seek the return of that wood.<sup>46</sup> Gibson filed the remission petition and that Indian wood was in fact returned.<sup>47</sup>

### Conclusion

The Lacey Act provides an important tool that helps enforcement officials fight crime, corruption, and the theft of fish, wildlife, and plants and plant products. The foreign law provision of the Lacey Act is neither unique nor unconstitutional. It is a perfectly legitimate means of furthering the goals of the Act and ensuring that only legal goods are imported into the United States. Companies operating in or procuring materials from other countries have a responsibility to ensure that the materials they bring into the United States are legal. As a consumer, I expect companies to do so and it is hard to imagine that any responsible, law-abiding American would want to buy goods that were stolen in another country or otherwise obtained in violation of another country’s laws. Without the foreign law provision of the Lacey Act, the problems of wildlife poaching, fish overharvesting, and illegal logging would proliferate, to the detriment of American businesses and consumers of present and future generations.

Thank you again for inviting me to appear today. I would be happy to answer any questions.

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Dr. FLEMING. Yes. Thank you, Mr. Asner.

We now move along to Mr. Rubinstein. You are recognized for 5 minutes, sir.

### STATEMENT OF REED D. RUBINSTEIN, ESQ., PARTNER, DINSMORE AND SHOHL

Mr. RUBINSTEIN. Thank you, Mr. Chairman, Ranking Member Sablan, members and staff of the Committee. My name is Reed Rubinstein, I am a partner with the firm of Dinsmore and Shohl in Washington, D.C. I am testifying here today on behalf of the U.S. Chamber Institute for Legal Reform.

First of all, it is a real pleasure, again, to be before you talking about this critically important issue. To begin with, I want to make it clear—and clarity is important—that ILR strongly supports the Lacey Act’s important fish, wildlife, and plant conservation goals. Those in our country who import or use medicines containing rhino horns, tiger bone, or bear bile, who eat sea turtle eggs and bush meat, seek out religious articles made from ivory obtained through the murderous poaching of elephants or rhinos, or purchase wood products known to have been illegally imported ought to be prosecuted. But ILR believes that the Lacey Act reform is needed, desperately so.

As written, it requires American citizens to comply with foreign law, very broadly defined, and as interpreted by U.S. bureaucrats, to avoid criminal and civil jeopardy under U.S. law. The government refuses to translate and specify the applicable foreign laws that are to provide basic rules of the road so that stakeholders may distinguish permitted from proscribed conduct.

The dynamic incorporation of foreign law into the U.S. code is a prima facie threat to democratic principles, contrary to all pruden-

<sup>45</sup> See, e.g., 50 CFR § 12.24(e).

<sup>46</sup> Gibson CEA, *supra* note 4 at 3.

<sup>47</sup> See note 5, *supra*.

tial principles of government transparency and accountability, and it should not be tolerated in a well-ordered constitutional republic.

Furthermore, the government's refusal to maintain a data base of applicable foreign wildlife and plant laws, and to articulate intelligible principles of due care, so that stakeholders have reasonable notice of proscribed conduct is profoundly unfair to the regulated community, and has, paradoxically, hampered Lacey Act compliance.

The Congressional Research Service reports that, lacking clear standards, government officials "might use information gained from foreign governments, non-governmental organizations, private citizens, anonymous tips, declarations, industry and border agents, among others," to enforce Lacey. The disorganized, ad hoc enforcement approach means agencies and prosecutors are afforded unbounded discretion to prosecute Americans in U.S. courts for violations of foreign laws that are enacted, interpreted, and "enforced" by corrupt authoritarian regimes based on information obtained from highly questionable and biased sources.

Also, there is more than ample evidence that the implementation of the 2008 Lacey Act amendments has proven to be expensive and unwieldy and ineffective. There is no evidence that those amendments have actually reduced the illegal logging rate. Although 5 years have passed since enactment, the USDA still cannot provide specific cost figures for the new requirements on legal plant imports, nor has it been able to determine whether the Act has led to a reduction in the level of illegal logging and trafficking.

Nevertheless, reform opponents will tell you that Congress must choose between aligning Lacey with core American legal norms and values, or protecting wildlife, fish, and plants. This is a false choice.

First, the Lacey Act's unique dynamic incorporation of foreign law is contrary to our most basic legal norms, and simply bad public policy, because it gives the government such broad enforcement discretion. On August 24, 2011, the Gibson Guitar factories in Nashville and Memphis were raided by armed agents from the U.S. Government. The company was not accused of importing banned wood. Rather, guns were drawn against the company and its workers because someone somewhere in the Federal bureaucracies thought that Gibson ran afoul of a technical Indian regulation governing the export of finished wood products designed to protect Indian woodworkers from foreign competition. To make matters worse, the Indian Government certified that the goods were properly and legally exported.

In July of 2012, Gibson and the government settled. Interestingly, the settlement, which was praised by the Justice Department in a press release, speaks very little to the Indian wood, other than to say that, notwithstanding the armed raid, certain questions and inconsistencies exist regarding the tariff classification of the wood. And, accordingly, until the Indian Government informs the U.S. Government that such imports are expressly prohibited by laws related to Indian foreign trade policy, there will be no enforcement against Gibson.

Frankly, it is difficult to imagine anyone who cares about Anglo-American principles of due process and the rule of law justifying the armed raid of Gibson.

My time is up. I would be happy to answer questions. Thank you.  
[The prepared statement of Mr. Rubinstein follows:]

**Statement of Reed D. Rubinstein, Esq., Partner, Dinsmore & Shohl, LLP,  
for the U.S. Chamber of Commerce Institute for Legal Reform**

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>

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

<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 (11th Cir.) cert. denied 540 U.S. 1177 (2004); *United States v. Lee*, 937 F.2d 1388, 1393 (9th 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, 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=](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=)

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, 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 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 ben-

AFQjCNFsj6zvWlQ7 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*, 110th 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 (9th 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).

<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—Remedying 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).

effit 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 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.”

<sup>13</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.*

<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: 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/sobektestimony10.16.07.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.

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>

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.

#### 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

<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 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—Remedying 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.

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.

#### *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>

<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).

<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 Juszkiwicz, *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>

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:

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>

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> Fur-

US-Government-s-Affidavit-in-Support-of-Search-Warrant-at-Gibson-Guitar-Factory (accessed May 4, 2012).

<sup>33</sup>Juszkiewicz, *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).

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

<sup>37</sup>U.S. DEP'T 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 "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).

thermore, 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.
- 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.

Dr. FLEMING. Thank you, Mr. Rubinstein.  
Next, Mr. Larkin. You are recognized for 5 minutes.

**STATEMENT OF PAUL J. LARKIN, JR.**

Mr. LARKIN. Thank you, Mr. Chairman. Thank you, Mr. Ranking Member. My name is Paul Larkin. I am a senior legal fellow at the Heritage Foundation. I want to thank you for the opportunity to testify today. The views I express are my own, and should not be taken as the views of the Heritage Foundation.

In my opinion, the Lacey Act unreasonably demands that a person who imports flora or fauna from a foreign nation, must know,

<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 112th 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.

<sup>47</sup> See Juszkiwicz, *supra* at note 8. Gibson CEO Juszkiwicz 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.*

on pain of criminal liability, every law of every foreign country in whatever form that law may take, however obscure that law may be, and whatever language that law may be written. That requirement is unreasonable, as a matter of criminal justice policy, and unconstitutional, as a matter of constitutional law.

The Lacey Act makes an essential element of a domestic Federal crime a blank space that each and every foreign nation can fill in as it sees fit. The Act does not identify any specific laws that trigger criminal liability. The Act does not limit the type of foreign laws that can trigger criminal liability. The Act does not identify any elements that those laws must contain, even though requirements of an act and an intent are historic requirements in Anglo-American criminal law.

In fact, the Lacey Act does not even require that a foreign law be written in English. The Lacey Act does not restrict in any manner a foreign government's power to select as law whatever constitutional provisions, statutes, regulations, judicial decisions, interpretive documents, or other legal edicts it sees fit to choose. A foreign nation may also delegate that law-making power to any body it chooses within or outside of its own government. In sum, each foreign nation may define the law however it wishes, and every foreign nation has the same law-making power.

Consider the difficulties that someone would have in trying to comply with foreign law on pain of criminal liability. Some foreign laws may have English translations. Some will not. Some foreign statutes may be codified in the same manner as the United States Code. Some will not. Some foreign regulations may be collected into their equivalent of our code of Federal regulations. Some will not. Some foreign officials will make their legal interpretations and decisions public and in English. Some will not.

Foreign nations may also have very different allocations of governmental power. Some countries will have one entity, and not necessarily a court, that can speak authoritatively about its own laws. Some will not. And different components of foreign nations may alter their interpretations of their own laws over time, perhaps nullifying the effect of prior interpretations, and perhaps not.

In sum, the Lacey Act's standard list dynamic, open-ended incorporation of foreign law effectively delegates law-making authority to foreign officials who are neither legally nor politically accountable for their actions to any supervisory Federal official or to the public. Those features of the Act make it a singularly unsound and unconstitutional example of Federal criminal legislation.

There are at least four policy solutions to deal with these problems. The first is to eliminate domestic criminal liability for violation of a foreign law.

A second is to require that the government prove that a person acted willfully. The Supreme Court has made clear that the term "willful" requires an intentional violation of a known legal duty. That is the interpretation the court has given to the tax laws. Using that term in the Lacey Act would carry through the Supreme Court's decisions in the Federal income tax laws.

Third, authorize a defendant to raise a mistake-of-law defense. The common law has never recognized the defense, but that is because the common law dealt with crimes that mirrored the contem-

porary moral code. That is no longer the case, certainly not the case once you take into account regulatory violations not only of our own domestic laws, but of foreign lands.

Finally, require that every foreign law that could give rise to criminal liability be identified and updated as necessary. The Congress could take that task on itself, or the Congress could assign that responsibility to an executive branch agency, such as the Justice Department. That would allow the public at least to find the laws, and to have some opportunity to at least read the laws before they show up in an indictment.

Thank you for your time; I am glad to answer any questions you may have.

[The prepared statement of Mr. Larkin follows:]

**Statement of Paul J. Larkin, Jr.**

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

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

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

**I. The Lacey Act Unreasonably Requires Parties to Know Foreign Law on Pain of Criminal Liability**

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

<sup>1</sup>See 16 U.S.C. § 3372(a)(2)(A) & (B)(i)–(iii) (2006) (“It is unlawful for any person \* \* \* to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce (a) any fish or wildlife taken, possessed, transported, or sold \* \* \* in violation of any foreign law; (b) any plant \* \* \* (i) taken, possessed, transported, or sold in violation of any law or regulation of \* \* \* any foreign law, that protects plants or that regulates—(I) the theft of plants; (II) the taking of plants from a park, forest reserve, or other officially protected area; (III) the taking of plants from an officially designated area; or (IV) the taking of plants without, or contrary to, required authorization; (ii) taken, possessed, transported, or sold without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any State or any foreign law; or (iii) taken, possessed, transported, or sold in violation of any limitation \* \* \* under any foreign law, governing the export or transshipment of plants \* \* \*”). The federal courts have construed the act to include not merely foreign statutes, but also other forms of law, even ones that impose only civil sanctions. *See, e.g.*, *United States v. McNabb*, 331 F.3d 1228, 1239 (11th Cir. 2003) (“Regulations and other such legally binding provisions that foreign governments may promulgate to protect wildlife are encompassed by the phrase ‘any foreign law’ in the Lacey Act.”); *United States v. Mitchell*, 985 F.2d 1275, 1280–83 (4th Cir. 1993) (Pakistani government orders); *United States v. One Afghan . . . Mounted Sheep*, 964 F.2d 474 (5th Cir. 1992) (same); *United States v. Lee*, 937 F.2d 1388, 1391–92 (9th Cir. 1991) (foreign regulations); *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 825

A. *The Due Process Clause Requires that the Criminal Law Be Readily Understandable by the Average Person*

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

One of the most elementary requirements of criminal and constitutional law is that the government must offer the public adequate notice of what the law forbids before a person can be held liable for violating a criminal statute.<sup>5</sup> The Latin phrases “*Nullum crimen sine lege*” (“There is no crime absent a written law.”) and “*Nulla poena sine lege*” (“There is no penalty absent a written law.”) stand for the settled propositions that there can be no crime or criminal punishment without a positive law, which means that no one can be punished for doing something that was not prohibited by law at the time that he or she acted.<sup>6</sup> Moreover, unlike the laws of Caligula, which were published in a location making them inaccessible,<sup>7</sup> criminal laws must be available to the public so that they can be found and read.<sup>8</sup> Finally, a statute that is unduly vague, so indefinite that the average person is forced to guess at its meaning, cannot serve as the basis for a criminal charge. The “void-for-vagueness” doctrine, embodied in the Fifth Amendment Due Process Clause, enforces the principal that no one may be held liable under a criminal law that the average person cannot understand.<sup>9</sup> Those principles are essential to the very concept of “law” and are enshrined in what we know as “due process of law.”

The void-for-vagueness doctrine is particularly relevant to the Lacey Act. The Supreme Court has made it clear that “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”<sup>10</sup> The Court also has devised a minimum standard of clarity. “The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”<sup>11</sup> Accordingly, “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”<sup>12</sup> Note the terms that the Court used to describe who must be able to understand what a criminal statute means: “all,” “men of common intelligence,” and “a person of ordinary intelligence”—not lawyers, law professors, or judges.

& n.2, 828–29 (9th Cir. 1989) (a Taiwanese board’s “announcement” that was not technically a “regulation” and imposed only a civil penalty).

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

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

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

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

<sup>6</sup>See Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165, 178 (1937).

<sup>7</sup>See *Screws v. United States*, 325 U.S. 91, 96 (1945) (plurality opinion) (“To enforce such a [vague] statute would be like sanctioning the practice of Caligula, who ‘published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.’”); Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 650 n.39 (1940) (“[W]here the law was not available to the community, the principle of ‘nulla poena sine lege’ comes into play.”).

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

<sup>9</sup>See Meese & Larkin, *supra* note 2, at 760–61.

<sup>10</sup>*Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (footnote omitted).

<sup>11</sup>*United States v. Harriss*, 347 U.S. 612, 617 (1954).

<sup>12</sup>*Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

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

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

Courts and commentators have justified the presumption that everyone knows the criminal law on several grounds. One is the proposition that everyone knows the laws in the locale in which he or she resides.<sup>13</sup> Another rationale is the fear that a contrary rule would eviscerate the ability of the law to police the public's conduct.<sup>14</sup> Those defenses made sense at common law, because the few criminal laws that existed at the time reflected contemporary mores, and violations were recognized as morally blameworthy.<sup>15</sup> Today, however, the proposition that everyone knows the law is not just a fiction<sup>16</sup> or a "legal cliché"<sup>17</sup>; it is an absurdity. The criminal law no longer merely expresses societal condemnation of inherently nefarious acts that everyone knows are wrong (*e.g.*, murder), so-called *malum in se* offenses. It also regulates the conduct of individuals by making it a crime to commit a variety of acts that are unlawful only because Congress has said so, crimes known as *malum prohibitum* offenses.<sup>18</sup> For more than a century, legislatures have used the criminal law to enforce regulatory régimes.<sup>19</sup> That is part of the explanation why there are more than 4,500 federal criminal statutes.<sup>20</sup> Many recent federal statutes create regulatory regimes and use the criminal law to implement those programs,<sup>21</sup> and there could be more than 300,000 relevant regulations.<sup>22</sup>

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

Most people learn the criminal code through an informal process. Religious precepts, morals, customs, traditions, and laws are the glue that holds society together and keep it from becoming the war of all against all. We learn them from family members, friends, schoolmates, co-workers, the news media, and others, at home, church, school, work, and play. Not surprisingly, what people learn in this nation

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

<sup>14</sup> See, *e.g.*, HOLMES, *supra* note 3, at 41.

<sup>15</sup> See Hall & Seligman, *supra* note 7, at 644 ("[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as 'custom.'"); JOHN SALMOND, JURISPRUDENCE 426 (8th ed. 1930) ("The common law is in great part nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right.")

<sup>16</sup> Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L. REV. 1, 14 (1957).

<sup>17</sup> Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009).

<sup>18</sup> See LaFAVE, *supra* note 3, § 1.3(f), at 14–15 (defining *malum in se* and *malum prohibitum* offenses).

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

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

<sup>21</sup> See Meese & Larkin, *supra* note 2, at 739–44.

<sup>22</sup> ONE NATION, UNDER ARREST xv–xvi (Paul Rosenzweig ed., 2d ed. 2013).

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

are the rules, policies, and mores of *this nation*. Just as the French, Argentineans, Laotians, and Senegalese learn the rules demanded of them in their own countries, in this country what children, adolescents, and adults learn are the laws and mores of America.

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

Laws come in all forms (*e.g.*, statutes vs. regulations); in all shapes and sizes (*e.g.*, the Sherman Act vs. the Clean Air Act); and in all degrees of comprehensibility (*e.g.*, the law of homicide vs. the Resource Conservation and Recovery Act). Different bodies have authority to create laws (*e.g.*, legislatures vs. agencies); to interpret them (*e.g.*, the President or an agency's general counsel); and to enforce them (*e.g.*, city, state, and federal law enforcement officers and prosecutors). And that is just in America. Including the laws of nearly 200 foreign nations just makes a bad situation worse.

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

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

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

In any event, the relevant due process standard is not whether the average lawyer knows the criminal law. The Supreme Court has made it clear on numerous occasions that the criminal law must be clear *not* to the average *lawyer*, but to the average *person*. Even if there were lawyers who could readily answer intricate questions of foreign law—and would be willing to do so for free—the criminal law is held to a higher standard. Unless men and women “of common intelligence” can understand what a law means, that law might as well not exist—and, under our Constitution, no one can be convicted for violating it.<sup>24</sup>

A 2012 paper published by the Union of Concerned Scientists identifies some of the problems that men and women “of common intelligence” must face. That paper stated that foreign nations may have “complex systems for legal timber extraction [that] motivate working around them,” and timber companies “operate in countries that often have conflicting and inconsistent laws \* \* \*.”<sup>25</sup> Those statements are

<sup>24</sup> See, *e.g.*, *United States v. Harriss*, 347 U.S. 612, 617 (1954); *supra* p. 3.

<sup>25</sup> PATRICIA ELIAS, LOGGING AND THE LAW: HOW THE U.S. LACEY ACT HELPS REDUCE ILLEGAL LOGGING IN THE TROPICS 5 (Apr. 2012), available at [http://www.ucsusa.org/assets/documents/global\\_warming/illegal-logging-and-lacey-act.pdf](http://www.ucsusa.org/assets/documents/global_warming/illegal-logging-and-lacey-act.pdf). In 2008, Congress added plants to the category of potentially illegal imports. Acting at the behest of a coalition of environmental organizations and the domestic timber industry, Congress amended the act as part of a far larger farm policy bill, the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923 (2008), in order to include plants taken or processed and imported in violation of a foreign nation's law. See Francis G. Tanzos Note, *A New Crime—Possession of Wood: Remedying the Due Care Double Standard of the Revised Lacey Act*, 42 RUTGERS L.J. 549 (2011). The rationale was the desire to protect foreign ecosystems and the domestic timber industry by targeting an alleged billion-dollar black market in foreign logging. See H.R. Rep. No. 110-627, 110th Cong. (2008); KRISTINA

tantamount to a confession that the Lacey Act should not—and cannot—be enforced via the criminal law. A person cannot be convicted in this country for an alleged violation of “complex,” “conflicting[,] and inconsistent” laws in the U.S. Code. If so, there is no persuasive reason to hold a person criminally liable for violating complex, conflicting, and inconsistent law in a foreign code. The Union of Concerned Scientists paper does not explain why Americans should be subject to a lower threshold of criminal liability for violating a foreign law than a domestic law, and no sound justification leaps to mind.

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

This is not an abstract problem. Consider the case of *United States v. McNab*.<sup>26</sup> Abner Schoenwetter and several others were convicted of several offenses in connection with their importation of Caribbean spiny lobsters from Honduras. The federal government charged Schoenwetter and the others with violating the Lacey Act by importing Honduran lobsters in violation of Honduran law: The lobsters were too small to be taken under Honduran law; some contained eggs and so could not be exported; and the lobsters were packed in boxes rather than in plastic as required by Honduran law. The jury convicted the defendants, and both the district court and the U.S. Court of Appeals for the Eleventh Circuit upheld the convictions. The district court relied on the opinions of officials in the Honduran agriculture department that the *McNab* defendants violated Honduran law. The appellate court, however, refused to give any weight to the opinions of a Honduran court, the Honduran embassy, and the Honduran Attorney General that the regulations in question were invalid under Honduran law and could not serve as predicate violations under the Lacey Act. The result was that Schoenwetter was sentenced to eight years in a federal prison—a term longer than what some violent criminals spend behind bars—for foreign regulatory offenses that, according to key Honduran officials, did not even violate foreign law. The *McNab* case illustrates why no one should be held accountable under this country’s law for violating a foreign nation’s law.

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

## II. The Constitution Prohibits the Delegation of Substantive Lawmaking Authority to Foreign Nations

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

But there are three additional, related constitutional problems with the Lacey Act delegation. First, the act defines no “intelligible principle” for a foreign government or a federal court to use in deciding what laws should trigger a criminal prosecution, in violation of the Article I delegation doctrine. Second, the act delegates federal lawmaking power to a party who has not been appointed in compliance with the Article II Appointments Clause. And third, the Fifth Amendment Due Process Clause forbids delegation of substantive lawmaking power to foreign officials. To-

ALEXANDER, CONG. RES. SERV., THE LACEY ACT: PROTECTING THE ENVIRONMENT BY RESTRICTING TRADE 2, 6 (Apr. 12, 2012); *Tanzcos, supra*, at 549–50 & n.4.  
<sup>26</sup> 331 F.3d 1228 (11th Cir 2003).

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

gether, Article I, Article II, and the Due Process Clause reveal that Congress cannot delegate standardless, substantive lawmaking authority to a party that is neither legally nor politically accountable for its actions to supervisory federal officials or to the public.

#### A. *The Article I Bicameralism and Presentment Requirements*

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

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

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

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

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

The Third Circuit concluded that the Lacey Act treats the violation of a foreign law as “simply a fact entering into the description of the contraband article.”<sup>35</sup> The text of the Lacey Act, however, makes proof that a defendant violated foreign law an essential element of an offense by making it a crime to import flora or fauna

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

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

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

<sup>31</sup> See, e.g., *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton*, 276 U.S. at 409).

<sup>32</sup> See Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 105 (2008) (“dynamic incorporation does delegate lawmaking authority”).

<sup>33</sup> See, e.g., *Whitman*, 531 U.S. at 474.

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

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

in violation of any foreign law. The most natural reading of the text is that a violation of a foreign law is a predicate for a violation of the act.

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

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

#### B. The Article II Appointments Clause

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

The Lacey Act, however, does not vest lawmaking authority in a *federal official*. Instead, the statute delegates that power to a *foreign nation*. That difference is critical. The Supreme Court’s decisions rejecting Article I challenges to the delegation of federal authority involved a handoff of federal lawmaking power to officials in the executive branch who must be appointed to their positions in compliance with the Appointments Clause. Article II forbids Congress from vesting federal lawmaking power in any person not appointed in compliance with that provision. By definition that prohibition applies to foreign officials, who are selected in accordance with the laws of their own nations, not ours. The Lacey Act effectively hands a portion of the federal lawmaking power over to a foreign state that is unaccountable to any branch of the federal government or to the American public. In so doing the Lacey Act not only disrupts the carefully balanced federal scheme for allocating govern-

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

<sup>37</sup> See *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1868).

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

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

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

<sup>41</sup> See, e.g., *Freytag v. Comm’r*, 501 U.S. 868, 880 (1991) (“The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint.”).

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

<sup>43</sup> See, e.g., *Free Enterprise Fund v. PCAOB*, 130 S. Ct. 3138, 3146–47 (2010).

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

mental authority, but also deprives the electorate of information vital to hold members of Congress and the President politically accountable for their actions and those of their appointees. As far as Article II of the Constitution is concerned, delegating federal government authority to a foreign official is not materially different from delegating lawmaking authority to a private party. Article II does not permit that type of delegation.

### C. The Fifth Amendment Due Process Clause

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

In other private delegation cases—such as *Cusak v. Chicago*,<sup>50</sup> *New Motor Vehicle Bd. v. Fox Co.*,<sup>51</sup> and *Hawaii Housing Auth. v. Midkiff*<sup>52</sup>—the Supreme Court upheld the vesting of state authority in private parties. The laws at issue there, however, left final decisionmaking authority in the hands of a state official.<sup>53</sup> The Lacey Act, by contrast, leaves it entirely up to a foreign nation to decide what it will deem a “law.” The decisions in *Cusak*, *New Motor Vehicle Bd.*, and *Midkiff* therefore do not justify the delegation that the Lacey Act accomplishes.

<sup>45</sup> 226 U.S. 137 (1912).

<sup>46</sup> *Id.* at 140–44.

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

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

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

<sup>50</sup> 242 U.S. 526 (1917).

<sup>51</sup> 439 U.S. 96 (1978).

<sup>52</sup> 467 U.S. 229 (1984).

<sup>53</sup> In *Cusak*, a Chicago ordinance prohibited the erection of billboards in residential communities without the consent of a majority of the residents on both sides of the relevant street. 242 U.S. at 527. The Court distinguished *Eubank* on the ground that the Richmond ordinance allowed a majority of local residents to impose a restriction, while the Chicago ordinance allowed a majority of local residents to lift an otherwise valid prohibition. *Id.* at 527, 531. *New Motor* rejected a due process delegation challenge to a state law directing a state agency to delay vehicle franchise establishments and locations when an existing dealer objects. 439 U.S. at 108–09. Relying on *New Motor*, *Midkiff* rejected the argument that due process prohibits a state from allowing private parties to initiate the eminent domain condemnation process. 467 U.S. at 243 n.6.

### III. Solutions For Those Problems

There are some solutions for those problems.<sup>54</sup>

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

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

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

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

#### C. Adopt a Mistake of Law Defense

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

#### D. Identify the Foreign Laws

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

### Conclusion

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

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Dr. FLEMING. Thank you, Mr. Larkin.

And finally, Mr. Kamenar, you are recognized for 5 minutes.

### STATEMENT OF PAUL D. KAMENAR, ESQ., ATTORNEY AT LAW

Mr. KAMENAR. Thank you, Mr. Chairman, Mr. Ranking Member, members of the Subcommittee. My name is Paul Kamenar, I am a Washington, D.C. lawyer and legal public policy advisor with over 35 years experience litigating Federal cases in the Supreme Court and lower Federal courts, including criminal enforcement of environmental laws.

As the former Senior Counsel to the Washington Legal Foundation, I was counsel in the McNab case for the three American citizens who were convicted for violating the Lacey Act for importing frozen lobster tails in plastic bags from Honduras, and sent to prison for over 8 years. I drafted and filed their petition in the Supreme Court, which I would like to make available as a copy for the record.

<sup>54</sup> See, e.g., Meese & Larkin, *supra* note 2, at 738–83; Paul J. Larkin, Jr., *A Mistake of Law Defense as a Remedy for Overcriminalization*, 26 A.B.A.J. CRIMINAL JUSTICE 10 (Spring 2013); Paul J. Larkin, Jr., *The Injustice of Imposing Domestic Criminal Liability for a Violation of Foreign Law*, THE HERITAGE FOUND., LEGAL MEMO. No. 94 (June 12, 2013), available at [http://thf\\_media.s3.amazonaws.com/2013/pdf/lm94.pdf](http://thf_media.s3.amazonaws.com/2013/pdf/lm94.pdf) (last visited June 13, 2013).

I am testifying today in my personal capacity, and not on behalf of any other person or organization.

Mr. McNab was a Honduran seafood exporter who shipped the frozen lobster tails in transparent plastic bags to seafood importers Mr. Blandford and Schoenwetter in the United States, where the shipments were subject to inspection and cleared by U.S. Customs and the Food and Drug Administration.

February 1999, the ship was seized, but they were not told why it was seized. Over the next 6 months, National Marine Fisheries Service agents traveled back and forth to Honduras, trying to figure out what Honduran law regulation might have been violated. They concluded that three might be involved. One, the size regulation limiting the size of lobster tails to less than 5.5 inches, or under 4 ounces. Packaging regulations said that the seafood must be packed in a cardboard box, instead of plastic bags, and an egg-bearing regulation prohibited capturing egg-bearing lobster tails.

Armed with rulers to measure the catch, the Federal agents determined that only 3 percent of the catch was undersized, a very low percentage that would not be unusual in catching and processing 70,000 pounds of lobster tails.

While the government expected the importers to be aware of this regulation, apparently the U.S. Government was not. Indeed, in their weekly public posting of all frozen seafood prices to the industry, the National Marine Fisheries Service listed prices of 2-ounce and 3-ounce lobster tails from Honduras in their price list. However, the packaging was such that the entire 70,000 pounds was shipped in plastic bags. By the way, these lobsters were neither endangered nor threatened. And, therefore, the entire shipment became illegal and subject to forfeiture. And it was this procedural regulation that resulted in the Draconian sentence of 8 years in prison.

To reiterate, while over 90 percent of the shipment did not contain illegal lobsters or contraband, as critics have claimed, they were legal lobsters, simply packed in the wrong packaging. Not satisfied with the Lacey Act violations, the Federal prosecution charged them with smuggling. Now, how could the shipment of these lobster tails in clear, transparent bags going through Customs and FDA inspection constitute smuggling?

Well, for Federal prosecutors, that was like shooting fish in a barrel. Anyone who brings in the United States merchandise "contrary to law" is guilty of smuggling. And since these were packed in the wrong packaging, that was contrary to law, and therefore, you are smuggling. Therefore, if you bought it in opaque cardboard boxes which had to be pried open to see what was in it, that was not smuggling. But if you bought it in clear, transparent bags, that is smuggling.

"Oh, did you pay for this seafood? Well, I guess we will have to charge you with money laundering." Well, they paid for it. They had their invoices and bills of lading. And hence, they were sentenced up to 97 months.

Now, on appeal in the 11th circuit the Honduran Government and its agencies filed the brief saying that the official position of the Honduran Government was that all three of these regulations were either void or of no legal effect. In short, none of the defend-

ants could have been prosecuted in the Honduras for violating these regulations. And the opinion in the 11th circuit, the court upheld it. But in the strong dissent, Judge Fay said, "What was thought to be a crime turns now not to be a crime."

As for whether foreign regulations should be covered, the court of appeals said that it was. However, as we know, the Lacey Act precludes importing seafood, et cetera, that violates any U.S. law or regulation, any State law or regulation, any tribal law or regulation. But when it came to foreign law, it didn't say any foreign law or regulation, it just said foreign law. And, indeed, in the 1981 amendments, Congress considered and rejected an expansive definition of foreign law to include foreign law and regulations, and struck that provision down. In short, Congress meant what it said and said what it meant, and the courts are not to rewrite the legislation.

In conclusion, my recommendations, along with Mr. Larkin, is that if Congress intended to incorporate foreign laws and regulations, then Congress should say so expressly, and not leave it to the courts to rewrite the legislation that Congress enacted.

Moreover, in order to give proper notice to the public and regulated community, these enforcement agencies should have a data base of all the valid regulations, edicts, decrees, and alike that are applicable in the Lacey Act. And finally, Congress should decriminalize the Lacey Act. At a minimum, if the foreign country uses only civil or administrative penalties, so should the U.S. Government, rather than using the heavy hand of criminal penalties and excessive prison terms. Thank you.

[The prepared statement of Mr. Kamenar follows:]

**Statement of Paul D. Kamenar, Esq., Attorney at Law**

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

My name is Paul D. Kamenar, a Washington, D.C. lawyer and legal public policy advisor with over thirty-five years experience litigating federal cases in the U.S. Supreme Court and lower federal courts, including cases involving abusive criminal enforcement of environmental laws such as the Clean Water Act, Endangered Species Act, and the Lacey Act. I am also a Senior Fellow of the Administrative Conference of the United States and Member of its Judicial Review Committee. I guest lecture at the U.S. Naval Academy on National Security Law, which includes a discussion of how certain environmental laws have hampered military training exercises. I was also a Clinical Professor of Law at George Mason University Law School and Adjunct Professor at Georgetown University Law Center where I taught a separation of powers seminar.

As the former Senior Executive Counsel of the Washington Legal Foundation, I litigated constitutional and regulatory cases, testified before Congress on environmental enforcement and oversight, and participated in symposia and conferences on overcriminalization. Of relevance to this hearing, I was counsel in *McKinney v. U.S. Dep't of Treasury*, 799 F.2d 1544 (Fed. Cir. 1986) representing Members of Congress and the International Longshoremen's Union to stop the illegal importation of goods from the former Soviet Union, including lumber, made by forced labor in violation of Section 307 of the Smoot-Hawley Tariff Act. Of more particular relevance, I was counsel to three American citizens who were convicted of violating the Lacey Act for importing frozen lobster tails from Honduras and sentenced to prison for over eight years and for whom I drafted and filed their petition for writ of certiorari to the Supreme Court. *McNab/Blandford v. United States*, 324 F.3d 1266 (11th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004).

I am testifying today in my personal capacity and not on behalf of any other person or organization. While I fully subscribe to the views of the other witnesses who are critical of the Lacey Act's overly broad and unconstitutional reach with respect to the enforcement of all foreign laws and regulations regulating their wildlife and plants, I will focus my testimony on the *McNab* case as an example of just how the

Lacey Act's reference to foreign law has been abused and misinterpreted by the courts.

**Foreign Law Enforcement under the Lacey Act: *United States v. McNab***

David McNab was a Honduran fisherman who owned and operated fishing vessels that caught spiny lobsters up to 350 miles off the coast of Honduras. After his catch was inspected at Roatan Island, Honduras, he would ship the frozen spiny lobster tails in clear transparent plastic bags to seafood importers Robert Blandford and Abner Schoenwetter in the United States where the shipments were subjected to inspection and cleared by U.S. Customs and the Food and Drug Administration. The lobsters were then sold to seafood dealers, including Diane Huang, for further processing and then resold to restaurants such as Red Lobster. These shipments were made over the years with no question as to their lawfulness.

On February 5, 1999, after receiving an anonymous facsimile that the shipment coming in that day may contain allegedly "undersized lobster tails" (i.e., those that were under four ounces), armed agents from the National Marine Fishery Services (NMFS) seized the vessel. Blandford, Schoenwetter, and McNab were not advised why the vessel was being seized. Several weeks later, the lobster tails were transferred from the ship to a facility in Florida. Over the next *six months*, NMFS agents traveled back and forth to Honduras to determine what if any Honduran laws or regulations might have been violated. They concluded that three Honduran regulations or laws may have been violated: 1) a regulation limiting harvesting of spiny lobsters whose tails are less than 5.5 inches (or under 4 ounces); 2) a regulation detailing how the seafood is to be packaged, namely, in cardboard boxes; and 3) a provision that prohibits capturing egg-bearing female lobsters. NMFS agents finally began their inspection of the shipment.

Armed with rulers, they determined that only three percent of the catch was undersized according to the Honduran size regulation—a very low percentage that would not be unusual in catching and processing 70,000 pounds of lobster tails. While the NMFS expected the importers to be aware of this foreign regulation, apparently the United States government was not. Indeed, in their weekly public posting of all frozen seafood prices to the industry, the NMFS listed Spiny Lobster Tails from Honduras as selling for \$8.75 for those weighing two ounces; \$9.95 for those weighing three ounces, and \$12.25 for those weighing four ounces. A copy of the price list is attached hereto. Thus, not only was it against the financial interest of the U.S. seafood dealers to import smaller lobster tails, but also the federal government even had an official price list for them.

Similarly, the NMFS determined that a small percentage of the catch was egg-bearing, allegedly in violation of another Honduran law. However, the entire catch of 70,000 pounds of spiny lobster—a species which was neither endangered nor threatened—were shipped in transparent plastic bags instead of cardboard boxes, and the entire shipment thus became "illegal" and subject to forfeiture. Not satisfied with the substantial forfeiture and severe civil penalties available, and despite the fact that the importers were advised that NMFS was only trying to build a civil case against Mr. McNab, federal prosecutors filed felony criminal charges against McNab, Blandford, Schoenwetter, and Huang. As Mr. Schoenwetter testified a few years ago on the topic of overcriminalization before the House Subcommittee on Crime, then Chaired by Congressman Bobby Scott, armed agents from the FBI, IRS, and NMFS searched Mr. Schoenwetter's home in the early morning, herding his wife, mother-in-law, and his young daughter in the living room in their night clothes, ordering them to be quiet. A few days later armed agents returned at 6:00 a.m. to arrest Mr. Schoenwetter. None of the defendants had ever before been charged with any offense, but were hard-working small businessmen trying to make a living.

**Smuggling and Money Laundering Charges**

The U.S. defendants were charged with violating the Lacey Act for importing frozen lobster tails in violation *not* of any U.S. law or regulation, or any State law or regulation, but of the Honduran regulations regarding size and packaging. As will be discussed, it was this technical packaging violation that dictated the draconian sentence of over eight years in prison. The U.S. defendants were not charged with violating the egg-bearing provision. Not satisfied with invoking the Lacey Act's felony provisions which provide a maximum punishment of five years for the worst violation, overzealous Justice Department prosecutors started to pile on with additional felony counts of smuggling and money laundering which, if sustained, would add more prison time to be served by these hardworking citizens.

One might be forgiven if one were to ask how could the shipment of these lobster tails in clear transparent plastic bags that went through Customs and FDA inspec-

tion constitute smuggling. After all, one would normally consider a smuggling scenario where illegal or endangered wildlife or parts are concealed in luggage or similar containers. Indeed, the trial judge was puzzled as to how the defendants' conduct constitutes smuggling. But for the federal prosecutors, making a smuggling case was like shooting fish in a barrel. After all, under 18 U.S.C. 545, anyone who brings into the United States merchandise "contrary to law" is guilty of smuggling, subject to a prison term of up to 20 years. So if the lobster tails were shipped in opaque cardboard boxes which would have to be pried open to see what was inside, then that would not constitute smuggling; however, if they were transported in clear transparent plastic bags and inspected by Customs and the FDA, then, according to the Justice Department, that constitutes smuggling. Under this definition, *any* violation of the Lacey Act's foreign law provision, even if it were an administrative, civil or misdemeanor violation, can easily be prosecuted as a felony smuggling offense since the seafood, wildlife, or plant was imported "contrary to law."

The prosecutors were still not finished. Did the importers pay for this seafood? Of course they did. They had invoices, cancelled checks, and bills of lading that were turned over to NMFS showing that they paid for the seafood as they have been for several years in the normal course of business. So now the prosecutors added money laundering charges. One would normally consider money laundering as "laundering" cash proceeds from drug deals through an offshore bank and the like. Even the trial judge also was puzzled as to how this offense could be considered money laundering. Yet the money laundering statute, 18 U.S.C. 1957 and 1956(h), is written in such a way that the conversion of the sale of unlawful goods—here, the lobsters "illegally" packed in plastic bags—constitutes felony money laundering charges. Again, the money laundering provision used this way can be used in almost any Lacey Act violation where goods are sold. And the Justice Department always adds a conspiracy count for good measure in cases where two or more violators are involved. Accordingly, those who characterize the McNab defendants as being notorious "smugglers" and "money launderers" as well as Lacey Act violators are being disingenuous and misleading.

As unfair as the heavy-handed prosecution was, it was made all the more troubling in that questions were raised at trial requiring a separate hearing as to whether the Honduran regulations at issue were even valid under Honduran law. The defendants' expert witness testified that the cardboard container regulation was invalid inasmuch as the enabling legislation giving rise to that regulation was repealed in 1995; the size regulation was procedurally defective in its promulgation; and the egg-bearing provision was repealed with retroactive effect. Nevertheless, the trial court accepted the testimony (later recanted) of a mid-level legal advisor to the Honduran Agriculture Department that the laws were valid.

All the defendants were convicted, and due to the value of the entire "illegal" shipment packed in plastic bags, the Court applied the then mandatory Sentencing Guidelines which were based on the total gross value of the "smuggled" goods, not the net profits. The Court imposed draconian sentences of 97 months (eight years and one month) on McNab, Blandford, and Schoenwetter and 24 months on Huang. That sentence greatly exceeded the punishment for more serious crimes. *See, e.g., United States v. McPhee*, 336 F.3d 1269 (11 Cir. 2003) (57-month sentence for intent to distribute 100 kilograms of marijuana aboard a vessel).

Although the maximum sentence under the Lacey Act was five years, to meet the 97-month sentence, the Court was forced to make the sentence of some charges consecutive with others rather than concurrent as is usually the case. In short, the statutory maximum became the mandatory minimum, and was especially excessive because parole has been eliminated in the federal system. Keep in mind that what drove these excessive sentences were goods that were not considered contraband *per se*, but what has been referred to as "derivative contraband," namely, violations of procedural rules regulating shipping or transporting. McNab was immediately incarcerated while the American defendants were allowed on bail pending appeal.

During the appeal, McNab challenged the validity of the size limit law in the Honduran courts and prevailed. Nevertheless, the federal district court rejected any post-conviction challenge to the law. On appeal to the Eleventh Circuit, the Honduran Government and its agencies filed an amicus brief noting that all three of the regulations were either void or of no legal effect. In short, none of the defendants could have been prosecuted in Honduras for violating these regulations. As noted, the government's star witness at trial from Honduras recanted her testimony.

In a 2-1 opinion, the Eleventh Circuit upheld the convictions, refusing to give any deference to the official position of the Honduran government as to the validity of their own laws but deferred to federal prosecutors as to the meaning of the foreign law. As Circuit Judge Fay remarked in his strong dissent, "what was thought to be a crime turns out not to be a crime under Honduran law" and that the convictions

should be reversed. That would be the outcome under our system if a defendant were convicted of a law found defective on appeal. See *United States v. Goodner Bros. Aircraft*, 966 F.2d 380 (8th Cir. 1992). The Circuit Court also rejected the argument with little analysis that even if the regulations were valid, the Lacey Act only makes it unlawful to import goods in violation of “foreign law,” not a country’s regulations, edicts, or decrees, of which there are thousands.

#### **Petition for Writ of Certiorari Judicial Deference to Foreign Governments**

In their petition for writ of certiorari, the defendants argued that the Supreme Court should hear the case because the defendants’ Due Process rights were violated since they were not tried on the basis of a valid law but rather on ones that were void or defective Honduran regulations that were incorporated by reference in the Lacey Act. Moreover, due to the nature of our global economy (and now, the expansive reach of the Lacey Act Amendments of 2008 to include plants and plant products), this case presented an exceptionally important question of the level of deference the courts should afford the official views of a foreign government in determining the meaning of their own laws. Indeed, the decision of the Eleventh Circuit conflicted with the decisions of the Supreme Court itself and other circuits where “substantial deference” is accorded a foreign government’s views of its own laws in other contexts, such as tax laws and the like. Indeed, ignoring the foreign country’s views of its own laws undermines the Lacey Act which its proponents claimed in 1981 as aiding “foreign nations in enforcing their own wildlife laws.” 127 Cong. Rec. 4737 (1981) (remarks of Senator Chafee).

In short, while it is grossly unfair and constitutionally suspect to require U.S. citizens to comply with foreign law by incorporating those laws wholesale by reference in the Lacey Act, at a minimum, the interpretation of those laws should be within the province of the foreign nation, not federal prosecutors, and substantial deference should be provided to that interpretation.

#### **“Foreign Law” Does Not Include Foreign Regulations**

In addition—and of particular relevance to this hearing—the American defendants sought review in the Supreme Court of the Eleventh Circuit’s facile conclusion that “foreign law” includes the myriad of foreign regulations and the like, including the (invalid) ones from Honduras invoked by the prosecutors in the *McNab* case. With scant analysis of the text and legislative history of the Lacey Act, the Eleventh Circuit followed the equally flawed decisions of the Ninth Circuit in concluding that “foreign law” also constitutes “foreign regulations” and similar provisions. See *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824 (9th Cir. 1991) and *United States v. Lee*, 937 F.2d 1388, 1391–92 (9th Cir. 1991).

Both the Eleventh Circuit and Ninth Circuit ignored fundamental rules of statutory construction by disregarding the language used by Congress regarding the applicability of foreign law. The Lacey Act expressly prohibits the importation of wildlife that violates any “law, treaty, or regulation” of the United States” (16 U.S.C. 3372(a)(1)); any “law or regulation of any State” (16 U.S.C. 3372 (a)(2)(A)); and “any tribal law” (16 U.S.C. 3372(a)(1)) further defined as meaning “any [tribal] regulation . . . or other rule of conduct enforceable by any Indian tribe . . .” 16 U.S.C. 3371(a)(c). However, with respect to the term “foreign law,” Congress did *not* include “regulation” to encompass that term. If Congress wanted to include foreign regulations, it could have easily done so. Indeed, it clearly decided not to do so in the 1981 amendments.

The pre-1981 version of the Lacey Act admittedly did proscribe the transportation of wildlife “in violation of any law or regulation of any State or foreign country” (formerly 18 U.S.C. 43(a)(2)). During the 1981 amendment process, however, when the original Lacey Act was actually repealed *in toto* along with the Black Bass Act, Congress considered and rejected an expansive definition of “foreign law” in the original Senate bill. See S. 736, 97th Cong., 1st Sess., 127 Cong. Rec. 4738 (March 19, 1981) (“‘foreign law’ means law or regulations of a foreign country . . .”) (emphasis added). In the final version of the bill as passed by the Senate, this definition was replaced with the current version of “foreign law” without including “regulations.” In short, Congress had the opportunity to adopt a broader definition of foreign law and did not do so. By both repealing the pre-1981 version of “foreign law or regulation” provision and rejecting the broad proposed definition, Congress meant what it said and said what it meant. It was impermissible for the Ninth and Eleventh Circuits to rewrite the law to suit their view of what “foreign law” should mean.

The Supreme Court unfortunately denied review and has not ruled on this important issue; consequently this expansive view of “foreign law” is only valid in the Ninth and Eleventh Circuits. At a minimum, it was incumbent on Congress in 2008 when it amended the law as it is today to make it clear in statutory language

whether “foreign law” encompasses the myriad of foreign regulations and decrees, many of which are unknown to the American public and importers.

Even the Eleventh Circuit agreed that the meaning of “foreign law” is ambiguous with respect to whether it encompasses foreign regulations. But under Due Process and the Rule of Lenity, the language of a statute that is enforced criminally should be strictly construed in favor of the defendant. See *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952); *Dunn v. United States*, 442 U.S. 100, 112 (1979).

In short, Congress is the body constituted under Article I of the Constitution to make laws, not the courts or foreign governments. If Congress intended to incorporate foreign laws and regulations, then fairness requires that the enforcement of those foreign laws under the Lacey Act be treated as they would be in the foreign country, namely, administratively or civilly rather than criminally as many foreign regulations so provide. Moreover, in order to provide proper notice to the public and the regulated community, the enforcing agencies should have a database of all the *valid* foreign regulations, edicts, decrees, and the like that are applicable to the natural resource at issue.

#### **Incorporating “Foreign Regulations” in the Lacey Act Is Inconsistent With the Congressional Review Act**

In addition to the constitutionally suspect “foreign law” provision of the Lacey Act to include “foreign regulations,” the incorporation of “foreign regulations” into a domestic law without specifying which foreign regulations are required to be obeyed violates the letter and spirit of the Congressional Review Act (CRA), 5 U.S.C. 801–888. The CRA requires each federal agency to send its covered final rules to the Comptroller General at the Government Accountability Office (GAO) and to both houses of Congress “[b]efore [such rules] can take effect.” 5 U.S.C. 801(a)(1)(A).

The CRA was enacted in 1996 to give Congress the power to disapprove agencies’ final rules by enacting a joint resolution of disapproval. Senator Don Nickles, a co-sponsor of the legislation, noted, “As more . . . of Congress’ legislative functions have been delegated to federal regulatory agencies . . . Congress has effectively abdicated its constitutional role as the national legislature . . . This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority . . .” Joint Statement of House and Senate Sponsors, 142 Cong. Rec. S3683 at S3686 (daily ed. April 18, 1996). While a limited category of rules are exempt from CRA’s coverage, other rules, such as those governing “foreign affairs” which are otherwise exempt from notice and comment under the Administrative Procedure Act, are most notably *not* excluded from coverage under the CRA. Accordingly, a strong argument can be made that to the extent “foreign regulations” are incorporated in the Lacey Act, those “regulations” are subject to the CRA and must be submitted to Congress before they may take effect.

#### **Conclusion**

The Lacey Act violates the Rule of Law and gives prosecutors too much enforcement power by incorporating “foreign law” and unspecified “foreign regulations” into the law’s reach, especially with respect to criminal prosecutions where an individual’s liberty is at stake.

The prosecution in the *McNab* case illustrates how the Lacey Act can be abused and how easy it is for the Justice Department to include smuggling and money laundering felony charges where more reasonable civil and administrative remedies are available and which would better serve the interests of justice and the environment.

I look forward to answering any questions the Committee may have. Thank you.

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Dr. FLEMING. Thank you, Mr. Kamenar. At this point we will begin Member questioning of the witnesses. To allow all Members to participate, and to ensure we can hear from all witnesses today, Members are limited to 5 minutes for their questions. However, if Members have additional questions, we can have more than one round of questioning. I now recognize myself for 5 minutes.

I have a yes-or-no question for the panel. You will have a chance to explain anything later, if you would like. But my question is this. Do you think that the Lacey Act, a bill, law, that is 113 years old now, was and is a good idea, that it has a value to protect the illegal importation of living substances, or post-living substances,

from other countries? Do you, panel, agree that is well intended? Starting over here.

Mr. VON BISMARCK. Yes.

Mr. ASNER. It is a great idea.

Ms. ALEXANDER. I am CRS, so I will have to qualify it.

Dr. FLEMING. I figured you would say something like that. That is OK, we will give you a pass.

Mr. RUBINSTEIN. Provided it is consistent with our legal norms and our Constitution, yes.

Mr. LARKIN. Yes.

Mr. KAMENAR. Yes, but qualified by making sure that due process is applied.

Dr. FLEMING. Right. So, at least conceptually, what could be wrong with protecting against the illegal importation of substances that could create, of course, endangered species from other nations? Well, we will get into that a little bit.

Now, here is another question. And I will start with you, Mr. Asner. Is it possible that in the wording of the 2008 amendments to the Lacey Act, we are subjecting United States citizens potentially to Sharia law in certain countries?

Mr. ASNER. I am not familiar with Sharia law, so I don't know how it regulates, if at all, the taking of wood or wood products or plants or plant products. But I can tell you that certainly if Sharia law says you cannot steal from your neighbor—and I suspect it does—then, yes, it would incorporate that concept in it.

Now, would it incorporate all concepts of Sharia law? No, because what it requires is—

Dr. FLEMING. Let me get to some others. I understand. I get your—good answer, thank you. That potentially it could, although limited, not necessarily all of Sharia law, and I certainly understand that.

Just to point out, countries that we do trade with include Yemen, Saudi Arabia, Qatar, Pakistan, Iraq, Iran, Afghanistan, Sudan, parts of Indonesia, Nigeria, and the United Emirates. So certainly at one point or another, we are likely to interact with this.

Other panel members, our attorneys, do you have any comments about is there the potential, whether limited, whether expanded, laws that could be ordinarily found to be unacceptable in this country, as we know Sharia law often can be, could we in fact be subjecting our own citizens to Sharia law?

Mr. LARKIN. Yes, sir. The Act doesn't limit the term "foreign law." Whatever foreign country adopts as its law must be treated as that.

If I could also add, it is not theft in the United States to capture wildlife, because no one has a property interest in wildlife. So it is—catching fish is not like stealing your neighbor's car. You have a property interest in your car. But for fish that are in the rivers and streams, no one has a property interest in those, so it is not the same.

Mr. RUBINSTEIN. I think that is right. The fundamental problem here—and, frankly, it was recognized in a case called *United States Bryant*—the laws that you are applying have to be defined so that the people who are subject to them are able to understand them and apply them. Michigan is not Madagascar. Indiana is not India.

And South Dakota is not Saudi Arabia. And, unfortunately, the Lacey Act doesn't draw that distinction, at least—

Dr. FLEMING. So you are suggesting that if there are laws in other nations that could be completely at odds with our culture and our understanding and our own law and our own civilization, that we could theoretically, by default, be subjecting our citizens to the laws of that nation.

Mr. RUBINSTEIN. That is correct.

Mr. KAMENAR. I would also agree. I mean you could think of other examples, as well. Let's assume that Venezuela and Bolivia, which is going to offer asylum to William Snowden, were to have a law saying that none of their exports could be shipped to the United States, because they don't like the United States, or we are an ally with Israel, or something like that. Therefore, any goods coming from those countries would violate the Lacey Act. And I think, again, there is another example of where the law can be misused.

Dr. FLEMING. Quickly, before my time runs out, just to throw it out to the three panelists on this end, do you agree with Mr. Asner that the Lacey Act does not subject Americans to foreign law?

Mr. LARKIN. It certainly does. The Supreme Court has made clear that the violation of a statute is a question of law. The statute here requires proof of a violation of foreign law.

Dr. FLEMING. Yes.

Mr. KAMENAR. And I agree. And what makes it more complicated is that when the courts are to determine what that foreign law is, you have days and days of hearings as to what this law means. And in the McNab case, the Honduran Government said, "Here is the meaning of these laws. They are invalid under our country." And yet the 11th circuit said, "No, we will decide what your law means." And because of that they were subjected to these Draconian penalties.

Dr. FLEMING. Real quickly.

Mr. RUBINSTEIN. Yes, it does. Yes.

Dr. FLEMING. OK. All right. My time is up. I yield to the gentleman from the Marianas.

Mr. SABLAN. Thank you. Thank you very much, Mr. Chairman.

I am going to ask all of you two questions. And if you could, please just give me a yes or no answer. Do you think American consumers have a right to know whether the goods they buy are stolen? We will start from the left to the right. Mr. von Bismarck?

Mr. VON BISMARCK. Yes, I do.

Mr. ASNER. Absolutely.

Ms. ALEXANDER. Pass.

Mr. SABLAN. Oh, come on. I mean that is a simple question.

[Laughter.]

Mr. SABLAN. You are a consumer.

Dr. FLEMING. She wants to keep her job.

Ms. ALEXANDER. In terms of CRS I am going to pass.

Mr. SABLAN. All right.

Ms. ALEXANDER. In terms of myself, I would like to know.

Mr. SABLAN. OK, sure. Mr. Rubinstein, sir?

Mr. RUBINSTEIN. Sure, they do. And it would be helpful—

Mr. SABLAN. Yes or no. Yes or no.

Mr. RUBINSTEIN. Yes, with an explanation.

Mr. LARKIN. Yes, with my earlier explanation.

Mr. KAMENAR. Yes, we should have a data base that has these goods listed—

Mr. SABLAN. No, no. It is just do they have a right to know whether the goods they are buying—

Mr. KAMENAR. They have a right to know it by the government telling them, too, what it is.

Mr. SABLAN. Now my next question is—and let's start with—Mr. Kamar?

Mr. KAMENAR. Kamenar.

Mr. SABLAN. All right. My next question, do you think foreign visitors and companies in the United States should have to abide by U.S. laws?

Mr. KAMENAR. I am sorry, could you repeat that?

Mr. SABLAN. Do you think foreign visitors and companies in the United States should have to abide by U.S. laws?

Mr. KAMENAR. Foreign visitors here in the United States have to comply with U.S. laws?

Mr. SABLAN. Yes.

Mr. KAMENAR. Yes, of course.

Mr. SABLAN. No explanation, but yes. OK. Sir?

Mr. LARKIN. Yes, sir.

Mr. RUBINSTEIN. Yes, sir.

Mr. SABLAN. Ms. Alexander?

Ms. ALEXANDER. I believe that is U.S. law, yes.

Mr. SABLAN. All right. Finally, thank you.

Mr. ASNER. Yes.

Mr. VON BISMARCK. Yes.

Mr. SABLAN. If you are saying that if you don't understand—I think it was Mr. Kamenar—if you don't understand—or one of you. Maybe Mr. Larkin was saying that if you don't really understand the law, then you should not be held responsible for it. Right?

Mr. LARKIN. No. What I said is if a law is not understandable by a reasonable person—

Mr. SABLAN. If it is not—

Mr. LARKIN [continuing]. You can't be criminally prosecuted for it.

Mr. SABLAN. If it is not written in English, so—wow. Really? I won't go there.

Mr. LARKIN. No, no, no, it is OK. I don't think any—I don't think the Supreme Court—

Mr. SABLAN. Let me go to Mr. Asner. Mr. Asner, other witnesses have said it should not be a crime under the Lacey Act to steal from other countries because people cannot possibly be expected to know other countries' laws. But my understanding is that in order to be criminally responsible under Lacey, someone would have to know the law, and then break it anyway, like what Gibson Guitar Corporation did.

Is that the case? And, if so, doesn't that standard give a lot of protection to people who just didn't know better?

Mr. ASNER. Absolutely. That is the law. And I have the advantage of being perhaps the one person in this room who actually has prosecuted a Lacey Act case. And the burden of proof is on the gov-

ernment to prove the mental state of the defendant with respect to the foreign predicate law. And to be very clear, if an individual does not know the foreign law, does not know he violated the foreign law, and in the exercise of due care should not have known that he violated the foreign law, the person is innocent.

Mr. SABLAN. I am going to—under different venue or circumstances, I am going to speak to Ms. Alexander eventually. But Mr. Asner, once again, in his testimony Mr. Kamenar insisted that the facts of the McNab case showed that the defendant did nothing wrong, and that a correct interpretation of the law shows they should not have been found guilty of violating the Lacey Act.

As a lawyer, when the facts are on your side, and the law is on your side, shouldn't you win the case? I am sure Mr. Kamenar is a good lawyer, I don't doubt that. So is he leaving something out in his description of the McNab case?

Mr. ASNER. Look—

Mr. SABLAN. Everything was in his favor and they lost the case. Something is wrong here.

Mr. ASNER. Yes. I mean I think the record is pretty clear. You can go and read the court opinions. I have. You can go read the briefs. I have. And the facts are extremely different from what is described here.

He lost the case. And they lost it at the trial level, they lost at the court of appeals. The Supreme Court didn't even bother to look at it. The facts as they describe are not correct. These individuals were found guilty of knowingly violating the law, and they were put in jail because of it, appropriately. That is the law.

Mr. SABLAN. Because we are government rule of law, that is the law.

I have one more question for Mr. Asner. In his testimony, Mr. Asner, Mr. von Bismarck points out that the transnational natural resources crime has grown incredibly sophisticated. The framers of the United States Constitution could hardly have envisioned militarized poaching rings that use disposable mobile phones to avoid detection, GPS units, and night vision goggles to track their prey, and helicopters and AK-47s to track it down. So is it appropriate that both criminal law and interpretation of the Constitution have evolved to keep pace with criminals?

Mr. ASNER. Well, the Lacey Act has evolved to take account of the changes in law. So the best example, for example, is just the fact that the airplane and the automobile were brought into our lives has changed the Lacey Act. And the increased coordination between law enforcement has definitely helped enforcement.

Dr. FLEMING. The gentleman's time is up. Ms. Shea-Porter, you are recognized for 5 minutes.

Ms. SHEA-PORTER. Thank you, and thank you for being here. I think former President George Bush would be very shocked to find out that he had somehow or another exposed us to Sharia law. I think the reality is that we have a problem in that this stuff is in other people's countries. And just as we have stuff in our country and we expect foreigners to obey our laws, I think it is reasonable to say if a country feels that—whether it is a national security issue, because there are poachers who are drug dealers, et cetera, involved, or whether they are running out of and facing potential

extinction of some product, or for whatever reason, that countries have a right to impose their laws there.

Having said that, we certainly expect to trade fairly and responsibly. But I just can't believe that if a foreign country came up and decided they would start chipping away at one of our plants and say, "Well, we don't want to fall under American law," that we would be offended. So it doesn't make sense to me, what we are talking about with the Sharia law. And I just felt that I needed to say that.

Now, the other part that I wanted to talk about was the guitar. Didn't they plead guilty? Didn't Gibson Guitar plead guilty?

Mr. RUBINSTEIN. No. I have here the document.

Ms. SHEA-PORTER. They paid a fine, right?

Mr. RUBINSTEIN. They paid a fine, they entered into an agreement. And this is called a criminal enforcement agreement. And it's quite lengthy.

Ms. SHEA-PORTER. But they accepted it?

Mr. RUBINSTEIN. Well, they paid it because many times in these kinds of situations—now, I did not represent Gibson Guitar, but I have represented other clients, and there comes a time when you do a cost benefit analysis.

Ms. SHEA-PORTER. Didn't they acknowledge that they had somebody on their staff who went and saw this wood and knew that this was not allowed? And didn't he report back? I could be wrong, but it seems to me—

Mr. RUBINSTEIN. Well, it is—I can show this to you, because—

Ms. SHEA-PORTER. Did they acknowledge wrongdoing? I am just asking did they acknowledge wrongdoing. A criminal enforcement—

Mr. RUBINSTEIN. Well, they paid a fine—

Ms. SHEA-PORTER. OK, so—

Mr. RUBINSTEIN [continuing]. To resolve the matter with respect to Madagascar.

Ms. SHEA-PORTER. They acknowledged wrongdoing, right?

Mr. RUBINSTEIN. No, what—no, they said that there were things that they could have done differently. And, in fact, what they did was they implemented a due diligence program—

Ms. SHEA-PORTER. Well, let me ask you a personal question. Would you acknowledge wrongdoing and pay a fine if you were not, or would you keep—

Mr. RUBINSTEIN. If I was threatened with bankruptcy as a result of having to pay lawyers? Sure.

Ms. SHEA-PORTER. I just think this is one of those cultural stories that we see passed around there.

But moving on, Mr. Asner, you have worked with the—

Mr. VON BISMARCK. May I contribute, Congressman? May I contribute—

Ms. SHEA-PORTER. No, no. I need to ask Mr. Asner a question. Thank you, though.

Mr. Asner, you have worked with a number of clients on issues relating to the Lacey Act. I am wondering if any of your clients don't attempt to work within the laws of foreign nations when they work overseas. It would seem to me that any business looking to operate overseas or purchase goods from outside the country would

want to do due diligence on what they were buying and who they were buying from, maybe even find out if what they are purchasing is contraband.

Mr. ASNER. Absolutely. That is what responsible organizations do. And going to Gibson, actually, it is quite interesting, because what Gibson ended up agreeing to, in addition to acknowledging wrongdoing, and acknowledging that their agent knew full well that it was illegal to get this wood, Gibson entered into an agreement to have a compliance program. And that compliance program now sets the standard. And it is very easy to follow. But what it does is it requires companies to, when they are bringing stuff into the United States, to do what you would expect, to take steps to make sure it is legal, so that when I buy it, it is legal. And it is what you would expect from a responsible company.

Ms. SHEA-PORTER. And the other question I had is, for these companies who are doing their due diligence—and they obviously need to have some staff assigned, right—is there a high rate of bankruptcy, because they have to follow the law and they have to hire somebody to see if the law is—or is it like a corporation that maybe has to offer—fall under regulations if they offer employee daycare, and there are lots of regulations, so they hire somebody? So they must have outside expertise or somebody within the organization that can help them comply.

Mr. ASNER. Most legitimate companies were doing this already, frankly. It is the companies that were trying to cut corners and look the other way that were willfully importing illegal wood into the United States. But from a compliance function, it is actually relatively simple to comply, and most companies operating internationally already have FCPA compliance programs in similar sorts of things.

Ms. SHEA-PORTER. So they are not going bankrupt because of these unbelievable regulations to—

Mr. ASNER. I have not heard of anything like that.

Ms. SHEA-PORTER. OK. And we impose regulations on them, as well, on—

Mr. ASNER. We do impose regulations on them, as well.

Ms. SHEA-PORTER. Right.

Mr. ASNER. And countries throughout the world are looking to the Lacey Act as something that they want to model for their own laws.

Ms. SHEA-PORTER. And countries expect this, and businesses on both sides of the ocean expect that there will be regulations.

Mr. ASNER. And, frankly, American consumers should expect it, too, because we have a right to legal goods.

Ms. SHEA-PORTER. Thank you. I yield back.

Dr. FLEMING. The gentlelady yields back. The Chair now recognizes Mr. Lowenthal for 5 minutes.

Dr. LOWENTHAL. Thank you, Mr. Chair, and thank you to our witnesses for coming here to testify today.

It is quite perplexing why the Majority chose such a successful law to attack, a law that keeps protected plants and animals from being illegally smuggled into the United States, and a law that protects Americans. It protects the American timber industry from unfair competition, from illegally harvested forest products.

And it is interesting. The Lacey Act has been repeatedly found to be constitutional by the courts, as illustrated by the ruling on three different U.S. district court rulings, and the refusal of the Supreme Court to even hear the McNab case on appeal. So let's move away from the constitutionality, and let's ask whether the Lacey Act now is good policy for the United States and for Americans, which—obviously, there are some folks who—here, on the Committee, in the Majority, think it clearly is not.

Let me pose an example to illustrate how this type of policy would be in the best interests of the United States. If a poacher in the United States illegally takes and smuggles bald eagles out of our country and into the EU in contravention of U.S. law, including the Federal Eagle Act of 1940, would it be to our benefit for the EU to respect U.S. laws? And, in fact, the EU currently does respect foreign wildlife laws.

What about China? You could say, well, what about China? Would it be appropriate to ask China to respect U.S. law? Would it be in the best interest of the United States to pass a law that required Chinese port inspectors to prevent illegally poached American Bald Eagles from being brought into China for sale? Should the United States Administration and Congress support the passage of a Chinese law that respects U.S. laws? If we dismantle the Lacey Act, then we have to answer no to all of these questions to be consistent with the reasoning that has been heard here today, which I point out is not in the United States' best interests.

It is not in the best interests of the United States for the EU, for China, or for any other country to refuse to accord deference to U.S. law. If we dismantle the Lacey Act, we will have significantly weakened our leverage to encourage nations like China to pass such measures that protect—and I repeat the emphasis on protect—U.S. businesses, plant, and wildlife interests by respecting U.S. law.

So, is the Lacey Act good U.S. policy? And the answer is most certainly yes. It has been hailed by the U.S. Trade Representative as an important tool in the U.S. efforts to combat illegal logging and associated trade. The forest product industry states that, "Our organization stands in strong support of the Lacey Act and all that it has accomplished in addressing the issue of illegal logging." Yet we are here today to discuss and we are attacking whether, in fact, Americans have to comply with the laws of foreign nations, and we are attacking the Lacey Act.

So, let me follow up these points with a question to Mr. von Bismarck.

As bad as the current poaching crisis is, how bad would it be if not for the Lacey Act? Does eliminating the United States as a market for stolen wildlife and timber make a difference? And how have other countries responded to the examples set by the Lacey Act?

Mr. VON BISMARCK. Thank you, Congressman. In my investigation and in my organization's investigations, the Lacey Act has been the leading deterrent against poaching around the world, whether it is tiger skins in Nepal, folks know about the Lacey Act and are worried about it.

The United States is still, for most goods, the biggest consumer. If we walk back the Lacey Act or the foreign law components of the Lacey Act, we would make the current battle on the ground where people are losing their lives, the battle over poaching for ivory, we would give up on it. It would be over. And currently we have a chance, for the reasons that you articulated, Congressman, the Lacey Act not only shuts down our major market as a driver for the money that goes to those criminal networks, but it gives us leverage to reach a tipping point for the overall global market to dry up that demand. So, there is a lot riding on it, Congressman.

Dr. LOWENTHAL. Thank you. And I yield back my time.

Dr. FLEMING. The gentleman yields back. Well, I think we are up for a second round, if our panel is. So I now recognize myself for 5 minutes.

First of all, let me mention that the 2008 amendments were not signed into law by President Bush. It was actually a Democrat-controlled Congress that overrode President Bush's veto. So I don't think, if Mr. Bush were here today, he would want to take credit for this.

Number two, we have established that even Sharia law could potentially be provided to make citizens subject to vis a vis the Lacey Act. And so, I would like to throw it out to our members on this side of the panel. Mr. Asner instructs us that he knows more about prosecuting the Lacey Act than anyone in the room today. I would like to hear what you would have to say in response, Mr. Larkin, about some of the statements made by Mr. Asner, and also—and others, as well, but also about the human cost.

We hear a lot about what happens to animals and plants. But, as an American, I care more about what happens to Americans. So, again, Mr. Larkin, I would be happy to hear your comments.

Mr. LARKIN. I think it is important to keep in mind that every one of these cases has a very human cost. And the cost is on people who are morally blameless. What you have is a problem here that people do not know the law because it is so obscure, it is so difficult. After all, Gibson Guitar was alleged to have violated the Madagascar inter-ministerial order that, if you read page seven of the appendix of that non-prosecution agreement, apparently was written in a foreign language. The idea that someone should be held liable for that seems to be quite unfair.

No one also, by the way, is saying the Lacey Act should be dismantled. I don't think anybody on this panel is. What we are talking about is implementing it properly. And it would not at all hurt prosecutions of the Lacey Act, if you required the government to prove that someone willfully violated the law, if you allowed someone to raise a mistake-of-law defense. Because in either of those instances, someone would not be subject to all the problems associated with the criminal process. And as a Federal agent for 6 years and a DOJ employee for 9, I know what that involves. Someone who is blameless would not have to go through that process if either of those elements were added into the Act.

Finally, if you just required the government to identify all the laws that it says someone should know, you would not have any diminution in the enforceability of the Lacey Act. You would just be notifying the public what the requirements of the law are. That

has been a cardinal requirement of Anglo-American criminal law for 1,000 years. The idea that somehow you are going to hurt enforcement if you don't tell people what the law is, is just silly. What it essentially amounts to is saying that it is OK for us to play Gotcha. If you don't know what the law is, you can still be held criminally liable for it. That is not the way our system works.

Dr. FLEMING. So, if, for instance, I am driving down the highway and the speed limit is 70, and I am driving 80 because there are no posted speed limit signs, then perhaps I would have driven within the speed limit had I know what the speed limit was. Is that what you are suggesting?

Mr. LARKIN. If you are in the United States and you are driving a car, you know that there is going to be a speed limit. You have the responsibility of determining what that is. And it is easy to find out, because they have signs and they have Web sites and the like that will tell you what the speed limit is. But there is no similar way of knowing what the law is in more than 190 foreign nations. And you are putting people at risk of not just the condemnation of the criminal process, but, as in Mr. Kamenar's client's case, having to serve more time in prison than some people do for violent offenses, because you are unaware of what a foreign nation's law is.

Dr. FLEMING. Well, Mr. Kamenar, tell us something about the human price here that is being paid.

Mr. KAMENAR. Well, it was paid by the defendants in this case, especially the U.S. defendants. They were told by the Marine Fisheries Service that they were trying to make out a civil case against Mr. McNab. But at 6:00 in the morning, armed Marine Fisheries Service, FBI, and IRS agents came into Mr. Schoenwetter's home in Florida, herded his wife, mother-in-law, and daughter, in their night clothes, into the living room and told them to be quiet while they searched the house. And then, a few days later, they came back to arrest this man, who has no prior criminal record and no running afoul of the law. And he spent 8—well, some time off for good behavior and so forth, but well over 6 years in Federal prison, he and Mr. Blandford. And it took a terrible toll on their health and their family.

And, here again, this case could have been handled administratively. OK. Seize the lobster tails, even though only 3 percent were undersized. Take the whole thing. Fine me. But why do we have to throw people in prison for 8 years? This is very much of an excessive overkill—

Dr. FLEMING. So what you are telling me—8 years in prison. He didn't murder anybody, correct?

Mr. KAMENAR. No, of course—

Dr. FLEMING. He didn't knock over a convenience store, he didn't assault anybody, he didn't rape anybody, right?

Mr. KAMENAR. That is right.

Dr. FLEMING. His crime was that the lobster tails were not the right size?

Mr. KAMENAR. Well, more importantly, the lobster tails were in plastic bags, instead of cardboard boxes, because it was the totality of that that drove the sentence.

And I might add that this sentence was twice as long as the one that Mr. Asner prosecuted, where it was clear that they knew they

were doing wrong, they were bribing the South African officials, they were smuggling it out, and yet our client is serving twice as much time for a law that, by the way, the Honduran Government said it was invalid under their own law. To me, that is just a travesty of justice.

Dr. FLEMING. Yes, I agree. Well, my time is up and I yield to the gentleman—the Ranking Member for 5 minutes.

Mr. SABLAN. Thank you very much, Mr. Chairman. Mr. von Bismarck, earlier you cited evidence, sir, that wildlife and timber crime is a threat to our national security. You also cited a report that shows that the 2008 Lacey Act amendments and similar efforts by the EU dramatically reduced the amount of wood China bought from high-risk countries and increased the amount of wood China bought from the United States. So is this evidence that the 2008 amendments are working to combat illegal logging?

Mr. VON BISMARCK. Absolutely. The impact that I have personally witnessed in our investigations in dozens of Chinese companies have been—it has been extraordinary to see that the Lacey Act passed here in the United States is changing the practices of factories on the other side of the globe.

In multiple meetings with Chinese factories, we saw the orders of American wood that were coming in. We have recorded the conversations where the CEOs of those companies explained that they are worried about making products with timber that comes from high-risk countries like Russia. And because they are worried that those shipments might get in some trouble in the United States, so they are changing their operations to get wood from places they trust. One of those places is the United States.

And the actual trade data from China themselves backs up this on-the-ground information, where the proportion of wood that is coming from the United States to China was 10 percent in 2007, the year before Lacey was passed, and in 2010 went up threefold.

Additionally, our trade surplus for manufactured goods with China in the wood sector was at about a \$20 billion deficit in 2006. And in 2010 went up to a \$200 million surplus. Again, because not only does it help companies importing wood in China, but it helps U.S. manufacturing companies, this concern, because it will be easier for them to compete by buying the wood that is directly next to their company, their manufacturing center in the United States.

Mr. SABLAN. So something is going right here. So again, Mr. von Bismarck, you also gave a number of compelling examples of how organized crime in wildlife and timber threatens our national security. Do we also have a national security interest in helping other countries—apparently with just your earlier conversation with China—develop the responsible and legal use of their own natural resources? Their own natural resources. Do the foreign law provisions of the Lacey Act help us achieve that goal?

Mr. VON BISMARCK. Absolutely. This is the irony, that for some of the markets that are maybe directly linked to some of the national security concerns, whether it is a cocaine shipment in Central America or rebels in Mindanao in the Southern Philippines, we are right now at the precipice of having markets that are directly adjacent to those situations pick up this principle, this principle

that they do not—they will not accept shipments that have evidence attached that they are coming from these practices.

Mr. SABLAN. All right.

Mr. VON BISMARCK. They are looking at what is happening here. If we backtrack on foreign laws in Lacey, we lose our chance to do that.

Mr. SABLAN. All right, thank you. I am going to go back. Mr. Asner, I have a question. Last time you were here, when you last appeared before the Subcommittee, you introduced Members to the concept of warranties and guarantees that could be used to shield importers from the unscrupulous actions of their suppliers. So can you please explain again the options people have to shield themselves from potential Lacey Act violations?

And could taking advantage of such options have allowed the defendants in McNab or Gibson to avoid breaking the law and paying the price?

Mr. ASNER. Yes, it could have. It could have helped. So, again, the Lacey Act has three different levels. If you knowingly are involved with illegal wood, it is a felony. If you should have known, it is a misdemeanor. If you didn't know, but it is nonetheless illegal, then what happens is it could be forfeited. You are not criminally liable, but it could be forfeited. The advantage of having a warranty or representation from your supplier is that it helps you on all three prongs.

With the forfeiture, it pushes the risk off to the supplier. With the other two you get a representation, and it helps you make the argument that you exercised due care.

Dr. FLEMING. The gentleman's time is up. The Chair now recognizes Ms. Shea-Porter for 5 minutes.

Ms. SHEA-PORTER. Thank you. And I had a question. The comment was made that the rules weren't even in English, and there is 194 nations. How on earth do they do business if it is not even in English in the rules about the Lacey Act? How do they even pick up the phone and start making a business deal? Does everybody speak English except the ones that are looking at the enforcement? Or—I mean I don't understand that comment. Could you—

Mr. LARKIN. Yes. No, I am glad to. I have here a copy, as my colleague referred to, of the non-prosecution agreement. The non-prosecution agreement talks about, at the invitation of Greenpeace and other non-profit environmental groups on June 9, 2008, a Gibson wood product specialist, Gibson representative, flew to Madagascar for a fact-finding trip with a group called the Music Wood Coalition, spearheaded by Greenpeace. The trip was designed to assess the potential for supporting sustainable forestry in Madagascar. Part of the justification for the Gibson representative's participation in the trip was the ebony species preferred for some of Gibson's instruments is found in Madagascar.

Now, in connection with the trip, the Gibson representative received a translation of Madagascar inter-ministerial order 16-030/2006, banning the harvest of ebony and the export of any ebony products that were not in finished form. The translation of the order received by the Gibson representative stated that the fingerboards are considered finished under Madagascar law. Participants in the Music Wood—

Ms. SHEA-PORTER. OK, so—but what I—

Mr. LARKIN. So let me—I will stop the quote.

Ms. SHEA-PORTER. No, because—

Mr. LARKIN. No, I understand. I am not trying to eat up your time. My point is—

Ms. SHEA-PORTER. No. What I am asking—I think you are, actually. But what I am asking is if you say they don't speak English, they are not writing it in English, then the question has to be how on earth do they conduct business?

Mr. LARKIN. No—

Ms. SHEA-PORTER. Somebody speaks English.

Mr. LARKIN. I didn't say no one speaks English. What I said was a lot of the laws that you can be held liable for violating—

Ms. SHEA-PORTER. Are not in English.

Mr. LARKIN [continuing]. Are not in English. And this is an example of one.

Ms. SHEA-PORTER. Right. But I do know that businesses are very savvy, and they know when they are signing contracts, that they want it in their language, that they weigh every word, they have attorneys, they have other business people. They know to weigh the words and understand what they are signing. And I know that they have lawyers who know how to do that.

So I don't understand the argument that they don't speak English. And, if anything, that would make me think even more that they hadn't paid enough attention to those aspects of the law, which I think are just as critical as signing the contract for the trade. But—

Mr. LARKIN. Would you like me to respond to that?

Ms. SHEA-PORTER. No, not yet. If I get another round, sure. But thank you.

All right, Mr. Asner, can you talk to me about that lobster? Can you tell me, from your perspective—

Mr. ASNER. The McNab case?

Ms. SHEA-PORTER [continuing]. The facts.

Mr. ASNER. Yes, it is sort of interesting, because you lose at the trial level, you lose at the court of appeals. Even before then you get another bite at the apple at the trial level. You lose at the court of appeals, you try and take it to the Supreme Court, you lose every step of the way. The jury finds the defendants guilty of knowingly violating these laws. That is upheld by the court of appeals. And you take it to the Supreme Court and then you lose there, so you bring it to Congress. And that is what is happening here.

So, this hearing, or at least a good portion of this hearing, is devoted to people who have lost a case. And they lost a case because the evidence supports the prosecution.

Some of the things that we haven't talked about, they intentionally falsified import documents using a secret code to disguise the true size of the illegal undersized lobster. After law enforcement intercepted one illegal shipment on its way to Alabama, the co-conspirators tried to circumvent law enforcement by putting lobster in a plane and flying it to LA. When they got caught doing that, they tried to move it to Panama and then fly it to Canada and come in through the northern borders. That is criminal behav-

ior. They got caught. They were convicted. And that is the end of the story.

Ms. SHEA-PORTER. Does that concern any of you? Did you not know that part of the story?

Mr. KAMENAR. I certainly do know part of the story, and a lot of it was left out by Mr. Asner. Namely that, again—

Ms. SHEA-PORTER. But let me just ask you about that. Did Mr. Asner just tell the truth?

Mr. KAMENAR. No, he did not. He misrepresented the facts of the case.

Mr. ASNER. It is in the record.

Mr. KAMENAR. The point is that when this was first stopped at—the first shipment that came in, there was 6 months before the U.S. officials figured out what was wrong with this. In the meanwhile, the U.S. importers did not think there was anything wrong, but they figured if they can't get at what they thought were lawful shipments, they will go to another port, where California did not have a law with undersized lobster tails, and neither did Canada. So they were trying to carry out their business, in what they thought was in a lawful way, because they weren't told for 6 months what was—

Ms. SHEA-PORTER. OK. All right. Mr. Asner, any comment, in all fairness?

Mr. ASNER. No, they were evading law enforcement. It is pretty plain. This was presented before the jury, and the jury found all the defendants guilty.

Ms. SHEA-PORTER. OK. Thank you. I think that is a good point to yield back.

Dr. FLEMING. The gentlelady's time is up. Again, I have more questions. Would you all like another round, or just ask questions ad lib? How would you like—we will have another round. I will yield myself 5 minutes. I believe we are up to me, next.

Let me understand kind of some central themes here. We have a situation where Americans who try to do business across our border with other nations are having to deal with very complex laws in other nations. Often they have an inability to get correct language description in English. And yes, somebody can be prosecuted by the law. And when you add the law to facts, if it is a bad law, you can send somebody to jail for a long time, or you can certainly extort their business or certainly extort some sort of plea agreement so that they can keep their business going. We know this happens all the time. And that may be constitutional, but it doesn't make it right. It does not make it right.

For a man to go to prison for 8 years—and I don't care whether or not he mislabeled. I don't even care if he went to the wrong island first. To go to prison for 8 years over lobster tails, because of violations from another nation? That is absolutely absurd. And I understand that there are disagreements on the facts of that, and there is no point in going through that. It is immoral to send somebody to prison for 8 years for getting the lobster tails the wrong size.

And we know that in the case of Gibson Guitar they were going to end up in bankruptcy if they didn't sign the deal. Nothing was proven in law. It never went to court, as far as I know.

So, I would like to have some of your comments, gentlemen, as to what you think about the law, the morality—I mean, again, as an American, I understand that, when it comes to criminal law, at least, that the government has a heavy, heavy burden to make sure that the law is clear to me, that I get every advantage, I get my day in court of protection. I am not seeing this in the Lacey Act, particularly with the 2008 amendments. So I would love to have your comments on this.

Mr. RUBINSTEIN. I will start. I would encourage all of you who have an interest in this to actually read the Gibson agreement, because it is—what they do is they admit to certain facts, but they do not admit to criminal culpability. And the fact of the matter is that armed agents went in, herded all the employees into rooms, guns drawn, about the Indian wood. And then, after a year and hundreds and hundreds and hundreds of thousands of dollars, just said, “Never mind, ignore all that.” It is wrong.

There are two real big problems that need to be fixed with respect to Lacey. One, there is no reason that the government, whether it is Congress or the executive branch, can specify and provide a place where people can go and see what laws apply. And, two, there ought to be some intelligible principles for what appropriate behavior is. Congress does this all the time. Take a look at Title 22 of the U.S. Code, and a whole bunch of other laws. We do laws, we write regulations, we provide people with notice. Under Lacey we should do the same thing.

Mr. KAMENAR. I would like to follow up on that, and I agree that we should have this information published. In fact, as I said in my testimony, the government itself—and I have this as exhibit to my testimony—published a price list of these so-called illegally sized lobster tails, letting the people know, “Here is what it costs for a two-ounce lobster tail from Honduras is \$8.75.”

And so, I am surprised that Mr. Asner, who, in his testimony, his written testimony at least, said, “Oh, no, we should not have a data base. Consumers don’t want that, that is not good for consumers.” I would think consumers would want more information as to what is legal or not legal to be imported. But yet Mr. Asner apparently believes people should be kept in the dark.

Dr. FLEMING. Well, I would suggest—I mean we have talked about this before, Mr. Asner. You represent both plaintiffs and defendants, is that correct?

Mr. ASNER. That is correct, yes.

Dr. FLEMING. And so, the more difficult and the more complex the law, the more cases there are, the more legal activity there is, the better for business. Right?

Mr. ASNER. Your Honor, or Mr. Chairman, I don’t actually represent anybody in this—any criminal defense. I represent—

Dr. FLEMING. But you are in private practice.

Mr. ASNER. I am in private practice—

Dr. FLEMING. And so you do charge fees for the consultant work, for legal advice—

Mr. ASNER. I think we all do. That is what lawyers do, right, in private practice?

Dr. FLEMING. OK. But we have these lawyers who are saying let’s fix a bad law, make it simple, and subject Americans to less

jeopardy. And you are saying, "No, let's keep it the way it is and make it as difficult as possible. Hey, it is good for business."

Mr. ASNER. That is not what I am saying. What I am saying, actually, is that the law, as it exists right now, makes a lot of sense. We could strengthen it. But right now, with the law——

Dr. FLEMING. Do you support the data base idea?

Mr. ASNER. No, I don't support the——

Dr. FLEMING. And why not?

Mr. ASNER. Because the data base idea is bad for American business, because what it does is it has some bureaucrat in Washington laying out the statutes that somebody has to follow. Whereas, if I am a company, I want to be the person who will decide whether it is illegal.

We don't have a data base of foreign laws with respect to property, either. And yet it is illegal to——

Dr. FLEMING. So the less information available to Americans——

Mr. ASNER. No——

Dr. FLEMING [continuing]. The better for Americans?

Mr. ASNER. Absolutely not. Businesses are in the best position to decide for themselves how to do——

Dr. FLEMING. If they have the information, correct?

Mr. ASNER. Yes. And they are the ones who have that information.

Dr. FLEMING. My time is up. I yield to the gentleman, the Ranking Member.

Mr. SABLAN. Mr. Asner, apparently you are combative today. I see. But we have heard a lot of outrage today over the alleged injustice of the Lacey Act's foreign law provisions. So is the Lacey Act unique among U.S. laws for its use of foreign law violation as a predicate offense?

Mr. ASNER. Absolutely not. In fact, many U.S. laws incorporate foreign laws. I used the example in my oral testimony a moment ago about how if you have illegal stolen cattle and you bring it into the United States, that is a violation of law. There are many examples. Stolen goods are some, there are all sorts of import-export violations.

The key to all of this—and this is very important, and I think the Chairman is missing this—is that the mens rea, the scienter, knowledge requirement, is what protects people here. If you don't know about the foreign law, and you have not violated the foreign law knowingly, you are not guilty. And that is constitutional. That has been in the Lacey Act for decades. And nobody has really complained about that until now.

Mr. SABLAN. Yes. Yes, I have one more question for Mr. von Bismarck.

Shark finning is a serious problem that destroys marine ecosystems and the economies of coastal communities that depend on healthy fisheries, including the Northern Marianas, where I come from. So do the Lacey Act's foreign law provisions have the ability to support the conservation efforts of other countries that ban shark finning in their waters?

Mr. VON BISMARCK. Absolutely. It is absolutely critical. I mean some of that might be on CITES, but CITES is a mechanism that is based on paperwork. And a lot of the problem is you can fake

paperwork. And for prosecutions to be effective, the fact that the Lacey Act says if you broke a law overseas and you illegally shark-finned overseas—we do not want to create a market for that here—is absolutely critical to support a variety of states that are trying to get that problem under control.

Mr. SABLAN. OK. So we are going to go back to China earlier, because you said—the wood you are seeing in China is, good business practice, transparency, and, so what are you seeing in China, but why do you think illegal logging in Russia hurts the United States, U.S. businesses?

Mr. VON BISMARCK. It is particularly pernicious for U.S. businesses, because it happens to be the same kind of trees, the same kind of timber that we produce here. So you could buy your oak from a tiger habitat in the Russian Far East, or you could buy it from family owned lands in the Eastern United States. And that is, right now, at the tipping point. And because of Lacey, we have a chance to make U.S. forests more valuable in the international marketplace.

We are seeing those changes happen right now in Chinese factories, as I discussed. But it will backtrack in a heartbeat if a signal comes—everyone is looking at the U.S. and the implementation of the Lacey Act, and wondering if it will continue, and if it will be strong. And if we send a signal that we are not interested in implementing the foreign law provisions, or scaling it back in some way, we will hurt American business in that way.

Mr. SABLAN. All right. My first CODEL was flying into the island of Espanola, and you just realize that half of the island is lush forests and the other half was barren deforestation, a lot of corruption and illegal logging. I am not sure if we took part in any of that. Maybe we didn't, we didn't buy any of those logs. But that is why we need laws. And we must respect.

But, Mr. Chairman, I yield back my time.

Dr. FLEMING. The gentleman yields back. Ms. Shea-Porter is recognized for 5 minutes.

Ms. SHEA-PORTER. Thank you, Mr. Chairman. So, hearing how difficult this is, I asked my staffer to Google the Lacey amendment. And, lo and behold, within about 30 seconds it tells you where to go if you need help. And I just wondered if that seemed too difficult to Google it and get there for your clients that seem to have trouble. There is an actual address to go to.

Mr. RUBINSTEIN. If you go, and this is laid out in some detail in the written testimony, so forgive me if it is repetitive a little bit, but the government does not provide hard information about what is or isn't permitted behavior. The Justice Department did a presentation where they put a Power Point up. And it provided "guidance" on how to comply with Lacey. And the guidance was to be charitable, less than specific, and not terribly helpful, at least according to the Justice Department's own admission, the idea being that due care is going to differ in every circumstance.

This is not how we typically enforce our laws. Generally, we tend to be a little more specific. And it is really not a lot to ask, I don't think, the government to provide some metrics for behavior. That would, according to CRS, by the way, improve Lacey enforcement. I don't think anybody objects to an effective Lacey Act. I think

what we are trying to do is get to a better place than where we are now, that, on the one hand, achieves the wonderful goals that we hear from over here, but on the other hand prevents situations like we had in Gibson, where you have armed agents coming in and then the government afterwards saying, "Oh, Never mind."

Ms. SHEA-PORTER. But that wood was clearly on the list. I mean that wasn't vague, it wasn't unknown.

Mr. RUBINSTEIN. Well, there are two, without getting too much into the weeds, there are two situations in Gibson, one related to Madagascar, one related to India. And the Madagascar wood is laid out in some detail in here, exactly what was agreed to and what wasn't. The Indian wood, though, the government said, "Oops, Never mind, we made a mistake."

Ms. SHEA-PORTER. OK. So let me follow up by asking both of you, please, what do you think about that? You talk to people around the world, I am sure. You must have to communicate in English, or whatever language, about these rules and regulations and protections. And how is that going? Are the people that you talk to, your counterparts in other parts of the world, pretty clear on the rules? And how about you?

Mr. VON BISMARCK. Well, I tried. But I think it is clearly an accurate point that the people that are overseas, whether it is a U.S. company or whether it is myself as an investigator, know better what the situation is than a bureaucrat in Washington.

And I think the Lacey Act, as structured right now, already takes, due to the due care standard, takes account of the fact that, if you cannot know, if it is difficult for you to know because you are a mom-and-pop shop making furniture in the United States, you don't need to know.

And so I think, I very much take Mr. Asner's point that it might be that there are many companies in the United States that would not want a declarative list of what foreign laws they are responsible for, in light that the current law exempts them from being responsible for that. So I am quite surprised that is the position being put forward.

I am also surprised that or rather I am not surprised that every description of an improper so-called raid on Gibson focuses on the India case. The India case was in the context of the Madagascar case going on, which, as you describe, had an extraordinarily clear circumstances of knowing import of illegal wood. And so I think it is not a particularly, from my point of view, unreasonable form of prosecution, that if you just sped by recklessly, at 110 miles an hour, that then you are pulled over the next time also, when you go with the same car 20 miles an hour over the speed limit. It seems to be an entirely reasonable way that things run forward.

And in the enforcement agreement, Gibson says, "We knew that logging was illegal since 2006. We knew that export was illegal, and we continued to import it."

Ms. SHEA-PORTER. So, Mr. von Bismarck, what you are saying is, that line from the movie, "I am shocked, shocked," is actually somewhat the truth here, as well, that—

Mr. VON BISMARCK. Yes.

Ms. SHEA-PORTER. That they should know, that there are certain things that you do know. And if you are a small mom-and-pop,

then it is, you don't need to read, like, every single line all the way through, because it probably doesn't apply to you, that we are talking about larger importers, right, that should know.

Mr. VON BISMARCK. Absolutely. The supplier to Gibson in this case was working exclusively with that timber boss, Mr. Tuman, in Madagascar, for 15 years. He set him up. Every detail of his operation was known by the supplier, by the company called Nagel in Germany that directly dealt with Gibson. And, on top of that, the representative of Gibson actually went to that boss's yard at a time when all of the wood in the yard was seized. He saw it seized. And there are a variety of other sort of absolutely obvious examples for why that wood was illegal. Thank you.

Ms. SHEA-PORTER. Thank you. And I yield back. Thank you for the extra time.

Dr. FLEMING. The gentlelady yields back. I am going to go through one more set of questions, and I think we can call it a day after that, after we are done with our next panel. I recognize myself for 5 minutes.

Well, here are the conclusions I draw from the facts in the testimony, that indeed the Lacey Act, particularly with the 2008 amendments, opens up Americans to be subject to foreign laws, up to and including Sharia law. Although that may not be a clear and present danger today, it is something to think about with future laws.

It is also clear that those rules, regulations, and laws from other nations are often unclear and unintelligible, which I think is a very dangerous thing for Americans.

But I am also bothered by the fact that if the government fouls up, nothing happens to the government. But if the government fouls up, the American is screwed. And I am very bothered by that. And we have a growing, growing government, like cancer today. And whenever it misses its deadlines, as we are seeing happening with all kind of laws today, Obamacare, Dodd-Frank, you name it, we are missing all kind of deadlines, nothing happens. But if something goes wrong, the American, the individual American, pays the price.

So, I am going to yield the last 3-point-whatever minutes that I have to you gentlemen on this side to explain to me how do we fix the Lacey Act to make it right?

Mr. KAMENAR. Well, as I said in my testimony, I think the first thing Congress needs to do is assert its legislative authority. And if it wants to include foreign regulations in the Lacey Act, for goodness sakes, say so. Congress said so with respect to U.S. laws and regulations, State laws and regulations. And the Indian tribal law and their regulations. But it just said "foreign law." So, step number one, put that in there.

Step number two, decriminalize the statute. And you can use forfeiture all you want. You can impose civil penalties. But for cases like McNab and others, where there is this heavy Draconian criminal sense, I think, is outrageous.

And, number three, I still can't understand why no one would, why Mr. Asner and his supporters object to a data base. We have, with CITES and others, we list all the things that you can't—that

are on the endangered species list and so forth. More information is better than less. And I think that is one thing we should do.

Mr. LARKIN. Of the four recommendations I mentioned earlier, two directly speak to the problem you are now dealing with. One would be to require that the government prove that someone acted willfully. That is, someone intended to flout the law. Someone knew that the law prohibited what he or she was doing, but went ahead and did it, nonetheless.

In the alternative, rather than require the government to prove that, you could allow the defendant to raise a defense of mistake of law. If no reasonable person would have thought that what the defendant did was a crime, the defendant would be exonerated. That would put the burden on the defendant, rather than the government, but it would also deal with the same problem: someone who reasonably believes that he or she is complying with the law, and nonetheless can get caught up in the criminal justice system.

Mr. RUBINSTEIN. ILR believes that Congress needs to take a hard look at Lacey, determine whether there is an appropriate threshold mens rea requirement, whether the statute adequately defines both the guilty act and the mens rea for the offense in specific and unambiguous terms, and clearly states whether the mens rea requirement applies to all of the elements of the offense, or, if not, which apply to the elements of the offense, sets limits on enforcement discretion, and, most importantly incorporates performance metrics required for meaningful oversight.

We need to do something about the foreign law trigger. Whether that is done by statute or administratively, there needs to be a place that people can go to find out what laws apply. There needs to be a place people can go to get, at least in broad strokes, what the metrics for acceptable performance are between proscribed and permitted conduct. This would help enforcement, it would streamline compliance. And, oh, by the way, it is what our Constitution and our legal norms require.

We support the Lacey Act, but the way it is being done now is just wrong.

And there is one thing I cannot let go. We heard about a so-called raid. The agents were not carrying so-called rifles. Those were real rifles. And the people who were rounded up were not so-called people, they were real people. And we have armed agents going into guitar factories over something that the government determined, a bureaucrat in Washington set that into motion. So, please, let's make it clear where everybody, then, where there is transparency, where there is government accountability, and where you don't have a bureaucrat sitting in an office somewhere talking to some NGO with the ability to send armed agents into Americans' workplaces and homes. That is wrong. That should not stand.

Dr. FLEMING. Well, thank you, gentlemen. That about says it all for me. And I will yield 5 minutes to Ms. Shea-Porter.

Ms. SHEA-PORTER. Thank you. Sitting next to a former bureaucrat, I hope you would be a little more sensitive to him. And I would like to know right now. How many people have worked for the government on the panel? Raise your hand, please, if you have been a bureaucrat.

Isn't that wonderful? And the taxpayers got their money's worth out of you. And we thank you. You are obviously smart, well educated, and have a lot of experience. So we thank you for your service. And I——

Mr. RUBINSTEIN. Yes, we do. We thank them for their service.

Ms. SHEA-PORTER. I would appreciate if maybe, a few less whacks at bureaucrats would be nice.

Mr. RUBINSTEIN. That is a fair comment.

Ms. SHEA-PORTER. Now, I also heard a comment about the government. So, let me start with Mr. Asner. Were there any juries involved here? Is it always the big, bad government, or did a jury of the peers ever say anything?

Mr. ASNER. McNab had a jury of the peers. And with a lot of these cases there are negotiations. And if you look, for example, in Gibson, they keep on talking about Gibson in fact, the agreement that they talk about there, they actually concede that they knew in emails, in a report that went up to Gibson from their agents on the ground, that it is currently illegal to harvest or export ebony from Madagascar.

Gibson entered into a criminal enforcement agreement that gave them the right to not be prosecuted as part of an agreement, because the government, in its grace, decided not to prosecute them. But they could have, under these facts.

Ms. SHEA-PORTER. OK. So we have had a combination of government and also a jury of peers looking at this.

And then I wanted to add one more comment. When you talk about not making it criminal, but rather making it just a civil penalty, and you find a group that could pay pretty much any kind of penalty, and yet they are working with criminals, often, doing this, then it is pretty naive to say, well, you just have to pay a little bit of cash. But the underlying problem is that they are working with criminals that are doing terrible things.

So, I think I will give Mr. von Bismarck the last chance to talk about that. You are aware of some criminal activity, no doubt. I am talking about overseas, using the import-export——

Mr. VON BISMARCK. Yes. I mean forests mean a lot of different things to a lot of different people in this case. And, unfortunately, it is a good place to hide for insurgents, is one of the things it means. And a good place to finance those insurgencies. You have ready-made trees that are very valuable on the international market, if there are no questions asked about those trees.

And so, as I mentioned before, we have very acute current examples of that, where U.S. servicemen are in the line of danger, where the killing of Americans is being financed by illegal logging, and by the fact that countries are not asking questions about whether foreign laws were being broken. I am glad to hear we actually, it seems like no one on this panel is actually against foreign, the concept of foreign laws being important, and I find that very encouraging. I wasn't expecting that.

But I think it is also very dangerous if we send a signal, because we are talking about the specifics, that we are going to scale back. We are going to lose our chance right now to address serious international, increasingly sophisticated organized crime and the funding of terrorism.

Mr. ASNER. May I add something?

Ms. SHEA-PORTER. Yes.

Mr. ASNER. Yes. Look. The fact that the Lacey Act is criminal is crucially important, because the criminal part of it reflects the serious nature of this and the criminal behavior of this.

And let me give you an example from the case that I prosecuted, the Bengis case. That was, as I mentioned before, a massive scheme for decades to over-harvest rock lobster and bring it into the United States. At one point, and they had all sorts of shenanigans to hide it, and they just raped the economy of South Africa, or at least the fish in South Africa, at one point one of Arnold Bengis's lieutenants said to him, "What will happen if you get caught?" And this is in the record, and I apologize for my language. His response was, "I will never get caught. I have f-you money." And that is what happens when you have just civil violations, is that somebody has f-you money, and can make it go away.

Ms. SHEA-PORTER. OK. Well, I am trying to breath again.

[Laughter.]

Ms. SHEA-PORTER. But let me just say that I think the point is made across the board that we can't just put a civil penalty, because it is not enough. It has to be prosecuted as a crime.

Mr. KAMENAR. If I could just comment on that, I mean, if it is such a crime in South Africa, why don't we just extradite these guys back to South Africa, where the crime took place? We can have extradition treaties with all these countries.

Mr. ASNER. That is reflected in the record repeatedly. The South Africans weren't able to do this, and these people were American citizens living in New York City and Maine.

Ms. SHEA-PORTER. Well, I thank you and I yield back.

Dr. FLEMING. The gentlelady's time is up. I believe we have had all of our questions answered.

I do thank the panel today. I think we learned a lot of very valuable information. I am personally convinced that this law needs some very significant changes. I think that we took a wrong direction back in 2008, in particular, and I really look forward to working with my colleagues on this.

Members of the Subcommittee may have, and I am pretty sure will have, additional questions for the witnesses, and we will ask for you to respond to these in writing.

The hearing record will be open for 10 days to receive these responses.

Before closing, I must say that, based on our own investigation and that of the Library of Congress, it is stunning that nowhere in the Committee hearings, Committee reports on the Floor debate on the Migratory Bird Hunting Stamp Act of 1935, is there any legislative history on why the 74th Congress felt it was necessary to force American citizens to comply with the laws of foreign nations. It was almost as if this provision was simply added as an afterthought.

And, again, unintended consequences. Everything we do up here can morph into something very ugly.

And the sponsors did not feel this historic change merited an explanation, in fact. Instead, what has happened is that the Federal courts, particularly the 9th circuit court of appeals, has been more

than happy to fill that legislative void by ever expanding the scope of foreign laws and thereby increasing the likelihood that Americans will lose their property and/or freedom for violating an obscure foreign law.

I ask unanimous consent to submit for the record a legal memorandum prepared by Mr. Paul J. Larkin, Jr. of the Heritage Foundation.

[No response.]

Dr. FLEMING. Hearing no objection, so ordered.

[The information submitted by Dr. Fleming for the record has been retained in the Committee's official files:]

Dr. FLEMING. I want to thank Members and the staff for their contributions to this hearing. If there is no further business, without objection, the Subcommittee stands adjourned.

[Whereupon, at 4:45 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

The documents listed below have been retained in the Committee's official files.

- American Forest & Paper Association, "*Written Testimony on the 2008 Lacey Act Amendments.*"
- Executive Order 13648—Combatting Wildlife Trafficking
- International Fund for Animal Welfare, "*Criminal Nature: The Global Security Implications of the Illegal Wildlife Trade.*"
- Larkin, Paul—article entitled, "The Injustice of Imposing Domestic Criminal Liability for a Violation of Foreign Law"
- Letter from the Honorable Ted Yoho, Member of Congress from the State of Florida
- On Petition for Writ to the United States Court of Appeals for the Eleventh Circuit, "*Robert B. Blanford, Abner Schoenwetter, and Diane H. Huang v. the United States of America.*"
- Senate Select Committee on Intelligence, "*Worldwide Threat Assessment of the U.S. Intelligence Community.*"
- United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, "*New York Frozen Seafood Prices.*"
- United Nations: Security Council, "*Report of the Secretary-General on the Activities of the United Nations Regional Office for Central Africa and on the Lord's Resistance Army-affected areas.*"

