

ISSUE BRIEF

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The Lacey Act: From Conservation to Criminalization

Joe Luppino-Esposito

How did a law originally enacted to target poaching of migratory birds evolve to authorize an armed raid of a guitar factory in search of wooden veneers imported without the proper paperwork? The Lacey Act was the first federal wildlife conservation statute, narrowly targeted at the interstate sale in poached game. But in the century since its enactment, the statute's scope has been enormously expanded to the point that it now incorporates the wildlife and trade laws of every foreign nation. As a result, it has become a trap for the unwary, placing honest businessmen and businesswomen at risk of criminal liability for unknowing violations of hyper-technical foreign laws and regulations.

In short, the Lacey Act has become the poster child for the phenomenon of overcriminalization and should be at the top of Congress's list for reform.

Poachers and Pot Hunters. In 1900, Iowa Congressman John Lacey introduced what would become the first federal wildlife protection statute upon its passage on April 30, 1900. *The New York Times* explained that the "Lacey Game Bill" was meant to assist the states in enforcing their own laws against poachers, who coveted bird feathers to sell to hatmakers, and "pot hunters" working for the food industry. While states could enforce their own laws within their own borders, they were effectively powerless to address the interstate market, and poachers took full advantage of this impotence, trapping game unlawfully in one state for sale in another where the law did not apply. The bill would put an end to this loophole. Lacey admitted to having "some sentiment in the bill" and thought that "[t]he protection of our native birds...ought to be dear to the heart of every American."¹

The original Lacey Act was thus a modest addition to federal authority. In effect, it promoted federalism by preventing poachers and pot hunters from circumventing the states' game laws. And it expanded criminal liability hardly at all, making federal crimes out of conduct that was

already prohibited under state law rather than creating a new federal mandate. The penalty for a violation was a not-inconsequential \$200 fine.²

Criminal Expansion. Over time, however, the scope of the Lacey Act expanded as federal legislators became more comfortable with passing broad federal environmental laws. In 1935, Congress increased the penalty for violations to \$1,000 with a maximum penalty of six months imprisonment. Congress also empowered Department of Agriculture agents to arrest citizens for violations in their presence and to execute warrants. Most important, Congress also extended the Act's list of predicate offenses to include foreign laws. This meant that if a bird was "captured, killed, taken, shipped, transported, or carried" in violation of the foreign state from which it originated, the United States could prosecute that individual or organization.³

Amendments to the Act in 1969 expanded the types of animals covered and increased the penalty to up to one year's imprisonment and up to a \$10,000 fine. At the same time, Congress withdrew the Act's jurisdiction over those birds covered by the Migratory Bird Treaty Act for

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

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fear that liability under multiple statutory schemes would lead to confusion.⁴

While broadening the scope of the Lacey Act in 1969, Congress took care to strengthen the associated criminal intent requirement, imposing liability only for violations committed “knowingly and willfully.” But in 1981, when the Lacey Act was combined with the Black Bass Act of 1926, “willfully” was removed to ease prosecutors’ burden in winning convictions.⁵ At the same time, indigenous plants were added to the list of covered species, including those that are considered endangered under U.S. law and those identified in the appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).⁶ The birds removed from coverage in 1969 were also added back in to the statute. The Act’s criminal offenses were divided into felonies and misdemeanors, with the former carrying a maximum sentence of five years’ imprisonment and a \$20,000 fine and the latter a maximum of one year’s imprisonment and a \$10,000 fine.⁷

Although there were amendments to the Lacey Act in 1988 and 2003, the most significant change occurred in 2008, when Congress expanded the statute’s reach once again to criminalize improper marking and labeling of protected plants. As amended, the statute prohibits the “knowing[]” import or export of a prohibited fish, wildlife, plant or the “knowing[]” conduct of a sale of prohibited fish, wildlife, or plant. Additionally, anyone who “knowingly engages in conduct prohibited by any provision of this chapter [with exceptions] and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation” may be subjected to criminal punishment.⁸

This amendment was hailed by proponents as the first ban on illegal logging operating across international borders. Critics, however, have explained that tracking wood products back to their sources is incredibly difficult and that the “due care” provision is too vague.⁹

Bad for Business. Since the beginning of the debate on the Lacey Act, Congress has been concerned about how the statute may affect legitimate business.¹⁰ The result, one century later, is that the individuals who try to act within the law are too often ensnared by the Lacey Act.

David McNab and Abner Schoenwetter, who were engaged in the lobster trade, were convicted under the Lacey Act for importing undersized lobsters in 1999. In addition, some of the lobsters were also egg-bearing, and all of them were shipped in plastic bags instead of cardboard boxes. These were not requirements of American environmental law, but requirements of Honduran law—requirements that Honduran courts later determined were invalid.¹¹ Nonetheless, McNab and Schoenwetter were sentenced to eight years in prison. Due to the low level of criminal intent required for conviction, it did not matter that the two men were unaware of the Honduran environmental regulations.¹²

More recently, armed federal agents raided Gibson Guitar facilities to seize imported woods intended for

1. *Lacey Game Bill Passed*, N.Y. TIMES, May 1, 1900, at 7.
2. Lacey Act, Ch. 553, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. §§ 3371–3378 (2008)).
3. Act of June 15, 1935, Ch. 261, S 242, 49 Stat. 378.
4. Act of Dec. 5, 1969, 83 Stat. 275.
5. Robert S. Anderson, *The Lacey Act: America’s Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27 (1995).
6. For an extensive discussion on the use of CITES in Lacey Act prosecutions, see Andrew Grossman, *The Unlikely Orchid Smuggler: A Case Study in Overcriminalization*, Heritage Foundation Legal Memorandum (July 27, 2009), <http://www.heritage.org/Research/Reports/2009/07/The-Unlikely-Orchid-Smuggler-A-Case-Study-in-Overcriminalization>.
7. 16 U.S.C. §§ 3371–3378 (1981).
8. 16 U.S.C. § 3373 (2008).
9. See Kris Maher and James R. Hagerty, *Forestry Law Splits Wood Industry*, WALL STREET JOURNAL (Sep. 2, 2011), <http://online.wsj.com/article/SB10001424053111903895904576544930331756462.html>.
10. *Lacey Game Bill Passed*, N.Y. TIMES, May 1, 1900, at 7 (“In response to a question Mr. Lacey said the bill would not affect the milliners’ trade.”).
11. Abner Schoenwetter, Statement to the House Subcommittee on Crime, Terrorism, and Homeland Security, *Reining in Overcriminalization: Assessing the Problems, Proposing Solutions*, Hearing, Sep. 28, 2010, available at <http://judiciary.house.gov/hearings/pdf/Schoenwetter100928.pdf>.
12. Conn Carroll, Morning Bell: Fighting Back Against Arbitrary Government Rule, THE FOUNDRY (Oct. 6, 2010), <http://blog.heritage.org/2010/10/06/morning-bell-fighting-back-against-arbitrary-government-rule>.

fingerboards, for the second time in two years. Although no formal charges have been filed, Gibson believes that it is being targeted for their importing of ebony from Madagascar in 2009 and from India this past year. The Justice Department has confirmed that a criminal investigation is under way.¹³

The case appears to turn on the thickness of the wood and what constitutes “finished” wood. The Indian tariff code “HS 4407” is meant for wood that exceeds 6 millimeters in thickness, which cannot be exported. Wood thinner than that is identified as “HS 4408” and may be exported. In this case, the Indian export documents labeled the fingerboard blanks as “HS 9209,” which refers to “[p]arts (for example, mechanisms for music boxes) and accessories (for example, cards, discs, and rolls for mechanical instruments) of musical instruments,” which may also be exported. But the import forms identified the wood as “HS 4408.”¹⁴ An affidavit filed by a special agent with the U.S. Fish and Wildlife Service alleges that the Lacey Act declarations incorrectly identified the wood as finished veneers rather than unfinished wood that exceeded 6 millimeters in thickness. The affidavit also alleges that the declarations failed to list Gibson Guitars in Tennessee as the final destination.¹⁵

In effect, Gibson was raided because of an otherwise harmless paperwork error. At worst (although even this is unclear), the company may have violated regulations pertaining to the export of unfinished wood that were intended to protect jobs in India. In any event, neither the law in question nor the pending investigation seems based upon the alleged violation or appears to have anything to do with protecting the environment.

Beyond criminal intent, both of these cases also raise questions regarding the requirements of foreign law. In the lobster case, evidence was presented showing that the Honduran regulations at issue were invalid because the size restriction had never been signed by the President of Honduras. The Honduras Attorney General issued an opinion confirming that without the presidential signature, the law was, in fact, invalid. The U.S. court determined that this testimony by an expert on Honduran law was not sufficient to reverse convictions.

As for Gibson Guitar, the company claims that Indian officials permitted the export of the unfinished wood. If that claim is correct, it appears that in both cases, the United States government is now attempting to make a federal crime out of foreign conduct that the

foreign countries do not hold to be unlawful.

Finally, both cases suggest that enforcement of the Lacey Act has deviated far from the Act’s purpose of respecting existing environmental laws to its current use in enforcing laws concerned with trade protection and economic advantage. The Indian regulation that Gibson stands accused of violating exists only to protect Indian workers from foreign competition, not to block illegal logging.¹⁶ And McNab and Schoenwetter were victims of an anonymous fax to the Fish and Wildlife Service by a competitor who lost out on the bid for the lobster shipment. Environmental protection was not even at the heart of either case.

Conclusion. The Lacey Act is overly broad and contains inadequate criminal intent provisions to protect even a sophisticated defendant, let alone the average citizen. Though originally passed with the good intention of enforcing state laws and protecting the American bird population, the Lacey Act has now become a casebook example of federal overcriminalization run amok.

—*Joe Luppino-Esposito is a Visiting Legal Fellow in the Center for Legal & Judicial Studies at The Heritage Foundation.*

13. Erik Schelzig, *Feds: Gibson wood seizure linked to criminal probe*, Associated Press (Oct. 6, 2011), <http://news.yahoo.com/feds-gibson-wood-seizure-linked-criminal-probe-203247537.html>.

14. John Thomas, *Knock on Wood: Importers Fret After Feds Raid Guitar Maker Under Lacey Act*, ABA JOURNAL (Dec. 1, 2011), http://www.abajournal.com/magazine/article/knock_on_wood_importers_fret_after_feds_raid_guitar_maker_under_lacey_act/.

15. See James C. McKinley, Jr., *Famed Guitar Maker Raided by Federal Agents*, N.Y. TIMES (Aug. 31, 2011), <http://artsbeat.blogs.nytimes.com/2011/08/31/famed-guitar-maker-raided-by-federal-agents>.

16. Henry Juskiewicz, *Repeal the Lacey Act? Hell No, Make It Stronger*, THE HUFFINGTON POST (Nov. 2, 2011), http://www.huffingtonpost.com/henry-juskiewicz/gibson-guitars-lacey-act_b_1071770.html.