The Heritage Foundation

LEGAL MEMORANDUM

No. 134 | AUGUST 21, 2014

Co-opting the Criminal Justice System to Prevent Competition or Serve Noncompetitive Interests

Paul J. Larkin, Jr.

Abstract

Whenever we see a concerted effort by industry rivals to exclude or harm competitors, whether or not the government is involved, we should suspect that, regardless of the rationale given for that enterprise, its goal is self-enrichment at the consumer's expense. That outcome is precisely the type of economic self-interest that the Sherman Act was designed to outlaw through the civil and criminal law. The public should be particularly wary when the government makes it a crime to engage in competitive conduct, because governments may (mis)use the criminal law to penalize disfavored parties. The public assumes that the government will outlaw only conduct that damages society as a whole. In fact, the government may use the criminal law just to benefit its chosen friends while also seeking to leverage the public's respect for criminal law enforcement.

Harmfulness of Agreements Between the Government and Private Parties to Prevent Competition by Fixing Prices or Output

In a recent paper, Mario Loyola argues persuasively that for 80 years, Congress and the Executive have conspired with the sugar producer lobby to artificially reduce the quantity of sugar available in the market and to raise its price to consumers.[1] The result has been what he colorfully—and accurately—labels a long-term "shakedown" of the American public. The goal of that enterprise—which but for the government's collaboration would clearly be illegal[2]—is to enrich sugar producers and re-elect incumbent Members of Congress. The shakedown has worked as follows.

This paper, in its entirety, can be found at **http://report.heritage.org/lm134**

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

Key Points

- Economic rivals, disinterested parties, or political adversaries can sometimes secure the passage of statutes that make it a crime to engage in certain conduct for protectionist or other purposes. When that happens, consumers lose by paying higher prices for goods, and some unfortunate individual can wind up in prison for engaging in socially disfavored conduct.
- Numerous state regulatory schemes function to limit entry in order to protect incumbents against competition rather than as a way to guarantee that no harm befalls the community. Even worse, many of those laws are accompanied by criminal penalties.
- Conspiracies among private parties can unravel if one or more participants decide to abandon their agreed-upon output restriction and increase supply. That possibility is not present when Congress has enacted a criminal statute policing the subject matter. Moreover, private conspiracies that succeed in seeing laws enacted have an effect long after the government officials or conspirators go their separate ways.

Congress regularly passes legislation, known colloquially as "farm bills," that has two sugar-related features. One is that the political branches agree to purchase sugar from domestic producers at a guaranteed minimum price. The effect of that decision is to set a nationwide price floor for sugar. The other feature is that the government imposes a quota on domestic sugar production, thereby choking off any domestic effort to increase supply and ensuring that the market price cannot drop below whatever price the government fixes. The result is to enrich sugar producers at the expense of consumers.

What makes the government–private cartel even worse is the dishonesty associated with it. The Congressional Budget Office (CBO) ordinarily "scores" the dollar cost of new legislation in order to inform Members of Congress and the public what new laws will cost. The CBO does not score the increased cost from sugar price supports, however, because farm bills achieve that result through misdirection.

In the same way that a magician hopes to focus the audience's attention elsewhere, farm bills hope to disguise the consumer price increase by using the two-step process of combining the price floor with an output restriction in the hope that the average consumer does not put two and two together. The intended result is to transfer income from sugar consumers to sugar producers and to transfer votes from challengers to incumbents who favor the sugar lobby.

The sugar price supports in farm bills are a classic example of companies using industry-specific laws to garner economic rents: supernormal profits obtained by virtue of the government's exercise of its regulatory power either to set prices (or output) or to limit the number of competitors.[3] Economists have long argued that businesses will seek to use the law as a tool for protectionism or predation, especially if industry can persuade the government to do the work of enforcing the law by bringing civil lawsuit against a rival.[4] That result makes the sugar subsidy components of farm bills a seriously bad policy choice for Congress. Mario Loyola makes a clear case for the elimination of sugar price supports.

But there are occasions where the Congress and private organizations go a step further than enriching themselves at the public's expense through price fixing. In some cases, Congress and private lobbies conspire to produce laws that make certain disfavored conduct a crime in order to insulate particular parties or activities against competition. When that happens, not only do consumers lose by paying higher prices for goods, but some unfortunate individual can wind up in the prosecutor's crosshairs and go to prison for engaging in socially disfavored conduct.

Deceitfulness of Agreements Between the Government and Private Parties to Prevent Competition by Labeling Disfavored Activities a Crime and Making Disfavored Parties Into Criminals

Whenever we see a concerted effort by industry rivals to exclude or harm competitors, whether or not the government is involved, we should suspect that, regardless of the rationale given for that enterprise,

1. *See* Mario Loyola, *Sugar Shakedown: How Politicians Conspire with the Sugar Lobby to Defraud America's Families*, The Heritage Found., Backgrounder No. 2929 (July 17, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/BG2929.pdf.
2. Section 1 of the Sherman Act, ch. 647, 26 Stat. 209 (codified, as amended, at 15 U.S.C. § 1 (2012)), outlaws so-called naked agreements among rivals to fix prices or reduce output—*viz.*, agreements whose sole purpose and effect is to create and maintain a cartel. *See, e.g.*, American Needle, Inc. v. NFL, 560 U.S. 183, 189–91 (2010); Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 263–79 (Rev. ed. 1993); Herbert Hovenkamp, The Antitrust Enterprise: Principle and Execution 125–49 (2005). An agreement among private sugar producers to limit their output for the sole purpose of raising the price of sugar would be a clear violation of the Sherman Act. The government's involvement in the process through sugar price supports disguises the operation of the cartel.
3. Sometimes, there is a more malicious motive for rent-seeking laws. For example, a statute limiting the number of hours that certain employees can work per week prevents employees from earning additional income by working overtime. The New York state legislature passed such a law around the turn of the 20th century, and the Supreme Court of the United States held the restriction unconstitutional in *Lochner v. New York*, 198 U.S. 45 (1905). Commentators almost uniformly deride the *Lochner* decision on the ground that the Court's ruling unjustifiably intrudes into the legislature's ability to design economic and social policy. Yet David Bernstein has convincingly argued that the purpose of that law was to benefit large, commercial, unionized bakeries against competition from "small, old-fashioned bakeries, especially those that employed Italian, French, and Jewish immigrants." *See* David E. Bernstein, Rehabilitating *Lochner*: Defending Individual Rights Against Progressive Reform 24–28 (2011). Critics of *Lochner* rarely examine the underlying rationale for that legislation or defend as a legitimate public policy the ethnic and religious discrimination that the legislation endorsed.
4. *See, e.g.*, William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247 (1985). *See generally* W. Kip Viscusi et al., Economics of Regulation and Antitrust 381–92 (4th ed. 2005) (collecting authorities).

its goal is self-enrichment at the consumer's expense. That outcome is precisely the type of economic self-interest that the Sherman Act was designed to outlaw through the civil and criminal law.[5]

The (mis)use of the criminal law to penalize disfavored parties attempts to add a patina of respectability to the process by labeling disfavored activities as a crime and making disfavored parties into criminals in order to leverage the public's respect for criminal law enforcement. This problem can arise in several different scenarios.

One scenario involves the adoption of an impenetrable or porous barrier to competition. Import restrictions and licensing requirements, respectively, are common examples of the former and latter restraints.

Consider the effect of a trade law that bans or caps importation of certain goods. At one time, the nation had such a cap in the case of imported automobiles. In the 1970s, the government enforced a "voluntary" cap on the number of foreign-manufactured cars that could be brought into the United States.[6] The purpose of that cap was to benefit domestic auto manufacturers and their unionized employees. The cap enabled domestic companies to sell their cars at prices above what the market would have set under a free trade regime, which had the secondary effect of keeping members of the United Auto Workers Union employed.[7]

Licensing schemes also can frustrate competition by restricting entry into the supply side of a market unless a potential entrant satisfies one or more sometimes irrational requirements in order to be deemed competent to sell a specific widget or to offer a particular service.[8] Examples would be a Florida law requiring a license to practice interior design, a Louisiana statute requiring a license to sell floral arrangements, or a different Louisiana law requiring that a company that manufactures caskets must be a licensed funeral director in order to sell that product.[9]

There is no plausible public health, public safety, or procompetitive justification for such laws. Protectionism is their only rationale.[10]

Another scenario involves a conspiracy among groups that normally would not be considered allies and might even be seen as opponents in the legal, political, or policy arenas. Parties can seek to use the criminal law as a Plan B to achieve industrywide regulation when the latter is too difficult to accomplish. In those cases, private parties seek to use the criminal law to prevent potential rivals from entering the market, to bludgeon the few hearty ones who make the effort, or to discipline the parties already positioned within it. Ironically, the scenario can even involve parties whose interests ordinarily would be in conflict.

Consider a particular sector of the economy, such as chemical manufacturing. Traditional adversaries such as private special-interest groups (*e.g.*, the Natural Resources Defense Council) and members of the regulated community (*e.g.*, DuPont) or one of its associations (*e.g.*, the American Chemistry Council) could agree to the adoption of a law making certain specified activity a crime instead of having the relevant agency (*e.g.*, the Environmental Protection Agency (EPA)) adopt regulations that apply across-the-board to every company in that sector.

Environmental groups may wish to see conduct made a crime so that the EPA, perhaps with their urging or support,[11] can use a potential crimi-

5. *See supra* note 2.
6. *See* Edward L. Hudgins, *The Costly Truth About Auto Import Quotas*, The Heritage Found., Executive Memorandum No. 74 (Feb. 1, 1985), available at http://thf_media.s3.amazonaws.com/1985/pdf/em74.pdf.
7. *Id.*
8. A licensing requirement that appears facially valid but is applied in a manner that is tantamount to a flat ban on entry into a certain occupation is a sham and should be treated in the same manner as a per se rule forbidding market entry. *See* Richard A. Epstein, *Beyond Textualism*, 37 Harv. J. L. & Pub. Pol'y 705, 709 (2014) (arguing that it is reasonable to construe legal rules in a manner that prevents their outright circumvention).
9. *See* Clark M. Neily III, Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government 57–60 (2013) (criticizing the interior design and floral arrangement restrictions). *Compare* St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2012), and Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002) (holding unconstitutional state laws limiting casket sale to licensed funeral home directors), *with* Powers v. Harris, 329 F.3d 1028 (10th Cir. 2004) (upholding the constitutionality of such a law).
10. *See* Neily, *supra* note 9, at 49–63.
11. *See, e.g.*, Andrew S. Hogeland, *Criminal Enforcement of Environmental Laws*, 75 Mass. L. Rev. 112, 114, 118 (1990) (offering examples of private environmental groups working with criminal prosecutors).

nal referral as a threat to "persuade" a company to accept an administrative settlement and fine, or perhaps just for the cachet that comes with being able to argue that society thinks that environmental misconduct is egregious because Congress has made it a crime.[12] Industries or companies might go along with reliance on criminal prosecution as a regulatory weapon if that is the price for a compromise that offers industry greater deregulation or at least some forbearance in additional regulation. Each member of the business community may decide that, unlike a regulation, which applies to every company in a sector, a criminal prosecution affects only the indicted company, which is to be sacrificed for the welfare of the others.[13] In this scenario, political adversaries, not economic rivals, conspire to persuade the federal government to use its criminal enforcement weapons as a regulatory device, perhaps even when straightforward regulation would be preferable to prosecution.[14]

Politically connected incumbent firms have another tool at their disposal. They may use government regulation or even prosecution as an entry barrier or as a tool to "soften" competition. The victims typically are smaller, less politically influential companies that cannot absorb the high fixed costs necessary to satisfy a regulatory requirement and compete effectively. For example, one of the criticisms levied against the Sarbanes–Oxley Act of 2002[15] is that it requires small banks to establish and maintain the same internal anti-fraud controls as large banks, even though the latter have a great cost advantage in compliance.[16] A similar problem arises when new environmental regulations grandfather facilities at existing firms with the result that only new entrants into an industry bear the added costs.[17]

These problems can be a form of crony capitalism at its worst. Politically powerful firms "pay" for the reduction in competition through party contributions or by means of "side payments" in the form of politically desired programs, such as unprofitable green technology projects that please government environmental officials and environmentalist lobbies with ties to government.

Collaborative use of the government to strangle competition also can occur in the case of private standard-setting organizations. Oftentimes, such organizations use a consensus process or ballot mechanism to develop industry codes, such as the National Electrical Code adopted by the National Fire Protection Association. Localities rely on the products endorsed by such organizations when setting their local building codes, because municipal officials lack the expertise independently to analyze the subject matter as well as the time and funds necessary to acquire it. Members of such an association selling an already approved product might agree to fend off competition by flooding the membership rolls with their own representatives, who can then effectively overwhelm any proposal to endorse a competitor's product when the association votes on approval.

That is essentially what happened in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*[18] Steel industry members recruited 230 persons to join the National Fire Protection Association for the sole purpose of voting against a proposal to endorse polyvinyl chloride conduit. The Supreme Court held that the agreement amounted to a horizontal conspiracy in restraint of trade in violation of the Sherman Act. Given the Court's ruling in *Allied Tube & Conduit Corp.*, firms will be less blatant in the future about

12. *See* Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J. Law & Pub. Pol'y 715, 738–39 (2013) (noting that legislators may use the criminal law as a regulatory tool because the public affords greater respect to law enforcement officers than to civil inspectors).

13. *See* Daniel Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, *in* The Political Heart of Criminal Procedure 64, 81–82 (Michael Klarman et al. eds., 2011).

14. An example where regulation would be preferable to prosecution can be seen in the case of interstate pollution. No one downwind state can address the problems stemming from upwind pollution, *see* EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584 (2014), and the number of potential upwind defendants makes regulation more efficient than prosecution of individual wrongdoers. Another alternative is a Pigouvian Tax on the company creating the externality (pollution) that third parties suffer, because the tax would force the company to internalize the pollution costs it otherwise would impose on others. *See* Arthur C. Pigou, The Economics of Welfare (1920).

15. Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

16. *See* Henry N. Butler & Larry E. Ribstein, The Sarbanes–Oxley Debacle: What We've Learned; How to Fix It 53 (2006).

17. *See* The Environmental Law Handbook § 2.2, at 256 (Thomas F. P. Sullivan ed., 21st ed. 2011) (the Clean Air Act imposes more stringent pollution controls on "new" sources than on ones that predated the act).

18. 486 U.S. 492 (1988).

any similar efforts to use standard-setting organizations to forge exclusionary rules, but companies are not likely to abandon the practice altogether given the economic rents that they can recover if they are successful.

The two-part argument often raised in defense of practices such as the ones described above is that (1) regulation benefits the public by protecting consumers against hazards that only businesses can forestall and (2) the parties working in a particular industry are in the best position to know what those potential risks are. In some instances, that argument is a reasonable one—as long as the government is ultimately responsible for deciding what, if any, regulation is necessary. Otherwise, self-interested parties will use the regulatory process for their own benefit, regardless of how that regulation affects the public.[19]

But not every regulatory program can be justified on the ground that it is necessary to protect the health and welfare of the community. Numerous state regulatory schemes function as a means of limiting entry in order to protect incumbents against competition rather than as a way to guarantee that no harm can befall the community. For example, it is difficult to understand why someone needs "a minimum of 1,200 hours of training" as a barber before he or she may cut someone's hair.[20]

Sadly, however, such entry barriers are not uncommon in many states even though their purpose is to protect not the public, but the already practicing members of a trade.[21] What is even worse, many of those laws are accompanied by criminal penalties.

The Lacey Act as an Example

The Lacey Act offers a specific example of how anticompetitive collaboration can occur.[22] The Lacey Act makes it a federal crime to transport flora or fauna across state lines in violation of state law or to import flora or fauna in violation of any law of any foreign nation. Congress originally enacted the statute in 1900 in order to help each state enforce its

19. *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564, 579 (1973) (practicing optometrists who were members of the state optometry board could not participate in a disciplinary proceeding against rival optometrists because the former had a direct and substantial pecuniary interest in the outcome of the case).

20. *See* Fla. Stat. Ann. § 476.034 (defining "barbers"); *id.* § 476.114(2)(c)(2) (requiring "a minimum of 1,200 hours of training" as established by the barber regulatory board, which consists of barbers, to be a licensed "barber"); *id.* § 476.134 (providing for examinations to be a licensed barber).

21. *See, e.g.*, Fla. Stat. Ann. § 476.178 (prohibiting the unlicensed operation of a "private school of barbering"); *id.* § 476.184 (prohibiting the operation of an unlicensed "barbershop"); *id.* § 476.188 (prohibiting anyone from providing barber services in any place that is not a licensed barbershop); *id.* § 476.194 (making it a misdemeanor to practice barbering or operate a barbershop without a license) (West 2014); Ky. Rev. Stat. § 316.030(1) (prohibiting anyone from being an unlicensed funeral director); *id.* § 316.990 (the penalty for being a funeral director without a license is a fine of $50–$500, imprisonment up to six months, or both); *id.* § 317A.020(2) (West 2014) (prohibiting the unlicensed practice of cosmetology); *id.* § 317A.990 (the penalty for the unlicensed practice of cosmetology is a fine of $50–$500, imprisonment of 10 days to six months, or both); Minn. Stat. Ann. § 326B.46 (West 2014) (requiring a license to be "a master plumber, restricted master plumber, journeyman plumber, and restricted journeyman plumber"); *id.* § 326B.47 (unlicensed individuals except apprentice plumbers must be registered with the state); Ohio Rev. Stat. § 4709.02 (West 2014) (prohibiting anyone from practicing barbering or operating a barbershop without a license); *id.* § 4709.07 (requiring as a condition of receiving a barber's license that one has "eighteen hundred hours of training from a board-approved barber school or has graduated with at least one thousand hours of training from a board-approved barber school in this state and has a current cosmetology or hair designer license"); *id.* § 4709.99 (a violation of the regulations on barbering is punishable by a fine of $100–$500); *id.* § 4719.02 (prohibiting anyone from engaging in telephone solicitation without a license); *id.* § 4719.99 (unlicensed telephone solicitation is a class four felony); Okla. Stat. Ann. § 396.3a1.c (West 2014) (prohibiting anyone who is not a licensed funeral director from selling any "funeral service merchandise," including caskets); Penn. Stat. Ann. § 63:479.3 (prohibiting anyone from being a "funeral director" unless licensed); *id.* § 63:479.17 (the penalty for being an unlicensed funeral director is a fine of $100–$1,000, up to one year's imprisonment, or both); *id.* § 63:551 (West 2014) (prohibiting the unlicensed practice of barbering); *id.* § 63:565 (the penalty for a first offense of barbering without a license is a fine of up to $600 or up to 90 days' incarceration); Tenn. Code Ann. § 62-4-108 (West 2014) (prohibiting anyone from practicing, teaching, or attempting to practice or teach "cosmetology, manicuring or aesthetics"); *id.* § 62-4-129 (making it a misdemeanor to violate the state law governing cosmetology, manicuring, or aesthetics); Wis. Stat. Ann. § 440.62 (1) (West 2014) (prohibiting anyone from operating a "school" of "barbering," "cosmetology," or "manicuring" without a license); *id.* § 440.63 (prohibiting anyone not holding an instructor certificate from being an instructor in those schools).

22. Act of May 25, 1900, ch. 553, 31 Stat. 188 (codified, as amended, at 16 U.S.C. §§ 3371–78 (2012)). For an excellent history of the birth, growth, and politics of the Lacey Act, see C. Jarrett Dieterle, Note, *The Lacey Act: A Case Study in the Mechanics of Overcriminalization*, 102 Geo. L.J. 1279 (2014); Francis G. Tanzcos, Note, *A New Crime—Possession of Wood: Remedying the Due Care Double Standard of the Revised Lacey Act*, 42 Rutgers L.J. 549 (2011).

game laws,[23] but Congress expanded the Lacey Act over time, including a 2008 amendment that included the importation of plants obtained in violation of any foreign law.[24]

The process leading up to the 2008 amendment was peculiar because it brought together two parties—environmental organizations and the domestic timber industry—that would not ordinarily be seen as allies. In this case, however, they were. Environmentalists wanted to halt overseas timbering in order to protect foreign ecosystems, and the timber industry wanted to prevent the importation of lower-priced wood cut overseas in order to save jobs. That marriage was not made in heaven, but it worked, as Congress extended the Lacey Act just as the two groups had sought. Just as Bootleggers and Baptists can agree to close liquor stores and saloons on Sundays,[25] environmentalists and industry can agree on a law that suits their very different interests.

In the process, of course, the American consumer took a financial hit. The certain effect of the law, and the undoubted desire of the domestic timber industry, is to make it risky to import lower-priced wood or wood products. Environmentalists hope that the risk of criminal prosecution will lead companies to forego overseas timbering, and industry hopes that the timber products industry will rely heavily on higher-priced domestic timber and wood products. Consumers therefore lose the ability to purchase lower-priced wood products if companies are deterred from importing wood.

Individuals in the import business also fare poorly because they can go to prison for unwittingly violating a foreign nation's law that no reasonable person would have thought existed.[26] Witness what happened to the Gibson Guitar Company, which became the subject of a federal raid and investigation for manufacturing guitars from wood allegedly imported in violation of an Indian labor law and a law from Madagascar not even written in English. A violation of any foreign law, however trivial and however unforeseeable, can land a person in prison for a considerable period of time.[27] But neither the domestic timber industry nor environmentalists care about the person who winds up in jail; to them, he is just "collateral damage."

Conspiracies among private parties, as Mario Loyola noted, can come undone if one or more participants decide to abandon their agreed-upon output restriction and increase supply. That possibility is not present, however, when Congress has enacted a criminal statute policing the subject matter. Moreover, private conspiracies that succeed in seeing laws enacted have an effect long after the government officials or conspirators go their separate ways.

Two years ago, for instance, Congress considered amending the Lacey Act in order to address the unjustified risk of domestic criminal liability for a violation of a foreign law that became part of the act five years earlier. The House of Representatives was about to consider a bill that would have either amended the Lacey Act generally or afforded Gibson Guitar relief.[28] At that point, 24 Virginia forest

23. *See, e.g.*, S. Rep. No. 91-526, at 1–2 (1969); H.R. Rep. 97-276, at 5, 30 (1981); *Oversight Hearing on the Lacey Act: Why Should U.S. Citizens Have to Comply with Foreign Law?*, House Comm. on Natural Resources, Subcomm. on Fisheries, Wildlife, Oceans, and Insular Affairs, 113th Cong. (2013) (statement of Kristina Alexander, Legislative Attorney, American Law Division, Congressional Research Serv.).

24. The 2008 Lacey Act amendments were part of a far larger bill that was addressed to the entirely different subject of farm policy. *See* the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110–234, 122 Stat. 923 (2008); Tanzcos, *supra* note 22, at 549 n.2. It is quite possible that members who voted on the farm bill were unaware of the Lacey Act amendments that the farm bill contained.

25. Bruce Yandle, an economist at the Federal Trade Commission, coined the phrase. He wrote that bootleggers wanted liquor stores and bars closed on Sundays so that they could sell liquor without competition, while Baptists wanted to prevent the lawful sale of liquor on Sundays so that church members could pursue a different pastime. *See* Bruce Yandle, *Bootleggers and Baptists: The Education of a Regulatory Economist*, 7 Regulation 12 (1983). The phrase "bootleggers and Baptists" has come to refer to the combination of two very different parties with entirely different agendas joining forces to achieve a common goal.

26. *See, e.g.*, Paul J. Larkin, Jr., *Why U.S. Citizens Should Not Be Branded as Criminals for Violating Foreign Law*, The Heritage Foundation, Legal Memo. No. 107 (Jan. 9, 2014), available at http://thf_media.s3.amazonaws.com/2013/pdf/lm92.pdf.

27. *See* United States v. McNab, 331 F.3d 1228 (11th Cir. 2003) (defendant sentenced to eight years in prison for importing undersized, egg-bearing lobsters from Honduras in violation of Honduran law). The *McNab* case is discussed in detail in Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. of Crim. L. & Criminology 725, 777–82 (2012).

28. *See* Brendan Sasso, *House to vote on easing environmental regulations after Gibson Guitar raid*, The Hill (May 25, 2012, 10:33 AM), http://thehill.com/blogs/e2-wire/e2-wire/229545-house-to-vote-on-easing-environmental-regulations-after-gibson-guitar-raid.

products companies, no doubt supported behind the scenes by environmental groups, wrote to a powerful Virginia Congressman and objected that modifying the Lacey Act would increase foreign imports and damage their business. The Congressman pulled the bill from a floor vote.[29] The result is that the criminal provisions of the Lacey Act remain on the books today, where they continue to hurt the public.

Conclusion

Mario Loyola has made a strong case that the sugar lobby must have a powerful hold on Congress because for eight decades, it has been able to maintain a cartel that has as its sole purpose taking money from the pockets of consumers and transferring it into the bank accounts of the companies that produce sugar. At the same time, Loyola speculates that the World Trade Organization (WTO) someday may force Congress to abandon that transfer payment because it discriminates against foreign companies in violation of our international trade agreements. Perhaps he will be proved right; the public certainly will be better off if he is.

The burden of this *Legal Memorandum* is not to take issue with Loyola in any way, but merely to add to what he has said in his paper. There are occasions in which economic rivals, disinterested parties, or political adversaries can co-opt the political process and see to the passage of statutes that make it a crime to engage in certain conduct for protectionist or other purposes. That prospect is worse for whoever falls victim to the cartel's plan, and it is not one that the WTO is likely to remedy.

*—**Paul J. Larkin, Jr.,** is a Senior Legal Research Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. Jason Snead, a Research Associate in the Meese Center, provided valuable research assistance and comments on this paper.*

29. *See* Geof Koss, *Lacey Act Overhaul Stalls Amid Push-Back by Virginia Companies*, Cong. Q. Today On-Line News (July 23, 2012), available at Westlaw, 2012 WLNR 15869677.