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LEGAL MEMORANDUM

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The Constitutional Problems Raised by Domestic Convictions for Foreign Crimes

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Abstract

The Lacey Act was originally enacted to help the states prevent the poaching of wild game by making it a federal crime to hunt game illegally and abscond with it to a different state. Congress greatly expanded the reach of the act late in the 20th century, and the law now makes it a crime in this country to import fauna or flora if it has been taken in violation of a foreign nation's laws. Whether the goals that Congress sought to achieve are laudable is irrelevant if the Lacey Act violates federal constitutional restrictions on federal lawmaking—as it clearly does. As written, the Lacey Act violates the Bicameralism and Presentment Clauses of Article I, the Appointments Clause of Article II, and the Due Process Clause of the Fifth Amendment because it delegates standardless lawmaking authority to foreign officials who are neither legally nor politically accountable to this nation's electorate or to the people over whom they exercise that authority.

Most federal criminal legislation is designed to regulate domestic affairs.[1] Over the past few decades, however, Congress has increasingly adopted several laws that apply beyond our shores. One example is the Foreign Corrupt Practices Act, which makes it a crime to bribe a foreign official, a crime that can occur overseas. In those cases, Congress has clearly defined the conduct that federal law prohibits. The question for the jury is whether a defendant engaged in prohibited conduct (with the necessary mental state) beyond our shores.

Congress has also created a second, very different category of extraterritorial criminal offenses. Some laws make it a domestic offense to violate a law of a foreign country. The Lacey Act is one

Key Points

- The Foreign Corrupt Practices Act makes it a crime to bribe a foreign official, a crime that can occur overseas. The Lacey Act differs from the Foreign Corrupt Practices Act in an important respect: It authorizes a foreign government to define an element of the offense. That difference turns out to have important consequences under our Constitution.
- Congress enacted the Lacey Act early in the 20th century to help the states prevent the poaching of wild game by making it a federal crime to hunt game illegally and abscond with it to a different state. Late in the 20th century, however, Congress greatly expanded the reach of that law.
- Specifically, the Lacey Act seeks to perform an end run around Articles I and II of the Constitution by lateraling government power to strangers to American democracy. Doing so is an affront to the Framers and to the carefully constructed scheme that they created.

This paper, in its entirety, can be found at **http://report.heritage.org/lm152**

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such statute.[2] The Lacey Act, however, differs from the Foreign Corrupt Practices Act in an important respect: It authorizes a foreign government to define an element of the offense. That difference turns out to have three important consequences under our Constitution.

First, the Article I Bicameralism and Presentment Clauses establish the federal lawmaking process. They demand that the Congress and the President cooperate in order to create a federal law and do not leave room for a foreign government or foreign government officials to play a role.

Second, the Article II Appointments Clause requires that any person entrusted with authority to enforce federal law must be appointed by the President or someone else specifically identified in the clause. Foreign officials, however, hold office under the authority of their own laws, not those of the United States.

Third, the Fifth Amendment Due Process Clause requires the federal government to act pursuant to "the law of the land," a requirement that prohibits Congress from delegating governmental authority to legally and politically unaccountable parties who are not "officers" of the United States.

Accordingly, by granting foreign officials the authority to define elements of a federal offense, the Lacey Act violates the constitutional processes for making and implementing federal law.

The Lacey Act

The Lacey Act began as an anti-poaching law. Congress passed the act in 1900 in order to help each state enforce its game laws against people who travel there, hunt unlawfully, and return to their home state before being apprehended.[3] Over time, Congress expanded the reach of the Lacey Act to embrace a broader range of conduct and to give it a larger jurisdictional reach. Today, the act makes it a federal crime not only to poach wildlife in another state, but also to import any fauna or flora taken in violation of another nation's laws.[4]

The original version of the Lacey Act was modest, but the scope of the present-day law is breathtaking.[5] For example, the act does not identify or in any way limit the foreign nations whose laws can be violated. The act reaches nations ruled by parliaments or military dictators. Atop that, the act does not define or restrict the type of foreign law that is incorporated. A foreign law can be criminal or civil in nature; it can be a constitution, a statute, a regulation, or whatever else a foreign country designates as "law"; and it may only regulate, rather than prohibit, the taking of wildlife or plants. The Lacey Act also incorporates not only the laws in effect in 2008, when the act was most recently amended, but also any laws that a foreign government may hereafter adopt. Finally, the act does not require that the foreign law be readily accessible or even be written in English.[6]

Article I Flaws in the Lacey Act

Article I of the Constitution grants "[a]ll legislative Powers" to a Congress consisting of a Senate and a House of Representatives.[7] In order to exercise that power and create a "Law," each chamber must pass the identical bill, and the President must sign it (or both houses must repass it by a two-thirds vote following a veto).[8] The modification or repeal of a law on the books requires Congress and the President to follow the same process.[9]

1. The discussion in this Legal Memorandum is taken from Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 Harv. J.L. & Pub. Pol'y 337 (2015).
2. For others, see *id*. at 341 n.14.
3. *See*, *e.g.*, Lacey Act of May 25, 1900, § 1, ch. 553, 31 Stat. 188 (1900).
4. For an exhaustive history of the birth and growth 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).
5. *See* Larkin, *supra* note 1, at 349–54.
6. Indeed, one American circuit court has even held that the act does not even require that the foreign "law" be valid in the land that adopted it. *See* United States v. McNab, 331 F.3d 1228 (11th Cir. 2003). The *McNab* case is discussed extensively in Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminology 725, 777–82 (2012).
7. *See* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").
8. *See* U.S. Const. art. I, § 7; INS v. Chadha, 462 U.S. 919 (1983).
9. *See* Clinton v. City of New York, 524 U.S. 417 (1998).

In theory, only Congress may create a law.[10] In practice, however, the Supreme Court has permitted Congress to delegate to federal agencies the authority to create law in the form of rules or regulations as long as Congress defines an "intelligible principle" for the agency to use when exercising that power.[11] The Supreme Court has been extraordinarily generous in its interpretation of the "intelligible principle" standard. Only twice in more than a century has the Court held delegations invalid, and those delegations gave an executive official no standard, intelligible or otherwise, to use when creating law.[12]

The problem for the Lacey Act is that it, too, supplies no standard for a foreign nation to use when creating a "law" whose violation can trigger liability under the Lacey Act. As noted, the Lacey Act does not identify the foreign laws it incorporates, the form that those laws make take, or the elements that American law deems essential to qualify a proclamation as a "law." The Lacey Act also does not give foreign government officials any factors or principles to use when enacting laws that create civil and criminal liability under American law. Nor does it require that a foreign law be readily accessible or even have an English translation.

The law that a person can violate also can be a provision in a foreign constitution, which, if a foreign nation reads its constitution the same way that the Supreme Court of the United States has read the Constitution of 1789, can have a meaning very different from what its text could be read to say.[13] In fact, a foreign constitution may delegate lawmaking authority to a purely private party whose actions are neither politically nor judicially reviewable, an action that the Due Process Clauses of the Fifth and Fourteenth Amendments would prohibit Congress or a state legislature from doing in the United States.[14]

The "intelligible principle" standard may be a broad one, but no judge could honestly say that the Lacey Act passes that test.

Article II Flaws in the Lacey Act

But there is more. The Lacey Act also runs into constitutional problems when the statute is analyzed under Article II of the Constitution.

The Constitution contemplates that Congress may create executive departments and give the President the powers necessary to run them.[15] The Constitution quite reasonably assumes that the President

10. *See* Marshall Field & Co. v. Clark, 143 U.S. 649, 692, 693–94 (1892) ("That Congress cannot delegate legislative power…is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution…. 'The true distinction…is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion *as to its execution,* to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'") (quoting Cincinnati, Wilmington & Zanesville, R.R. Co v. Comm'rs of Clinton Cnty., 1 Ohio St. 77, 88–89 (1852) (emphasis added)); John Locke, Two Treatises of Government 312 (R. Cox ed., 1982) ("The power of the *legislative*, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make *laws,* and not to make *legislators,* the *legislative* can have no power to transfer their authority of making laws, and place it in other hands.") (emphasis in original).

11. *See* Whitman v. Am. Trucking Ass'ns Inc., 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).

12. *See id*. at 474 ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'"); Larkin, *supra* note 1, at 363–66. The two cases are *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *Panama Refining* held unconstitutional a section of the National Industrial Recovery Act (NIRA) that delegated to the President the power to forbid the distribution of so-called hot oil—oil produced in excess of a production quota—in interstate commerce. *Schechter Poultry* held unconstitutional a different NIRA provision, one that delegated to private parties the authority to define codes of "fair competition" among rivals that would be exempt from the federal antitrust rule that price fixing and other horizontal agreements to restrain trade are unlawful.

13. *See* Larkin, *supra* note 1, at 395–96 ("It therefore may be impossible to know how to fully interpret a provision in a particular foreign constitution simply by reading its text. That is certainly true in this country. Constitutional interpretation may demand a knowledge of the meaning of its terms and related concepts contemporaneous with the document's enactment, the history underlying a particular provision, the problem that a feature was designed to solve or avoid, the value choices that different provisions represent, related areas of law, and the relevant precedents. Yet, the enterprise is still a difficult one even when armed with that knowledge. After all, the First Amendment declares that '*Congress* shall make no *law*,' but everyone, lawyer or not, knows that it also limits what a state or local government can do, even when that does not involve passage of a 'law.'") (emphasis in original; footnotes omitted).

14. *See id.* at 401–23 (discussing, inter alia, Eubank v. City of Richmond, 226 U.S. 137 (1926), and Carter v. Carter Coal Co Inc., 298 U.S. 238 (1936).

15. *See* U.S. Const. art. II, § 2, cl. 1 (the Opinion Clause); *id.* cl. 2 (the Appointments Clause).

may enlist lieutenants to enforce the law, since the contrary assumption would require the President to perform the impossible.[16] The Article II Appointments Clause therefore complements the Article I Bicameralism and Presentment Clauses because the former clause defines the process for appointing federal officials.[17] As has been explained elsewhere:

> The Appointments Clause of Article II is not merely a civil service code. It is a critical element in governance, regulating the selection of all administrative officials who exercise delegated federal authority. The manipulation of official appointments by the Crown was a major grievance of the Framers, and they saw the appointment power as the most insidious and powerful weapon of eighteenth-century despotism. To prevent that cudgel from reappearing under the Constitution, the Framers carefully husbanded the appointment power to limit its diffusion to officials who would be subject to the will of the people. At the same time, the Framers made sure that the people would be able to hold the President accountable for decisions he made to assign implementation authority to his appointees—or alternatively, to hold Congress accountable for letting someone else do that job. Finally, the requirement that a specific individual be appointed consistently with Article II to head a department ensures that there will always be a person with authority to make a final agency determination that can be challenged in an Article III court.[18]

The Lacey Act violates the Appointments Clause of Article II of the Constitution because it delegates federal lawmaking authority to foreign officials. American voters do not elect foreign parties to their positions of authority under a foreign government, and neither the President nor anyone else identified in Article II can appoint or remove them from whatever offices they hold. Foreign officials may not even hold office in a democratic republic like ours. "If their government does not resemble ours, they may have received their power out of the barrel of a gun."[19]

However they come to hold whatever positions they occupy, foreign officials are not appropriate parties to exercise the executive authority of this nation. Allowing foreign government officials to *define* the laws that the Lacey Act incorporates is no more permissible than entrusting to those officials the authority to *adjudicate* a criminal charge under our federal law. Each delegation would offend the text and purposes of Article I.

Due Process Flaws in the Lacey Act

The Due Process Clause traces its lineage to Article 39 of Magna Carta.[20] It provided that "[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land."[21] By establishing the "rule of law"—*viz*., the principle that everyone, including King John, was subject to English law—Article 39 sought to prevent the English crown from arbitrarily exercising royal power.

The guarantee that the crown could administer punishment only in accordance with "the law of the land" meant that, according to Coke, "no man [could] be taken or imprisoned, but *per legem terrae*, that is, by the common law, statute law, or custome of England."[22] Expressed in today's language, Article 39 protected "life (including limb and health); personal liberty (using the phrase in its more literal and limited

16. *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483 (2010) ("In light of '[t]he impossibility that one man should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'") (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed., 1939)).
17. *See* U.S. Const. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").
18. Larkin, *supra* note 1, at 370 (footnotes and internal punctuation omitted).
19. *Id.* at 432.
20. *Id.* at 411–15.
21. J.C. Holt, Magna Carta 461 (2d ed. 1992).
22. Larkin, *supra* note 1, at 413 (citation omitted).

sense to signify freedom of the person or body, *not* all individual rights); and property."[23] In the 14th century, an act of Parliament changed the phrase "*per legem terrae*" or "the law of the land" to "due Process of the Law,"[24] but the revision did not alter its meaning.[25]

The American colonists brought the Article 39 guarantees with them to the New World, where those provisions became a settled part of this nation's early common law.[26] James Madison, author of the Bill of Rights, included those protections in the Due Process Clause of the Fifth (and later the Fourteenth) Amendments.[27]

Considered in light of its origins, the Due Process Clause plays an important role in the process of federal (and state) governance.[28] The Qualifications Clauses, along with the Bicameralism and Presentment requirements, of Articles I and II of the Constitution (as revised by the Twelfth and Seventeenth Amendments) identifies who may participate in the federal lawmaking process and how they must cooperate to create federal legislation. The Appointments Clause of Article II defines the process by which the President (along with a few specified other parties, such as the "Courts of Law") may appoint federal "officers" to implement the laws that Congress and the President enact. Add to this the Article III Judicial Power Clause, which grants the Supreme Court and lower federal courts the power "to say what the law is,"[29] and you have the "Republican Form of Government" that the Framers created for the nation and that Article IV guarantees each state.[30] There is no room in that carefully established structure to grant lawmaking or law-applying power to private parties or foreign officials. As has been explained elsewhere:

> By requiring that all three branches act only pursuant to law, the Fifth Amendment Due Process Clause ensures that the actors in each department cannot evade the Framers' carefully constructed regulatory scheme by delegating their federal lawmaking power to unaccountable private parties, individuals beyond the direct legal and political control of superior federal officials and the electorate. That is, the due process requirement that federal government officials act pursuant to "the law of the land" when the life, liberty, or property interests of the public are at stake prohibits the officeholders in any of those branches from delegating lawmaking authority to private parties who are neither legally nor politically accountable to the public or to the individuals whose conduct they may regulate. That is the bedrock due process guarantee, one so fundamental that we take it for granted. The principle that government officials are governed by "the rule of law" is so deeply ingrained into the nation's culture, psyche, and legal systems that we forget just how important it is. The Barons at Runnymede had no Parliament to which they could turn for protection against King John. They had only their own troops and the common law, representing the accepted, common understanding of Englishmen regarding the permissible operation of the crown and its institutions, as enforced by the courts. In order to avoid a continuing need to rely on the former, they forced the king to agree to be governed by the latter. The requirement that the crown act pursuant to "the law of the land" was a protection against the king going outside the law to accomplish his will through brute force.[31]

23. *Id.* (citation and punctuation omitted).
24. *Id.* (citation and punctuation omitted).
25. A. E. Dick Howard, Magna Carta: Text and Commentary 14–15 (Rev. ed. 1998) ("In Magna Carta's 'law of the land' we can find the early origins of the concept of 'due process of law,' one of the cornerstones of our jurisprudence.... [A]s early as 1354 the words 'due process' were used in an English statute interpreting Magna Carta, and by the end of the fourteenth century 'due process of law' and 'law of the land' were interchangeable.").
26. Larkin, *supra* note 1, at 414.
27. *Id.* at 414–15.
28. *Id.* at 415–20.
29. *See* U.S. Const. art. III, cl. 1; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
30. *See* U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government....").
31. Larkin *supra* note 1, at 416–17 (footnote omitted).

The Supreme Court's case law recognizes and enforces that principle. In *Eubank v. City of Richmond*,[32] the Court analyzed a local land-use ordinance that empowered private 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 the line.[33] 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 own self-interest or even arbitrarily.

Two decades later, in *Carter v. Carter Coal Co.*,[34] the Court applied that principle to an act of Congress, the Bituminous Coal Conservation Act of 1935,[35] which authorized private parties to set minimum and maximum coal prices and industry-wide wage and maximum working hour agreements. Describing the act as "legislative delegation in its most obnoxious form,"[36] the Court, relying on *Eubank*, held that the statute arbitrarily interfered with a coal producer's property rights by vesting governmental power in the hands of a party interested in the outcome of a business transaction.[37]

Eubank and *Carter Coal* make clear that the government cannot delegate its legal authority to private parties who are neither legally nor politically accountable to other government officials or to the electorate.[38] They also demonstrate why the delegation in the Lacey Act violates the Due Process Clause: The act delegates the power to define domestic law to foreign officials, parties who are neither elected to their positions by American voters nor appointed to their offices by the President or another authorized federal official.

The Lacey Act seeks to perform an end run around Articles I and II by lateraling government power to strangers to American democracy. Doing so is an affront to the Framers and to the carefully constructed scheme that they created:

> Granting a private party power that the Constitution vests only in parties who hold the offices created or contemplated by Articles I, II, and III is the exact opposite of what the Framers had in mind. If followed across the board, that practice would allow federal officials to turn the operation of government over to private parties and go home. That result would not be to return federal power to the states. At a macro level, it would be to abandon responsibilities that the Constitution envisioned only a centralized government could execute to ensure that the new nation could survive and prosper. At a micro level, it would be to leave to the King's delegate the same arbitrary power that Magna Carta sought to prohibit the King from exercising through the rule of law. The "plan of the Convention" was to create a new central government with the responsibility to manage the affairs of the nation for the benefit of the entire public with regard to particular functions—protecting the nation from invasion, ensuring free commercial intercourse among the states and with foreign governments, and so forth—that only a national government could adequately handle. The states were responsible for everything else, and they had incorporated the common law into their own legal principles. The result was to protect the public against the government directly taking their lives, liberties, and property through the use of government officials or indirectly accomplishing the same end by letting private parties handle that job. The rule of law would safeguard the public against the government's choice of either option. Using private parties to escape the carefully crafted limitations that due process imposes on government officials is just a cynical way to defy the Framers' signal accomplishment of establishing a government under law.[39]

32. 226 U.S. 137 (1912).
33. *Id.* at 141, 143–44.
34. 298 U.S. 238 (1936).
35. Ch. 824, 49 Stat. 991 (1935).
36. *Carter v. Carter Coal*, 298 U.S. at 311.
37. *Id.* at 282–84.
38. Larkin, *supra* note 1, at 403–09, 421–23.
39. *Id.* at 419–20.

Conclusion

Congress enacted the Lacey Act early in the 20th century to help the states prevent the poaching of wild game by making it a federal crime to hunt game illegally and abscond with it to a different state. Late in the 20th century, however, Congress greatly expanded the reach of that law. The Lacey Act now makes it a crime in this country to import fauna or flora if it has been taken in violation of a foreign nation's laws.

Whether the goals that Congress sought to achieve are laudable is irrelevant if the Lacey Act violates federal constitutional restrictions on federal lawmaking. It clearly does. As written, the Lacey Act violates the Bicameralism and Presentment Clauses of Article I, the Appointments Clause of Article II, and the Due Process Clause of the Fifth Amendment because it delegates standardless lawmaking authority to foreign officials who are neither legally nor politically accountable to this nation's electorate or to the people over whom they exercise that authority.

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