

NOTES

The World's Laws in American Justice: The Foreign Law Provisions of the 2008 Lacey Act Amendments

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INTRODUCTION

In August of 2011, armed federal agents raided Gibson Guitar Corporation for the second time in as many years. The government was targeting Gibson over allegations that it had violated one of the oldest environmental laws in the United States—the Lacey Act. The raid brought production to a halt at several of Gibson's Tennessee-based facilities and resulted in the seizure of documents, guitars, and other items.¹ Gibson soon faced not only civil penalties from its alleged Lacey Act violation, but also the threat of a criminal investigation from the Department of Justice's Environmental Crimes Section that could have resulted in imprisonment for some of Gibson's executives.² Gibson's CEO, Henry Juskiewicz, angrily took to the media, denouncing the federal government's actions as an

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¹ 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/>.

² Steven Andersen, *DOJ Accuses Gibson Guitar of Environmental Violations*, INSIDECOUNSEL MAG., Nov. 11, 2011, at 2, <http://www.insidecounsel.com/2011/11/01/doj-accuses-gibson-guitar-of-environmental-violati>.

overreach of authority that threatened American businesses.³ Nearly a year later, the case was settled: the criminal investigation was dropped in exchange for Gibson's agreement to pay approximately \$300,000 in fines, \$50,000 in community service payments to the National Fish and Wildlife Foundation, and to forfeit its claims to all wood seized in the earlier raids, the value of which totaled over \$250,000.⁴ The investigation cost Gibson losses of over \$600,000 and consumed years of federal action and resources, despite the fact that the Lacey Act does not punish for violations of American law. Here, Gibson was accused of violating the law of India.⁵

The Lacey Act, since its amendment in 1948, deems it unlawful, under threat of both civil and criminal penalties, to "import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce—any fish or wildlife taken, possessed, transported . . . in violation of any foreign law."⁶ The Act was amended again in 2008 and greatly broadened all of its provisions dealing with plants.⁷ As a result, all foreign laws concerning

³ See, e.g., Henry Juskiewicz, *Op-Ed., Gibson's Fight Against Criminalizing Capitalism*, WALL ST. J., July 19, 2012, at A11.

⁴ Press Release, Dep't of Justice, Gibson Guitar Corp. Agrees to Resolve Investigation into Lacey Act Violations (Aug. 6, 2012), <http://www.justice.gov/opa/pr/2012/August/12-enrd-976.html> ("In light of Gibson's acknowledgement of its conduct, its duties under the Lacey Act and its promised cooperation and remedial actions, the government will decline charging Gibson criminally in connection with Gibson's order, purchase or importation of ebony from Madagascar and ebony and rosewood from India, provided that Gibson fully carries out its obligations under the agreement, and commits no future violations of law, including Lacey Act violations").

⁵ Andersen, *supra* note 2, at 1.

⁶ Lacey Act, 16 U.S.C. § 3372(2)(A) (2012); Hugh Sage, *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824 (9th Cir. 1989), 4 INT'L LEGAL PERSP. 93, 95 (1992).

⁷ Elinor Colbourn & Thomas W. Swegle, *The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber*, UNITED STATES ATTORNEYS' BULLETIN, 91, 92 (July 2011). See also *Amendments to the*

plants—as defined under the new, more comprehensive Lacey Act—must be respected by all businesses attempting to import flora from abroad.⁸ These recent amendments require a broader application of foreign law on the part of all sides concerned in modern Lacey Act litigation, from the plaintiff to the defendant to the court.⁹

In light of the demonstrable effect that the amended Lacey Act has already had on commerce, this note aims to explore exactly how foreign law is applied through the Lacey Act, as well as the responsibilities this places upon the federal government as plaintiff and prosecutor, upon defendants and potential defendants doing business in foreign countries, and upon the court in interpreting the foreign law that can be central to Lacey Act prosecutions. Accordingly, Part I of this note addresses the history of the Lacey Act to the modern day, including its recent 2008 amendments and how they have dramatically affected the scope and enforcement of the Act. Part II discusses the foreign law provisions of the Lacey Act in detail, especially past and present litigation relating to foreign law violations under the Act. Lastly, Part III offers commentary on how the Lacey Act's amendments will affect litigants and the judiciary in applying potentially vast amounts of foreign law to United States courts and parties.

I. HISTORY AND COMPONENTS OF THE LACEY ACT

A. BACKGROUND OF THE ACT

The Lacey Act was the brainchild of Iowa Congressman John Lacey, a conservationist who was particularly concerned about the effects of declining

Lacey Act from H.R. 2419, Sec. 8204, United States Dep't of Agric. (Nov. 4, 2012), available at http://www.aphis.usda.gov/plant_health/lacey_act/downloads/background—redlinedLaceyamndmnt—forests—may08.pdf. (providing highlighted text of the 2008 amendments).

⁸ Colbourn & Swegle, *supra* note 7, at 92.

⁹ Andersen, *supra* note 2, at 1.

bird populations on agriculture and American wilderness.¹⁰ Lacey was worried that poachers could avoid prosecution by shipping their illicit game to another state, and thus escape the jurisdiction of the state in which they poached the wildlife. He solved the dilemma by federalizing the issue with respect to a narrow class of fauna.¹¹ Originally, the Lacey Act was almost entirely concerned with birds and other wildlife.¹² Like many laws, however, the Act expanded over the 20th century, with major amendments coming in 1935 and 1981.¹³ The 1981 amendments greatly expanded the power of the Lacey Act, empowering federal wildlife agents to carry firearms, execute warrants, and make arrests, along with authorizing strict liability forfeitures of illegal fish, wildlife, and plants.¹⁴

One of the defining features of the Lacey Act is the fact that it gives authorities the power to enforce violations of foreign law as a breach of the Act and thus subject to criminal and civil penalties.¹⁵ It was the amendments of 1935 that originally rendered violations of foreign law illegal.¹⁶ From that

¹⁰ Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27, 37 (1995). Rep. Lacey introduced the Lacey Act around the time of several poaching-related ecological disasters, including the human caused extinction of the Passenger Pigeon.

¹¹ *Id.* at 37–38.

¹² Sage, *supra* note 6, at 95. Note that fish is not included in the definition of "wildlife."

¹³ Victor J. Rocco, *Wildlife Conservation Under the Lacey Act: International Cooperation or Legal Imperialism?*, 80 NYSBA J. 10, 12 (2008).

¹⁴ Anderson, *supra* note 10, at 50.

¹⁵ Andersen, *supra* note 2, at 1.

¹⁶ Anderson, *supra* note 10, at 45–46; Migratory Bird Hunting Stamp Act, ch. 261, § 242, 49 Stat. 378 (1935) ("It shall be unlawful for any person, firm, corporation, or association to deliver . . . any wild animal or bird, or the dead body or part thereof, or the egg of any such bird imported from any

time forward, enforcement of foreign law became a key component of the Lacey Act. However, the Act's foreign law provisions protecting endangered plants were notably unequal to its strong defense of wildlife and fish.¹⁷ Only violations of state law regarding plants were prosecutable, as compared to the fish and wildlife provisions, which outlawed "violation of any law or regulation of any State or in violation of any foreign law."¹⁸ The Act also proved to be deficient in protecting plant life due to its highly restrictive definition of the word "plant," especially contrasted with its very broad definition of "fish or wildlife."¹⁹ Protection for plants on a level commensurate with fish and wildlife was eventually achieved through the 2008 amendments to the Lacey Act.

foreign country contrary to any law of the United States, or captured, killed, taken, purchased, sold or possessed contrary to any such law, or captured, killed, taken, shipped, transported, carried, purchased, sold or possessed contrary to the law of any State, Territory, or the District of Columbia, or foreign country. . . .") [emphasis added].

¹⁷ Anderson, *supra* note 10, at 54–55. ("The disparity between the Lacey Act's application to wildlife and its application to plants becomes most apparent when considering the types of importation activity the Act addresses. For example, the importation of cockatoo eggs, bear parts, a tiger skeleton, salmon, or live snakes in violation of customs laws is an automatic felony violation of the Lacey Act. However, the Act cannot be used to prosecute the importation of an equally endangered orchid or pitcher plant species taken from a foreign rain forest.").

¹⁸ Lacey Act, 16 U.S.C.A. § 3372(2)(A–B) (1981) (amended 1988).

¹⁹ Anderson, *supra* note 10, at 54–55 (Plant was defined pre-2008 as "[A]ny wild member of the plant kingdom, including roots, seeds, and other parts thereof (but excluding common food crops and cultivars) which is indigenous to any State and which is either (A) listed on an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, or (B) listed pursuant to any State law that provides for the conservation of species threatened with extinction.").

B. THE 2008 AMENDMENTS TO THE LACEY ACT

The amendments to the Act in 2008 drastically expanded the coverage of the Lacey Act to include most plants and plant products.²⁰ Most notably, the definition of "plant" changed, now being defined as "any wild member of the plant kingdom, including roots, seeds, parts, or products thereof, and including trees from either natural or planted forest stands."²¹ The definition still excludes common crops and cultivars, along with scientific specimens of genetic material and any plant that will remain planted or be planted or replanted.²² However, the latter two exemptions are invalid if the plant is listed in the appendix of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, or is listed as an endangered or threatened species under the Endangered Species Act, or is specifically restricted under "any" state law which conserves species indigenous to that state and are threatened with extinction.²³

Accompanying the Lacey Act's powerful new definition of plant was its prohibition of the importing, exporting, transporting, selling, receiving, acquiring, or purchasing of any plant taken, possessed, transported, or sold in violation of any foreign law.²⁴ This foreign law must be directly related to the plant; a tangential connection to plant life is not sufficient to trigger a violation of the Act.²⁵ For example, a company which violated foreign labor

²⁰ Colbourn & Swegle, *supra* note 7, at 93.

²¹ Lacey Act, 16 U.S.C. § 3371(f)(1) (2012).

²² Lacey Act, 16 U.S.C. § 3371(f)(2) (2012) (The definition of common crop and cultivar was proposed in 2010 by the Department of Agriculture, but appears not to have been adopted into law at this time. *See* Lacey Act Implementation Plan; Definitions for Exempt and Regulated Articles, 78 FR 40949 (July 9, 2013) (to be codified at 7 C.F.R. pt. 357).

²³ Lacey Act, 16 U.S.C. § 3371(f)(3) (2012).

²⁴ *Id.* at § 3372(a)(2)(B)(i) (2012).

²⁵ Colbourn & Swegle, *supra* note 7, at 93.

laws concerning its timber harvesters would not be violating the Lacey Act.²⁶ However, the Act does create a new prohibition against taking, possessing, transporting, or selling plants without paying necessary taxes, royalties, or stumpage fees.²⁷

Lastly, new regulations in the Lacey Act require importers of plants to make an import declaration listing the scientific name of the plants, a description of the value of the plants, a description of the quantity of the plants in a unit of measure, and the name of the country from which the plants were taken.²⁸ In addition, new false labeling offenses have been added for plants, which prohibit the making or submitting of any false record, account, or label for any plant which has been or is intended to be imported, exported, sold, purchased, transported, or received from any foreign country, or in interstate commerce.²⁹

C. PENALTIES FOR VIOLATING THE LACEY ACT

One of the unique aspects of the Lacey Act is that, though it prohibits actions in violation of United States or foreign law, it does not impose the penalties that breaking those laws would normally bring.³⁰ The underlying violation for Lacey Act enforcement may be criminal, civil, or administrative in nature, and need not even be currently valid law so long as it was properly enacted at the time of the offense.³¹ There are three main mechanisms of

²⁶ *Id.*

²⁷ Lacey Act, 16 U.S.C. § 3372(a)(2)(B)(ii) (2012) (A stumpage fee is the amount paid to the owner of the land upon which a company is harvesting timber.).

²⁸ *Id.* at § 3372(f).

²⁹ *Id.* at § 3372(d).

³⁰ *See generally* Rocco, *supra* note 13.

³¹ *Id.* at 12.

enforcement provided for in the Act: Civil sanctions, criminal sanctions, and forfeiture.³²

The Lacey Act imposes civil sanctions on parties who, in the exercise of due care, should have known that the plant or wildlife they were transporting was in contravention of a state, federal, foreign, or tribal law.³³ "Due care" is an extremely important phrase in the Lacey Act which essentially defines the barrier between civilly liable and non-liable activity.³⁴ Due care is a flexible standard which varies based upon individual situations and circumstances, but essentially requires individuals or corporations to take reasonable precautions.³⁵ Violation of the Act's anti-trafficking provisions or its requirement for proper labeling carries a penalty of up to \$10,000 per breach.³⁶ All marking requirement failures which do not fall under § 3373(a)(1), but still constitute a breach of the Act, may command a fine of only up to \$250.³⁷

Criminal violations of the Lacey Act require knowing conduct on the behalf of the defendant, unlike civil liability impositions.³⁸ This is known as the requirement of *scienter*, and is only present in the criminal portion of the act; Congress specifically included it in order to curb problems of criminal

³² Colbourn & Swegle, *supra* note 7, at 95.

³³ *Id.* at 96; Lacey Act, 16 U.S.C. § 3373(a)(1).

³⁴ See, e.g., Greg McCue, *The New Lacey Act: What You Can "Do" to show "Due Care,"* OR. WOOD INNOVATION CTR., Summer 2009, at 1, 5, <http://owic.oregonstate.edu/sites/default/files/newsletter/Summer%202009.pdf>.

³⁵ *Id.* at 5; see also *United States v. Lee*, 937 F.2d 1388, 1396 (9th Cir. 1991).

³⁶ Lacey Act, 16 U.S.C. § 3373(a)(1) (2012).

³⁷ *Id.* at § 3373(a)(2).

³⁸ *Id.* at § 3373(d); Colbourn & Swegle, *supra* note 7, at 96.

penalties under a general intent standard.³⁹ The primary goal of the *scienter* requirement is to curb abuse. In order to obtain a criminal conviction, the prosecution must prove the defendant knew or should have known that its conduct was illegal.⁴⁰ Any party who knowingly engages in a violation of the Act by importing, exporting, selling, or purchasing prohibited fish, wildlife, or plants with a market value greater than \$350 may be fined up to \$20,000 and imprisoned up to five years per violation.⁴¹ A party who knowingly violates the Act by engaging in prohibited conduct and should know through the exercise of due care that the fish, wildlife, or plants were taken, possessed, transported, or sold in violation of the law may be fined up to \$10,000 and imprisoned up to one year.⁴² Violations of the labeling requirements of the Act carry penalties of up to \$20,000 and up to five years imprisonment if the labeling offense involved the importation or exportation of fish, wildlife, or plants, or if the value of the items intended to be sold or purchased exceeded \$350.⁴³ Otherwise, the labeling violation imposes a fine of not more than \$10,000 and/or a year in prison.⁴⁴

The forfeiture requirement in the Lacey Act, in contrast to its civil or criminal sanctions, is one of strict liability.⁴⁵ Section 3374(a)(1) provides:

All fish or wildlife or plants imported, exported, transported, sold, received, acquired, or purchased contrary to the provisions of section 3372 of this title

³⁹ United States v. Lee, 937 F.2d at 1393; Anderson, *supra* note 10, at 82.

⁴⁰ *Id.*; Rocco, *supra* note 13, at 13.

⁴¹ Lacey Act, 16 U.S.C. § 3373(d)(1) (2012).

⁴² *Id.* at (d)(2).

⁴³ *Id.* at (d)(3)(A).

⁴⁴ *Id.* at (d)(3)(B).

⁴⁵ Lacey Act, 16 U.S.C.A. § 3374(a)(1) (2012); Colbourn & Swegle, *supra* note 7, at 95.

(other than section 3372(b) of this title), or any regulation issued pursuant thereto, shall be subject to forfeiture to the United States notwithstanding any culpability requirements for civil penalty assessment or criminal prosecution included in section 3373 of this title.⁴⁶

Thus the government must only prove by a preponderance of the evidence that the seized items were in violation of either the Lacey Act requirements for import declarations, or breached a state, foreign, or federal law that protects fish, wildlife, or plants.⁴⁷ It is not necessary to prove any state of mind requirement that would be vital for a government claim of civil or criminal liability under the Lacey Act.⁴⁸

II. FOREIGN LAW VIOLATIONS UNDER THE LACEY ACT

A. PAST CASES INVOLVING LACEY ACT PROSECUTION FOR BREACH OF FOREIGN LAW

The Lacey Act has penalized violations of foreign law since 1935.⁴⁹ Since that time, several high profile cases involving defendants convicted for Lacey Act violations—either solely or partially due to their violations of foreign law—have arisen. This section addresses the most important of these.

⁴⁶ *Id.*

⁴⁷ Colbourn & Swegle, *supra* note 7, at 95; *see also* United States v. 144,774 Pounds of Blue King Crab, 410 F.3d 1131, 1136 (9th Cir. 2005) (finding strict liability justifying seizure of property where "the government can establish that the crab was taken, possessed, transported, or sold in a way that rendered it illegal under Russian law.").

⁴⁸ Colbourn & Swegle, *supra* note 7, at 95.

⁴⁹ Anderson, *supra* note 10, at 45–46.

The first important Lacey Act case involving a defendant who breached only foreign law is *United States v. Fifty-Three (53) Eclectus Parrots*.⁵⁰ The events that gave rise to *Eclectus Parrots* occurred when Allen, the appellant, sought to overturn a forfeiture action by the government seizing his parrots.⁵¹ He had purchased the birds through an importer in Singapore, who had himself bought them from their native Indonesia.⁵² Unbeknownst to Allen, however, Indonesia had restricted export of eclectus parrots, and his purchase was thus a violation of the Lacey Act's provisions against breaking foreign law relating to wildlife.⁵³

Allen contested the forfeiture by claiming that because the United States Custom Service had not published the foreign laws which led to the seizure of his birds, the forfeiture was void.⁵⁴ The Ninth Circuit, however, ruled in favor of a strict liability interpretation of the Lacey Act's forfeiture provisions.⁵⁵ The fact that the defendant had asked United States Customs agents whether the parrots were legal to import into the United States and received "no definitive answer" likewise offered no protection against the forfeiture.⁵⁶ Lack of knowledge of a foreign law is no defense against a Lacey Act seizure of property that has violated any foreign law concerning fish, wildlife, or plants.⁵⁷

⁵⁰ 685 F.2d 1131 (9th Cir. 1982).

⁵¹ *Id.* at 1132.

⁵² *Id.*

⁵³ *Id.*; Lacey Act, 16 U.S.C. § 3372(2)(A) (2012).

⁵⁴ *Eclectus Parrots*, 685 F.2d at 1134–35.

⁵⁵ *Id.* at 1134–36; Lacey Act, *supra* note 45. *See also Blue King Crab*, *supra* note 47 (reaffirming the rule).

⁵⁶ *Eclectus Parrots*, 685 F.2d at 1133.

⁵⁷ *Id.* at 1135; Colbourn & Swegle, *supra* note 7, at 95.

Another defining feature of the Lacey Act is that, despite the Lacey Act's language prohibiting violation of foreign "law,"⁵⁸ the Act may punish any party who violates not just a statute, but also a regulation or administrative decision.⁵⁹ In a case again before the Ninth Circuit, the court was confronted with the issue of whether a Taiwanese proclamation by the Board of Foreign Trade of the Republic of China banning export of salmon without a permit was "foreign law" for Lacey Act purposes.⁶⁰ The claimant, Union, Inc., sought to have the forfeiture of its salmon reversed due to the fact that Taiwan's ban on permit-less salmon exports came via a "regulation," rather than a statute.⁶¹ The court disagreed on the basis that Congress intended to expand, rather than limit, the scope of the Lacey Act when it amended it in 1981 to "control effectively the burgeoning and highly profitable trade in illegal fish and wildlife."⁶² Therefore, a reading of the Act's legislative intent clearly indicated that Congress intended "foreign law" to comprise foreign regulations.⁶³

One of the more controversial Lacey Act cases in recent years was the 2003 case of *United States v. McNab*.⁶⁴ The background to the case is

⁵⁸ See, e.g., Lacey Act, 16 U.S.C. § 3372(2)(A) (2012); Lacey Act, 16 U.S.C. § 3372(a)(2)(B)(i) (2012).

⁵⁹ Rocco, *supra* note 13, at 13.

⁶⁰ *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 825 (9th Cir. 1989).

⁶¹ *Id.* at 824 n.2. The court notes that "regulation" is not truly an accurate definition of the decision issued by the Taiwanese board, and is used for simplicity. That foreign legal systems do not divide their law-making functions as the United States does, and indeed that language by its nature resists word for word translation, lends further credence to the court's decision to interpret the word "law" loosely.

⁶² *Id.* at 827.

⁶³ *Id.* at 827–28. See also *United States v. Labs of Virginia, Inc.*, 272 F. Supp. 2d 764 (N.D. Ill. 2003) (holding the same).

⁶⁴ 331 F.3d 1228 (11th Cir.), *cert. denied*, 540 U.S. 1177 (2004).

complex. In 1999, the National Marine Fisheries Service received an anonymous message via fax claiming that the defendant, McNab, would be arriving in Alabama with his vessel, carrying lobster tails which violated Honduran packaging and size laws.⁶⁵ In response to this letter, the agents from the Service asked for and received an explanation of Honduran law from its Department of Fish and Agriculture, representatives of which confirmed that McNab and his fellow defendants were in breach of Honduran law.⁶⁶ Many lobster tails were less than 5.5 inches, were egg-bearing or had their eggs removed, had not been inspected and processed, and were packed in bulk plastic bags, all of which violated Honduran law according to the Honduran representatives at a pre-trial hearing to determine the precise law that governed.⁶⁷ All defendants were found guilty on multiple counts of violating the Lacey Act.⁶⁸

Following their convictions, the defendants appealed, challenging the validity of the Honduran laws.⁶⁹ As recently as 2001, Honduran officials reiterated that the laws underlying the Lacey Act convictions were valid.⁷⁰ However, the Honduran government later shifted its position, even filing an amicus brief on behalf of McNab.⁷¹ The official position of the Honduran government was, at the time that the Eleventh Circuit issued its decision, that the laws buttressing defendants' convictions were invalid.⁷² Thus the court was forced to decide "whether we are bound by the Honduran government's current position regarding the validity of these laws, or whether we are free to

⁶⁵ *Id.* at 1232.

⁶⁶ *Id.* at 1232–33.

⁶⁷ *Id.* at 1232–34.

⁶⁸ *Id.* at 1234.

⁶⁹ *Id.*

⁷⁰ *United States v. McNab*, 331 F.3d at 1235.

⁷¹ *Id.* at 1240 n.23.

⁷² *Id.* at 1240.

follow the Honduran government's original position."⁷³ The court's conclusion was that it was not so bound.⁷⁴ The court's given reason for the decision was "finality":

When, however, a foreign government changes its original position regarding the validity of its laws after a defendant has been convicted, our courts are not required to revise their prior determinations of foreign law solely upon the basis of the foreign government's new position. There must be some finality with representations of foreign law by foreign governments. Given the inevitable political changes that take place in foreign governments, if courts were required to maintain compliance with a foreign government's position, we would be caught up in the endless task of predetermining foreign law.⁷⁵

Accordingly, the Eleventh Circuit declined to give the Honduran government's position on its own laws controlling weight. In a thoroughly researched dissent, Justice Fay noted that, had this case been tried in Honduras for a violation of Honduran law, such a result would have violated the Honduran constitution's prohibition on convicting a defendant for a criminal statute later declared invalid.⁷⁶ Furthermore, in the United States, the conviction would likewise have been "easily" resolved in the defendants' favor.⁷⁷ The Lacey Act's utilization of foreign laws thus convicted the defendants in a result that directly contravened the substantive law of each state in the name of finality. The case has drawn considerable ire from both

⁷³ *Id.*

⁷⁴ *Id.* at 1242.

⁷⁵ *Id.* at 1241.

⁷⁶ *United States v. McNab*, 331 F.3d 1228, 1248–49 (11th Cir. 2003) (Fay, J., dissenting), *cert. denied*, 540 U.S. 1177 (2004).

⁷⁷ *Id.*

domestic and foreign commentators.⁷⁸ In fact, a recent bill was introduced into Congress to strike the Lacey Act's provisions for prosecuting violations of foreign law, spurred by both this case and the Gibson guitar cases.⁷⁹

B. THE *GIBSON GUITAR* CASES

On November 17, 2009, the United States government raided Gibson Guitar's Tennessee based warehouses and factories, seizing guitars and several forms of wood.⁸⁰ At issue in this raid was an alleged violation of the law of Madagascar that prohibited the export of unfinished ebony wood.⁸¹ Two years later, the government again raided and seized Gibson's properties.⁸² This time the charge was that the Lacey Act had been violated by falsely labeling Indian ebony wood to circumvent Indian law.⁸³ The much publicized case has been roundly criticized as an attack on the free market by certain groups, while cautiously praised by others as a good demonstration of how the Lacey Act may curb illegal environmental actions.⁸⁴ As future Lacey Act litigation ensues, all parties will be forced to grapple with the reality that all foreign laws must be considered, no matter how insignificant, if commerce is to be done globally.

⁷⁸ See, e.g., Editorial, *Rough Justice*, ECONOMIST, July 22, 2010.

⁷⁹ Freedom from Over-Criminalization and Unjust Seizures Act of 2012, H.R. 4171, 112th Cong. § 2 (2012).

⁸⁰ Verified Complaint *In Rem*, United States v. Ebony Wood in Various Forms, No.3:10-cv-00747 (M.D. Tenn. Aug. 9, 2010).

⁸¹ Marcus Asner, Maxwell Preston & Katherine Ghilain, *Gibson Guitar, Forfeiture, and the Lacey Act Strike a Dissonant Chord*, BLOOMBERG BNA: DAILY ENVIRONMENT REPORT n.29 (Sept. 4, 2012).

⁸² Andersen, *supra* note 2.

⁸³ Asner et al., *supra* note 81, at 4.

⁸⁴ See, e.g., Juskiewicz, *supra* note 3 (attacking the government's decision to raid); Asner et al., *supra* note 81, at 5 (arguing that the Act achieves its goals while protecting individual rights).

III. THE IMPACT OF LACEY ACT ENFORCEMENT OF FOREIGN LAW ON LITIGANTS AND THE JUDICIARY

A. LAW ENFORCEMENT

The 2008 amendments to the Lacey Act have, by all accounts, given significantly expanded power to federal authorities to prosecute environmental violations.⁸⁵ Lacey Act enforcement is primarily handled by the Department of Justice's Environmental Crimes Section, which has national responsibility for trying environmental and conservation crimes.⁸⁶ Given that the Lacey Act now authorizes prosecutions for violations of "any foreign law" under the Act, however, the Environmental Crimes Section now has the option of utilizing any foreign law, regulation, statute, or other legal promulgation by a state to prosecute people or businesses attempting to import plants and wildlife into the United States illegally.⁸⁷ The question, then, becomes how federal authorities will become aware of, and how they will apply, foreign law to Lacey Act violations.

A primary method as to how authorities learn of Lacey Act violations in all forms, but especially in cases of broken foreign law, is reporting and information from outside the federal government.⁸⁸ For this reason environmental groups have taken it upon themselves to be vigilant in reporting not only instances of illegal activity, but also the specific laws which are being infringed.⁸⁹ The International Network for Environmental

⁸⁵ See, e.g., Colbourn & Swegle, *supra* note 7, at 92–93.

⁸⁶ *Recent Amendments to U.S. Lacey Act Should Help Protect Forests Worldwide*, INT'L NETWORK FOR ENVTL. COMPLIANCE AND ENFORCEMENT, 7–8, available at http://www.inece.org/climate/ClimateComplianceAlert_LaceyAct.pdf [hereinafter *Recent Amendments to Lacey Act*].

⁸⁷ *594,464 Pounds of Salmon*, 871 F.2d at 825; Colbourn & Swegle, *supra* note 7, at 102–04.

⁸⁸ *Recent Amendments to Lacey Act*, *supra* note 86, at 7.

⁸⁹ *Id.* at 8.

Compliance and Enforcement, for example, recommends that copies of the laws be sent to the appropriate authorities in order to assist in their case.⁹⁰ In most previous international law cases involving the Lacey Act, the initial investigation commenced due to a tip from an outside source. For example, in *United States v. Lee*, the National Marine Fisheries Service undertook an investigation "after receiving information" that the defendant was engaged in activity in contravention of Taiwanese law.⁹¹ Similarly in *United States v. McNab* the Service began its investigation following reception of "an anonymous facsimile" which detailed not only the details of the defendant's operation, but also that it was in breach of Honduran law.⁹² Thus the government often relies upon outside, usually anonymous, tips to conduct investigations into Lacey Act violations involving foreign law.⁹³

Some criticism has been leveled at federal enforcement activities for the lack of a clear explanation as to how authorities prosecute foreign law Lacey Act cases.⁹⁴ Rocco, for example, notes that the very broad delegation of authority under the Act gives the government "the power to decide for itself which laws or regulations of the foreign sovereign should be enforced."⁹⁵ True or not, the fact that there appears to be no systematic method or unit that investigates foreign law to check Lacey Act violation makes the government an easy target for defendants seeking to criticize the legitimacy of the prosecution. Gibson Guitar's CEO, for example, claimed that the federal government was "gunning for us" and "just looking for us to make a mistake or do something wrong."⁹⁶ A clearer explanation of the policies that law enforcement uses to find and investigate foreign law in connection with the

⁹⁰ *Id.*

⁹¹ 937 F.2d 1388, 1396 (9th Cir. 1991).

⁹² 931 F.3d 1228, 1232 (11th Cir.), *cert denied*, 540 U.S. 1177 (2004).

⁹³ *Id.*; *Lee*, 937 F.2d at 1396.

⁹⁴ *See, e.g.*, Rocco, *supra* note 13, at 15.

⁹⁵ *Id.*

⁹⁶ McKinley, *supra* note 1.

Lacey Act would stem much of this criticism and instill more public confidence in the prosecution process—confidence which has been damaged by high profile cases such as Gibson Guitar, in which the media rushed to the defense of the corporation.⁹⁷

B. POTENTIAL LACEY ACT DEFENDANTS

Corporations and individuals who deal in plants and wildlife that fall within the Lacey Act's purview have the unfortunate duty to remember that they may be potential defendants in Lacey Act suits if they do not follow its provisions.⁹⁸ Furthermore, the onus for remaining within the boundaries of the Act is entirely upon the importer.⁹⁹ The government has made clear that it has no intention to make a comprehensive list of foreign laws, the violation of which would trigger a Lacey Act violation.¹⁰⁰ However, it continues to emphasize that "any" foreign law that protects plants or regulates plant related offenses must be known by the importer.¹⁰¹ Importers accordingly must be vigilant to ensure they remain on the right side of the law.

As a response to this burden, several wood products companies, law firms, and other entities dealing with imported plants have formulated certain

⁹⁷ See, e.g., Andersen, *supra* note 2, at 2; Lee Christie, *Gibson Guitar CEO fights back*, CNNMONEY, Sept. 2, 2011, http://money.cnn.com/2011/09/02/smallbusiness/gibson_guitar/index.htm.

⁹⁸ Colbourn & Swegle, *supra* note 7, at 103.

⁹⁹ ANIMAL AND PLANT HEALTH INSPECTION SERVICE, U.S. DEP'T OF AGRIC., LACEY ACT AMENDMENT: COMPLETE LIST OF QUESTIONS AND ANSWERS (Feb. 16, 2012), www.aphis.usda.gov/plant_health/laceyact/downloads/faq.pdf.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*; Lacey Act, § 3372(a)(2)(B)(i).

guidelines in the hopes of avoiding Lacey Act related trouble.¹⁰² Many of these recommendations focus upon the "due care" requirement of the Act in an effort to cultivate a safe harbor for businesses.¹⁰³ The checklists generally enshrine a policy of extensive documentation and a requirement for wood and plant suppliers to thoroughly research their local laws and the origins of their products.¹⁰⁴ Other common items include, but are not limited to, independent research, on-site inspections of suppliers, and negotiating insurance or letters of credit.¹⁰⁵ However, none of these checklists are intended to be used as the only form of protection by an importer against Lacey Act violations, and all persons and corporations importing plants covered by the Lacey Act must ensure compliance in order to avoid potential forfeiture, civil, and criminal actions.¹⁰⁶

C. THE JUDICIARY

On some level, the problems facing the judiciary with regard to interpretation and application of foreign law are the same problems faced by the prosecution in proving its case and the defense in showing that it was not in violation. There is, however, an interesting split dynamic in the treatment of foreign law in federal court.¹⁰⁷ Questions of foreign law are issues of law,

¹⁰² See, e.g., Shannon Rogers, *Lacey Act Compliance Becomes a Little Less Cloudy*, J. GIBSON MCILVAIN CO., Oct. 5, 2012 <http://www.mcilvain.com/lacey-act-compliance-becomes-a-little-less-cloudy/>.

¹⁰³ See, e.g., McCue, *supra* note 34, at 1, 4–8.

¹⁰⁴ See, e.g., Rogers, *supra* note 102; McCue, *supra* note 34, at 6–7.

¹⁰⁵ McCue, *supra* note 34, at 6–7.

¹⁰⁶ Rogers, *supra* note 102; McCue, *supra* note 34, at 1, 5; Colbourn & Swegle, *supra* note 7, at 94.

¹⁰⁷ Roger M. Michalski, *Pleading and Proving Foreign Law in the Age of Plausibility Pleading*, 59 BUFF. L. REV. 1207, 1228 (2011).

not fact, and are subject to *de novo* review on appeal.¹⁰⁸ Nevertheless, each party may, and sometimes must, litigate issues of foreign law.¹⁰⁹ The role of the judiciary in interpreting foreign law, especially as it regards the Lacey Act, is often murky and deserves close study.¹¹⁰

Foreign law in federal court is controlled by Federal Rule of Civil Procedure 44.1, which states in full:

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Because the ruling is a question of law, it is subject to *de novo* review on appeal, further separating it from a question of fact.¹¹¹ However, as noted in FRCP 44.1's first sentence, the party intending to raise an issue about the law of a foreign state must provide notice. In this case that would mean that a federal prosecutor would be required to raise the issue of the foreign law that formed the predicate offense under the alleged Lacey Act violation.¹¹² It is therefore often highly advantageous for each party to present its own views

¹⁰⁸ Louise Ellen Teitz, *From the Courthouse in Tobago to the Internet: The Increasing Need to Prove Foreign Law in US Courts*, 34 J. MAR. L. & COM. 97, 99 (2003).

¹⁰⁹ FED. R. CIV. P. 44.1; Michalski, *supra* note 107, at 1228–29.

¹¹⁰ *Id.*; Lacey Act, § 3372(a)(2)(A); Michalski, *supra* note 107, at 1228–29; Teitz, *supra* note 108, at 99.

¹¹¹ Teitz, *supra* note 108, at 99.

¹¹² *See generally* Colbourn & Swegle, *supra* note 7, at 93.

on the interpretation of a foreign law, especially in the instance of a Lacey Act foreign law case, where the entire suit may hinge upon foreign law.¹¹³

Despite these incentives, however, the question of foreign law remains entirely a question of law, not fact, and judges are experts on the law.¹¹⁴ FRCP 44.1 provides judges the opportunity to undertake research *sua sponte* into foreign law.¹¹⁵ Some judges are vociferous in voicing their support for such an action, especially when it comes as a replacement for listening to expert testimony or reading affidavits from experts retained by either side of the suit.¹¹⁶ The primary justification for discounting such party-sponsored testimony is bias.¹¹⁷ Others, however, see no problem with using expert testimony and affidavits so long as they are properly authenticated using appropriate legal methods.¹¹⁸ An additional complication is that judges are under no obligation under the Rule to undertake this investigation.¹¹⁹ As a result, there is no way for the litigants to know whether the judge will

¹¹³ See Michalski, *supra* note 107, at 1228–29.

¹¹⁴ *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 633 (7th Cir. 2010) (Posner, J., concurring).

¹¹⁵ Michalski, *supra* note 107, at 1228.

¹¹⁶ See, e.g., *Bodum*, 621 F.3d at 629, 632–34 (Posner, J., concurring).

¹¹⁷ See, e.g., *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 495–96 (7th Cir. 2009) ("But the lawyers who testify to the meaning of foreign law, whether they are practitioners or professors, are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client or their willingness to fall in with the views urged upon them by the client. Those are banes of expert testimony.").

¹¹⁸ See *Bodum*, 621 F.3d at 639 (Wood, J., concurring); see also Michalski, *supra* note 107, at 1231 ("Appellate courts frequently rebuke district courts for not considering expert testimony.").

¹¹⁹ See FED. R. CIV. P. 44.1.

undertake a *sua sponte* investigation, and thus must argue their case on the law, even if the judge ultimately ignores their arguments.¹²⁰

Furthermore, suits involving foreign law often pose unique difficulties to the judge, who must ultimately make the final interpretation on the matter.¹²¹ Especially when the foreign law originates in a language other than English, issues of translation and comparative law between different legal systems will make the process of interpretation extremely difficult.¹²² In defending the use of expert testimony, Judge Wood has aptly stated:

There will be many times when testimony from an acknowledged expert in foreign law will be helpful, or even necessary, to ensure that the U.S. judge is not confronted with a "false friend" or that the U.S. judge understands the full context of the foreign provision. Some published articles or treatises, written particularly for a U.S. audience, might perform the same service, but many will not, even if they are written in English, and especially if they are translated into English from another language.¹²³

In fact, if there is a criticism of Judge Wood's statement it is that it may overestimate the ability of even experts to adequately convey or translate certain difficult and complex topics in foreign law to the U.S. Judge. The language of the law is not equivalent to a technical manual; specific words have very important and charged meanings, which may influence the

¹²⁰ Michalski, *supra* note 107, at 1228 ("The litigating parties thus will never know, *ex ante*, to what extent the court will be involved in determining questions of foreign law.").

¹²¹ *Bodum*, 621 F.2d at 638–39 (Wood, J., concurring).

¹²² *Id.*

¹²³ *Id.* at 639.

outcomes of entire cases.¹²⁴ If two or more translations of law differ, then that translation difference, whether it is stylistic or substantive, may still play an important role in determining whether the prosecution or defendant prevails in a given case.¹²⁵ When considering that the Lacey Act enforces literally every foreign state's law concerning plants, the daunting task of the judiciary becomes more apparent; any federal court must be prepared to confront a case based on law from any jurisdiction on the planet.¹²⁶

IV. CONCLUSION

While the Lacey Act is the oldest operating environmental protection law in the United States, its recent amendments have pushed it in a bold new direction.¹²⁷ Its expanded definition of the word "plant" has sent shockwaves throughout many of world's industries.¹²⁸ Opinion has varied wildly from effusive praise of the United States government for taking a stand against illegal logging and other plant-related offenses¹²⁹ to harsh criticism for imposing burdens on American businesses.¹³⁰ At its heart, this dispute is a reflection of many conflicting ideologies in the United States today: laissez-faire vs. regulation; industry vs. the environment; business vs. Washington.

When the Lacey Act was implemented in the early 1900s, it is difficult to imagine that Congressman Lacey expected it to expand from a law designed to protect against the poaching of birds to one of the most important

¹²⁴ See Carolyn B. Lamm & K. Elizabeth Tang, *Rule 44.1 and Proof of Foreign Law in Federal Court*, LITIG., Fall 2003, at 31, 32.

¹²⁵ *Id.* at 33.

¹²⁶ Lacey Act, 16 U.S.C. § 3372(a)(2)(B) (2006); Andersen, *supra* note 2, at 1.

¹²⁷ Anderson, *supra* note 10, at 29.

¹²⁸ Coulbourn & Swegle, *supra* note 7, at 92–93.

¹²⁹ See, e.g., *Recent Amendments to Lacey Act*, *supra* note 86.

¹³⁰ See, e.g., Juskiewicz, *supra* note 3.

tools in the federal prosecutor's arsenal.¹³¹ However, it was undoubtedly the will of Congress to give the Lacey Act new teeth in fighting environmental offenses against plants when it voted to amend and expand the Act.¹³² The Act now may apply its powerful strict forfeiture, civil liability, and criminal liability provisions to all plant-related offenses encapsulated within it.¹³³

This, of course, includes its foreign law provisions, which have proven controversial in the past and will doubtless provide fodder for discussion in the future. Some of the Lacey Act's most controversial moments came in the beginning of the 21st century. *United States v. McNab* saw fishermen convicted for violating a law of a foreign government that strenuously objected to its application and even briefed in opposition to the conviction.¹³⁴ And the recent Gibson Guitar cases demonstrated that no business in America may escape investigation if suspected of dealing in illegal plant imports.¹³⁵ In today's increasingly globalized world, there will likely be many more complex and difficult Lacey Act cases in the future.

These difficulties are present for all involved in Lacey Act litigation. The prosecutor and other law enforcement entities must grapple with the difficult problems of determining foreign law and locating those who are importing plants to the United States illegally.¹³⁶ As a result, there is a great reliance on tips and outside sources, which occasionally leads to allegations of bias.¹³⁷ Of course importers, too, must be extremely concerned about avoiding violations of the Lacey Act. In practice, this has resulted in attempts to maintain stricter control over their suppliers and ensure that everything

¹³¹ See Rocco, *supra* note 13, at 11.

¹³² See Colbourn & Swegle, *supra* note 7, at 93.

¹³³ Lacey Act, 16 U.S.C. § 3372(a)(2)(B) (2006).

¹³⁴ *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003).

¹³⁵ See, e.g., Andersen, *supra* note 2, at 1.

¹³⁶ Colbourn & Swegle, *supra* note 7, at 98.

¹³⁷ McKinley, *supra* note 1.

possible is done to fulfill the due care standard.¹³⁸ And, finally, the judiciary itself must grapple with questions of foreign law, including when to take *sua sponte* notice of it, as well as the very difficult issues of translation and the use of treatises as compared to party-presented expert witnesses.¹³⁹

Lacey Act foreign law cases are challenging and complex. They demand that attorneys deal with legal and substantive issues that reach across borders and judicial systems, often with millions of dollars and even individual freedom on the line, in an effort to halt illegal environmental crimes around the world. The foreign law issues of the Lacey Act are deeply important for the 21st century as the world shrinks and enforcement efforts become interconnected and transnational, precariously balancing environmental needs, individual freedom, business interests, and worldwide law.

¹³⁸ McCue, *supra* note 34; United States v. Lee, 937 F.2d 1388, 1396 (9th Cir. 1991).

¹³⁹ Bodum USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624, 633 (7th Cir. 2010) (Posner, J., concurring).