Criminal Law & Procedure

Domestic Convictions for Foreign Violations

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Note from the Editor:

This article discusses the Lacey Act and argues that its incorporation of foreign law renders it unconstitutional. As always, the Federalist Society takes no position on particular legal or public policy matters. Any expressions of opinion are those of the authors. Generally, the Federalist Society refrains from publishing pieces that advocate for or against particular policies. When we do so, as here, we offer links to other perspectives on the issue, including ones in opposition to the arguments put forth in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.

• *The Lacey Act: Leading the Fight Against Illegal Logging*, Sierra Club, *available at* http://www.sierraclub.org/interactive/lacey-act.

• Craig Havighurst, *Why Gibson Guitar Was Raided By The Justice Department*, NPR (August 31, 2011), *available at* http://www.npr.org/sections/therecord/2011/08/31/140090116/why-gibson-guitar-was-raided-by-the-justice-department.

The statutory definition of most criminal offenses is entirely self-contained. That is, the law creating the offense defines every element of that crime. In some cases, however, a criminal law may refer to other statutes to fill out one or more elements of an offense. One example is the Racketeer Influenced and Corrupt Organizations Act (RICO).[1] RICO makes it a federal offense for an "enterprise," which can consist of one person or a group of offenders, to commit a "pattern of racketeering activity" through two or more "predicate offenses," which can include numerous crimes defined by other provisions in the United States Code.[2]

In a few instances, however, the government[3] makes it a crime to violate a foreign law.[4] One example is the Lacey Act.[5] Originally enacted in 1900, the Lacey Act prohibits, on pain of criminal penalties, the importation of flora or fauna obtained in violation of "any foreign law."[6] The federal government has applied that statute to various types of imported items.

There is a particularly odd feature of the Lacey Act. Unlike the RICO Act, the Lacey Act incorporates foreign laws as elements of the offense. A person therefore can violate domestic law if the imported goods were obtained in violation of a foreign law. Moreover, the foreign law need not be a criminal law; the violation of a civil statute is sufficient.[7] The foreign law also need not be a statute; not only is the violation of a regulation sufficient, but the failure to comply with other rules issued by a foreign nation is satisfactory as long as it amounts to a "law" in that country. Moreover, it is not necessary that a foreign law be adopted by a branch of a foreign government that is the equivalent of our legislature, executive, or judiciary, because the Lacey Act does not limit who may create "law" overseas. 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.[8]

The result is that the Lacey Act creates a remarkable anomaly in federal criminal law because it delegates federal lawmaking authority to foreign officials. Because of this delegation, the act violates Articles I and II of the Constitution, as well as the Due Process Clause of the Fifth Amendment. Those provisions forbid Congress and the President from handing over to foreign officials the ability to adopt rules or regulations that govern the conduct of the people in this country.[9]

I. The Origin of the Lacey Act

The Lacey Act did not start its life with that breathtaking scope. It began as a humble anti-poaching law. Late in the nineteenth century, the states found themselves unable to enforce their game laws against non-resident hunters. States were able to enforce their games laws against residents, but found that out-of-staters were violating their laws with relative impunity. People would travel from one state (e.g., North Dakota) to another state (e.g., South Dakota), hunt without a license, take more than the state limit, and return home before anyone was the wiser. Since state law enforcement officers cannot exercise authority in another state, even an adjacent one, poachers were able to escape the reach of the law.

Congress could have left the problem to the states to work out by cross-designating each other's game officers as their own law enforcement officers,[10] but Congress decided to make a federal case out of the matter by enacting the Lacey Act.[11] The original version of the act, however, did not raise the constitutional problems noted above. That did not occur until a 2008 revision of the statute.[12]

In that year environmentalists, members of the domestic timber industry, and labor unions combined to support a revision to the statute that added the importation of plants obtained in violation of state law, as well as any products made from plants obtained in violation of foreign law, to the list of punishable offenses. The combination was a classic example of the quip that politics makes strange bedfellows. Environmentalists wanted to prevent the deforestation of foreign lands, while timber industry employees and their unions wanted to make it difficult to import foreign timber for use in the construction of houses or furniture. The combination persuaded Congress to enact their sought-after revision of the Lacey Act. In all likelihood, what helped those groups succeed was the fact that the Lacey Act revision was added to an entirely unrelated

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farm policy bill.[13] Members of Congress therefore likely paid little attention to what appeared to be a minor revision to a statute that had not generated much controversy in its 108-year existence. It certainly is difficult to believe, however, that the Members of Congress in office that year consciously intended to subject American individuals and businesses to governance by foreign nations.

II. The Reach of the Lacey Act

As revised, the Lacey Act makes it is unlawful to "import, export, transport, sell, receive, acquire, or purchase" fish, wildlife, or plants that have been "taken, possessed, transported, or sold . . . in violation of any foreign law."[14] Some federal courts of appeals have concluded that the Lacey Act does not require proof of a foreign law violation.[15] The text of the Lacey Act, however, is clearly to the contrary. Whether a case involves "fish" "wildlife," or "any plant," Section 3372(a)(2)(A) and (B) of Title 16 requires the government to prove that item was "taken, possessed, transported, or sold . . . *in violation of any foreign law*."[16] The italicized phrase is, when properly read, an element of the offense. Indeed, the act makes little sense otherwise. Disregarding the phrase "taken, possessed, transported, or sold . . . *in violation of any foreign law*" transforms the Lacey Act into a flat ban on imports. Yet, Congress did not design the Lacey Act to work in that manner. Congress sought to ban only the importation of unlawfully obtained items in order to pay respect to the law of the home state or nation. Any court that holds otherwise is misreading the statute to avoid addressing the serious, and likely fatal, constitutional issues discussed in this article.[17]

The Act does not define the term "any foreign law" or restrict its meaning. [18] The federal courts have read that term broadly, to reach civil laws, regulations, and an agency's statement of the governing law.[19] Moreover, the Lacey Act is not limited to only those foreign laws in existence in 2008; the act reaches later-adopted laws as well. The effect is to delegate lawmaking authority to every foreign nation, enabling them to alter or amend the scope of the crime defined by federal law over time as they see fit.

A violation of the Lacey Act can result in long-term imprisonment and crushing fines. A person who "knowingly" imports or exports wildlife or plants in violation of the Act can receive a sentence of five years' imprisonment and a fine of $250,000 ($500,000 for corporations) for each offense.[20] The act also authorizes criminal penalties for mere negligence. A person who "in the exercise of due care" should have known that the statute prohibited his conduct can receive one year's imprisonment and a fine of $100,000 ($200,000 for an organization) for each offense.[21] Each unlawful act is a violation of the statute, so a commercial fisherman who negligently hauls in one thousand fish, or an importer who brings into America one thousand different pieces of furniture, is subject to one thousand years of imprisonment and a fine exceeding the gross domestic product of most of the world's nations. Moreover, liability is not limited to the person who violates a foreign law on foreign soil. An importer, for example, is liable if anyone in the potentially long and convoluted chain of parties responsible for the harvesting, processing, finishing, shipping, and entry of original material (such as wood) or a processed item (such as bagpipes) violated a foreign law.[22] The Lacey Act therefore has the potential to expose a person engaged in a facially legitimate activity—such as importing fish or furniture—to the onerous sentences society ordinarily reserved for dangerous felons and heinous crimes.

III. The Constitutional Flaws in the Lacey Act

It is impossible to believe that the Framers would have countenanced any delegation of federal lawmaking authority to a foreign power. After all, "foreign control over American law was a primary grievance of the Declaration of Independence. The Declaration's most resonant protest was that King George had 'subject[ed] us to a jurisdiction foreign to our constitution.'"[23] The colonists railed against Parliament for making laws governing the colonies notwithstanding their lack of representation in that assembly, laws that, from 1763 to 1775, generated the friction that lead to the clashes at Lexington and Concord.

The delegates to the Constitutional Convention of 1787 hotly debated the question of how Congress should be structured to ensure that both large and small states would be adequately represented in that body.[24] It would be absurd to believe that the Framers would have delegated to Parliament the authority to continue to pass legislation governing the United States. It is even more absurd to infer from the Framers' silence on the matter that something as drastic as delegating to a foreign government the ability to make laws for the new nation would have gone unnoticed. If the Founders contemplated any such result, someone would have mentioned it, and the overwhelming response would have been negative. Yet, that is the effect of the Lacey Act on Americans. Not surprisingly, therefore, the act violates Articles I and II of the Constitution

A. The Lawmaking Power in Article I

Start with the text of the Constitution. Article I grants "[a]ll legislative Powers" to a Congress consisting of a Senate and a House of Representatives.[25] To exercise that power, individuals must be elected (and re-elected) to office and satisfy certain defined criteria to be sworn in as Senators and Representatives.[26] Article I also establishes a rigorous process for the House and Senate to enact a "Bill" and "[e]very Order, Resolution, or Vote" requiring the approval of both chambers.[27] In order to create a "Law," each chamber must pass the identical bill and present it to the President, and the President must sign it (or both houses must repass it by a two-thirds vote following the President's veto).[28] The effect is to give the Members the opportunity for study and debate over any bill and to compel each Senator, each Representative, and the President to take a public position on what conduct should be outlawed, encouraged, supported, protected, or funded.[29] As noted elsewhere:

> The Article I lawmaking procedure not only offers the opportunity for reasoned consideration and debate over the merits of proposed legislation, but also—and perhaps more importantly—provides voters with a basis for holding elected federal officials politically accountable for the decisions that they make and must stand behind

> when they run for re-election. The bicameralism and presentment requirements therefore enable the electorate to decide whether Representatives, Senators, and the President should remain in office or be turned out every two, six, or four years.[30]

The incorporation as "Law" of whatever edicts or instruments foreign nations may adopt is tantamount to vesting lawmaking authority in those nations or, what is the same thing, delegating lawmaking authority to foreign nations.[31] Article I, however, vests the authority to create a "Law" only in Congress and the President. On its face, therefore, the Lacey Act violates the Legislative Vesting, Senate and Representative Qualification Clauses, Election Regulations, Bicameralism, and Presentment Clauses of Article I.

The text of Article I strongly suggests that only Congress (with the President's assistance) can create a "Law," which gives rise to the necessary corollary that Congress cannot delegate its lawmaking responsibilities elsewhere.[32] There are circumstances, however, where Congress may delegate to federal agencies the authority to promulgate regulations that are tantamount to a law.[33] To do so, Congress must define an "intelligible principle" in the authorizing legislation for the agency to use when exercising that power. The U.S. Supreme Court has been extraordinarily generous in its interpretation of what constitutes an "intelligible principle," with even a delegation to promulgate regulations that are in the "public interest" being held sufficient.[34] Since 1935, the Court has upheld every delegation of congressional authority to a federal agency to issue governing regulations.[35] The Supreme Court has found a delegated standard "unintelligible" only twice in the Court's history,[36] and those delegations gave the recipient of delegated power utterly no standard to apply when creating law.[37] Accordingly, as presently interpreted, the Delegation Doctrine imposes a rather low hurdle for Congress to overcome if it wants to delegate rulemaking authority to an executive agency.

Even if this low standard is applied to delegations of lawmaking authority to foreign governments, the Lacey Act would not pass muster because the statute supplies no standard whatsoever for a foreign nation to use when creating a "law" whose violation can trigger liability under the Lacey Act. The act does not identify the foreign laws it incorporates, the form that those laws may take, or the elements that American law deems essential to qualify a proclamation as a "law." The act does not give foreign government officials any test, standard, factors, or principles to use when enacting laws that create civil and criminal liability under American law. Indeed, the Lacey Act does not even require that a foreign law be readily accessible to Americans or have an English translation. The Supreme Court has set the bar low for Congress to empower a delegated party to adopt law, but the Lacey Act provides no standard at all for a foreign nation to use. Finally, even if it were possible to imply a "public interest" standard into the Lacey Act, there is no justification for assuming that officials of a foreign government will act with the interests of the *American public* in mind. Accordingly, the Lacey Act violates Article I.

B. The Appointment Power in Article II

The Constitution expressly contemplates that there will be federal offices other than the three specifically created in Articles I, II, and III. How do we know that? Because the Constitution empowers the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[38] Congress can create those offices by exercising its power under the Necessary and Proper Clause[39] to assist the President in his duty to see to the execution of federal law.[40] The Constitution does not provide a mechanism for the election of those officers, however, so how do they come to hold office? That is where the Appointments Clause of Article II comes into play.[41]

The Framers knew that they had to fill out a government with non-elected officials, but they were troubled by the Crown's "manipulation of official appointments" and remembered the appointment power as "the most insidious and powerful weapon of eighteenth-century despotism."[42] To avoid that problem, the Framers carefully regulated the appointment of "officers of the United States,"[43] a term that refers to any person who exercises "significant" federal authority.[44] The Framers "carefully husband[ed] the appointment power to limit its diffusion" to officials who would be subject to "the will of the people."[45] The Appointments Clause serves that role. Only the President, "the Heads of Departments," and "the Courts of Law" may appoint "officers of the United States." Only those parties who have been properly appointed, who have received a commission from the appointing official, and who have taken the oath of office may exercise federal power.[46] The Clause "ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people."[47]

Foreign officials come in all shapes and sizes. Some foreign presidents run the country; others are just figureheads. Some national leaders have terms lasting four years; others, up to seven. Our Interior Secretary is responsible for America's federal parks and other properties. The Interior Minister in other nations is their chief domestic law enforcement officer. And so on and so forth. But whatever office they hold, whatever authority they may exercise, and whatever period they exercise that power, they all have two elements in common: None of them were elected by Americans, and none of them were appointed by one of the three entities specified in Article II. Accordingly, none of them may exercise authority under federal law, and the making of laws to govern the people of the United States is the most fundamental federal authority imaginable. The result is that none of them may define the elements of a Lacey Act violation.

C. The Due Process Clause of the Fifth Amendment

There is yet another constitutional flaw in the Lacey Act. The delegation of federal lawmaking authority to foreign parties violates the Fifth Amendment Due Process Clause.[48] To understand why, it is helpful to start with some history.

The Due Process Clause is the lineal descendant of Magna Carta. King John signed the Great Charter in 1215 in order to end a civil war brought on by the barons because of King John's arbitrary use of royal power. Article 39 of Magna Carta is the most relevant provision. 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."[49] The "chief grievance to be redressed" by Chapter 39, as one scholar has noted, "was the King's practice of attacking his barons with forces of mercenaries, seizing their persons, their families and property, and otherwise ill-treating them, without first convicting them of some offence in his curia."[50] The guarantee that the crown could administer punishment only in accordance with "the law of the land" meant, according to Sir Edward Coke, that "no man [could] be taken or imprisoned, but per legem terrae, that is, by the common law, statute law, or custome of England."[51] Said differently, Article 39 protected "life (including limb and health), personal liberty (using the phrase in its more literal and limited sense to signify freedom of the person or body, not all individual rights), and property."[52] In the fourteenth century, Parliament changed the phrase "the law of the land" to "due Process of the Law," but the revision did not alter its meaning.[53] The principal teaching of Article 39 is that every component of the government—executive, legislative, and judicial—is subject to "the rule of law," the principle that, as *Marbury v. Madison* put it, "ours is a government of laws, and not of men."[54]

The constitutional history of the Due Process Clause reveals that the clause serves as an additional regulation of federal lawmaking power. The Election and Term Limit Clauses in Articles I and II, along with the Twelfth and Seventeenth Amendments, require that Senators, Representatives, and the President be elected to the limited terms of office defined in those provisions.[55] The Bicameralism and Presentment Clauses of Article I establish the procedure necessary for those federal elected officials to make "Law."[56] The Take Care Clause in Article II directs the President to see to the faithful execution of that "Law,"[57] the Judicial Power Clause in Article III grants the Supreme Court and lower federal courts the power "to say what the law is,"[58] and the Appointments Clause of Article II ensures that only parties properly appointed to their posts may enforce or interpret the "Law."[59] Read together those Articles define the "Republican Form of Government" that the Framers created for the nation and that Article IV guarantees each state.[60]

The Due Process Clause bars Congress from circumventing that regulatory scheme by delegating federal lawmaking power to private parties. As noted elsewhere:

> [T]he 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.[61]

But the Due Process Clause protects the public against more than the arbitrary exercise of government power. It also keeps the government from trying to avoid the constitutional restrictions imposed on federal lawmaking by delegating that power to politically unaccountable private parties.

> 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.[62]

By delegating lawmaking power to foreign government officials, the Lacey Act takes a giant step beyond a delegation of lawmaking power to private parties in this nation. Members of Congress and officers in the executive and judicial branches take an oath or affirmation to uphold the Constitution of the United States.[63] That oath is no less important than the one that a person takes as a witness before Congress, before an executive hearing officer, or in court. It is a solemn pledge to honor and support our nation's fundamental law—and probably is similar to the oath that foreign officials take to uphold their own nation's laws. The Lacey Act therefore turns over

federal lawmaking authority, not simply to parties who have not sworn to uphold our Constitution, but to individuals who have pledged instead to uphold the constitution of a foreign nation. Even if we were willing to assume that private parties in America would place this nation's interests above those of a foreign land, it would be fatuous to assume that government officials in North Korea would do so.

IV. Conclusion

Protection of wildlife and their natural environment is a worthwhile endeavor, but like every such undertaking it can only be done within the limit of the law. Good intentions cannot substitute for legal authority. The Lacey Act attempts to achieve a worthwhile goal in a constitutionally illegitimate manner. Congress cannot delegate its lawmaking power to foreign government officials.

Endnotes

1 The RICO Act was Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified, as amended, at 18 U.S.C. §§ 1961-68 (2012)).

2 18 U.S.C. 1961(A) & (B) (2012).

3 Ordinarily, only the federal government seeks to apply the criminal law extraterritorially. The reason is that the United States government does not face several legal and practical obstacles that hamper the states from extending their laws overseas. *See* 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, 342-44 & nn.19-23 (2015). For discussion of the federal government's efforts to apply federal law overseas, see generally Ellen S. Podgor, *A New Dimension to the Prosecution of White Collar Crime: Enforcing Extraterritorial Social Harms*, 37 McGeorge L. Rev. 83 (2006); Ellen S. Podgor, *Globalization and the Federal Prosecution of White Collar Crime*, 34 Am. Crim. L. Rev. 325 (1997).

4 That practice is different from making it a federal offense to commit certain acts in a foreign nation. For example, the Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified, as amended, at 15 U.S.C. §§ 78dd-1–78dd-3 (2012)), makes it a crime to bribe foreign government officials in order to obtain a benefit such as an export permit.

5 Lacey Act of May 25, 1900, ch. 553, 31 Stat. 188 (1900) (codified, as amended, at 16 U.S.C. §§ 3371-3378 (2012).

6 *See* Rachel Saltzman, *Establishing a "Due Care" Standard Under the Lacey Act Amendments of 2008*, 109 Mich. L. Rev. First Impressions 1 (2010); Francis G. Tanczos, Note, *A New Crime: Possession of Wood—Remedying the Due Care Double Standard of the Revised Lacey Act*, 42 Rutgers L.J. 549 (2011).

7 *See* United States v. 594,464 Pounds of Salmon, 871 F.2d 824, 828–29 (9th Cir. 1989) (holding that the Lacey Act makes it a federal crime to violate a foreign law imposing only civil sanctions); Animal & Plant Health Inspection Serv., U.S. Dep't of Agric., Lacey Act Primer and Updates 7 (Aug. 2013) [hereinafter Lacey Act Primer], http://www.aphis.usda.gov/plant_health/lacey_act/downloads/LaceyActPrimer.pdf [http://perma.cc/A4WG-Y76G] ("The underlying foreign law violation does not have to be a criminal violation, nor one actively enforced in the foreign country."); Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 Pub. Land L. Rev. 27, 81-82 (1995).

8 *See* United States v. McNab, 331 F.3d 1228 (11th Cir. 2003). For an extensive discussion of the *McNab* case, see Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminology 725, 777–82 (2012).

9 *See* Larkin, *supra* note 3.

10 For example, North Dakota could have designated South Dakota game officers as North Dakota law enforcement officers, and vice versa, which would have allowed each state to pursue suspects into their state of residence. The only potential federal issue raised by an interstate agreement is the Compact Clause, U.S. Const. art. I, §10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into an Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."). The principal role for the Clause is to prevent states from joining forces to infringe on federal power. *See*, *e.g.*, Cuyler v. Adams, 449 U.S. 433, 440 (1981); Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 694–95 (1925). Cross-designation of state law enforcement officers would not seem to pose any such risk.

11 *See* H.R. Rep. No. 56-474, at 1–2 (1900).

12 A comprehensive history of the adoption and development of the Lacey Act can be found at C. Jarrett Dieterle, Note, *The Lacey Act: A Case Study in the Mechanics of Overcriminalization*, 102 Geo. L.J. 1279 (2014).

13 Larkin, *supra* note 3, at 349 & nn.35-36.

14 16 U.S.C. § 3372(a)(2)(A)–(B) (2012).

15 *See* United States v. 594,464 Pounds of Salmon, 871 F.2d 824, 830 (9th Cir. 1989) (ruling that a foreign law violation is not an element of the offense, but is simply a matter for the government to consider in its exercise of prosecutorial discretion); United States v. Rioseco, 845 F.2d 299, 302 (11th Cir. 1988) ("Congress has made it a United States crime to take, to sell, or to transport wildlife taken in violation of any foreign law relating to wildlife. Congress, itself, has set out the penalties for violation of these Lacey Act provisions. Thus, Congress has delegated no power, but has itself set out its policies and has implemented them.") (citations omitted); United States v. Molt, 599 F.2d 1217, 1219 n.1 (3d Cir. 1979) (ruling that the Lacey Act treats the violation of a foreign law as "simply a fact entering into the description of the contraband article"; "[t]he Act does not delegate legislative power to foreign governments, but simply limits the exclusion from the stream of foreign commerce to wildlife unlawfully taken abroad. The illegal taking is simply a fact entering into the description of the contraband article[.]"). Some private parties have made the same argument. *See Oversight Hearing on the 2008 Lacey Act Amendments Part 1 and 2: Hearing Before the Subcomm. On Fisheries, Wildlife, Oceans, and Insular Affairs of the H. Comm. on Natural Res.*, 113th Cong. 62-63 (2013) (testimony of Marcus A. Asner).

16 16 U.S.C. § 3372(a)(2)(B) (2012) (emphasis added).

17 Ironically, any court that tried to interpret the Lacey Act as not requiring proof of a foreign-law violation to steer clear of the constitutional problems noted below would simply run headlong into another one that is equally fatal. A series of Supreme Court decisions interpreting the Due Process Clause prohibits the courts from interpreting a criminal law in a manner that unreasonably expands the breadth of the statute. *See, e.g.*, Metrish v. Lancaster, 133 S. Ct. 1781 (2013); Rogers v. Tennessee, 532 U.S. 451, 458-62 (2001); Marks v. United States, 430 U.S. 188, 192 (1977); Douglas v. Buder, 412 U.S. 430 (1973); Rabe v. Washington, 405 U.S. 313 (1972); Bouie v. City of Columbia, 378 U.S. 347, 352 (1964) ("[A] deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language."). A decision that eliminates the government's burden to prove a foreign-law violation evident from the text of the law would have the same effect as an unreasonable expansion of the statute and would be unconstitutional for the same reason.

18 *See* Larkin, *supra* note 3, at 352-54 ("First, the Act does not limit the 'foreign' nations whose laws are incorporated into domestic law. Countries with a civil law background, like Italy, are as eligible for inclusion as countries like Great Britain, from whence our common law arose. Countries with a sectarian code, like Saudi Arabia, are also included along with countries with secular codes, like Canada. Countries ruled by dictators, like Sudan, are afforded the same treatment as countries governed by parliaments, like Hungary. Second, the act does not restrict the type of foreign "law" that is incorporated. The foreign law need not be a criminal law; a foreign law with only a civil penalty

can trigger federal criminal liability. Third, the foreign law need not altogether forbid taking an animal or plant. Violation of a foreign law regulating only the process of harvesting wood can trigger federal criminal liability, as can the failure to pay an export fee or the erroneous completion of required paperwork. Fourth, the Lacey Act does not restrict the form that foreign law may take. That law can be a statute, a regulation, a local ordinance, a nation's interpretation of one of its laws, or anything else that a foreign nation defines as "law." For example, in 2012 the Department of Justice investigated the Gibson Guitar Corporation for a violation of the laws of Madagascar, which the government described as "Departmental Memorandum 001/06/MINENVEF/Mi" and as Madagascar Interministerial Order 16.030/2006. That interpretation suggests that a foreign legal edict of any type can trigger criminal liability. Fifth, the Lacey Act incorporates not only the foreign laws in effect at the time that statute was adopted, but also whatever laws a foreign nation may hereafter adopt. Sixth, the Act does not require that the foreign law, in whatever land and in whatever form it appears, be readily accessible or even be written in English. In the Gibson Guitar case, the Department of Justice investigated Gibson Guitar for a violation of the laws of Madagascar even though at least one of the relevant laws had to be translated into English.") (footnotes omitted).

19 *See* United States v. 594,464 Pounds of Salmon, 871 F.2d 824, 825 n.2, 828–30 (9th Cir. 1989) (holding that the Lacey Act makes it a federal crime to violate a Taiwanese board's "announcement" that was not technically a "regulation").

20 16 U.S.C. § 3373(d) (2012); 18 U.S.C. § 3571 (2012); Lacey Act Primer, *supra* note 7, at 8.

21 16 U.S.C. § 3373(d)(2) (2012).

22 *See, e.g.*, United States v. McNab, 331 F.3d 1228 (11th Cir. 2003) (commercial fishermen); United States v. Lee, 937 F.2d 1388, 1393 (9th Cir. 1991) (same); Lacey Act Primer, *supra* note 7, at 7; *id*. at 19 ("Example: Bagpipes with wooden pipes . . . HTS Section 92059020—no declaration required . . . The Lacey Act itself still applies to the wooden pipes . . . If the pipes were made from illegally harvested trees then the bagpipe shipment is in violation of the Lacey Act"); Dieterle, *supra* note 12, at 1303.

23 Nicholas Quinn Rosenkranz, *An American Amendment*, 32 Harv. J.L. & Pub. Pol'y 475, 477–78 (2009) (footnote omitted).

24 *See*, *e.g.*, Bernard Bailyn, The Ideological Origins of the American Revolution (enlarged ed. 1992); Jack P. Greene, The Constitutional Origins of the American Revolution (2011); Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution (1985); Charles Howard McIlwain, The American Revolution: A Constitutional Interpretation (1923); Edmund S. Morgan, The Birth of the Republic, 1763-89 (4th ed. 2013); Jack Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1996).

25 *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.").

26 *See* U.S. Const. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); *id*. cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id*. § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."); *id*. cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."); *id*. §3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State[.]"); *id*. cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."); *id.* art. IV, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."); *id*. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.").

27 *See* U.S. Const. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."); *id*. cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."); *id*. cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.").

28 *See* U.S. Const. art. I, § 7, cls. 1 & 2; INS v. Chadha, 462 U.S. 919 (1983); *cf.* Clinton v. City of New York, 524 U.S. 417 (1998) (noting that Article I requires the same process in order to repeal or amend an existing law).

29 *See* Larkin, *supra* note 3, at 356.

30 *Id.*

31 *See* Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. Pa. L. Rev. 103, 105 (2008) ("dynamic incorporation does delegate lawmaking authority").

32 Article I expressly contemplates that Congress may select certain officers. *See* U.S. Const. art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers"); *id*. § 3, cl. 4 ("The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided."); *id*. § 3, cl. 5 ("The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of the President of the United States."). The Necessary and Proper Clause implicitly empowers Congress to hire staff. *See id*. § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."). Article I, however, does not suggest that Congress may empower anyone other than elected Senators and Representatives to cast a vote on an bill subject to the Bicameralism and Presentment requirements.

33 How to classify such delegations is somewhat of a mystery. On occasion, the Supreme Court has said that Congress cannot delegate its legislative power. *See*, *e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers."). If so, agencies cannot enact laws. Agencies, however, can fill in the blanks that Congress left for them in statutes, *see, e.g.*, Touby v. United States, 500 U.S. 160, 167 (1991) (holding that Congress can delegate to the Attorney General the authority to list controlled substances whose distribution is a federal offense); Yakus v. United States, 321 U.S. 414 (1944) (upholding statute that made violations of the price administrator's regulations a criminal offense); United States v. Grimaud, 220 U.S. 506 (1911) (Congress can delegate authority to an

administrative agency to promulgate regulations whose violation is punishable as a crime); *cf.* INS v. Chadha, 462 U.S. 919, 953 n.16 (1983) (noting that administrative agency rulemaking is not subject to the Presentment Clause), and those regulations have the force and effect of law, *see, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 295-96 (1979) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.' This doctrine is so well established that agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause.") (footnotes omitted).

34 *See* Nat'l Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943) (upholding against a delegation challenge a statute authorizing the licensing of radio communication "as public interest, convenience, or necessity [requires]"); Sunshine Coal Co. v. Adkins, 310 U.S. 381, 397 (1940) (same, a statute authorizing an agency to set maximum prices for coal "when in the public interest"); New York Central Securities Corp. v. United States, 287 U.S. 1, 24 (1932) (same, a statute authorizing the consolidation of interstate carriers when "in the public interest").

35 *See, e.g.*, *Whitman*, 531 U.S. 457; Loving v. United States, 517 U.S. 748 (1996); Touby v. United States, 500 U.S. 160 (1991); Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989); Mistretta v. United States, 488 U.S. 361 (1989); Lichter v. United States, 334 U.S. 742 (1948); Fahey v. Mallonee, 332 U.S. 245 (1947); Am. Power & Light Co. v. SEC, 329 U.S. 90 (1946); Bowles v. Willingham, 321 U.S. 503 (1944); Yakus v. United States, 321 U.S. 414 (1944); FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944); Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); New York Cent. Sec. Corp. v. United States, 287 U.S. 12 (1932); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); United States v. Grimaud, 220 U.S. 506 (1911).

36 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

37 *See, e.g.*, *Whitman*, 531 U.S. 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.'") (citations omitted).

38 U.S. Const. art. II, § 2, cl. 1.

39 U.S. Const. art. I, § 8, cl. 13 ("The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

40 U.S. Const. art. II, § 3 ("[The President he shall take Care that the Laws be faithfully executed[.]").

41 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.").

42 Gordon Wood, The Creation of the American Republic, 1776-1787, at 79, 143 (1998).

43 U.S. Const. art. II, § 3, cl. 6.

44 *See* Buckley v. Valeo, 424 U.S. 1, 126 (1976) ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]."); *see also* Edmond v. United States, 520 U.S. 651, 662 (1997); Weiss v. United States, 510 U.S. 163, 168–70 (1994).

45 Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 883–84 (1991); *id*. at 880 ("("The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint."); Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 483–84 & n.4 (1989) (Kennedy, J., concurring) (quoting The Federalist No. 76, at 455–56 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

46 *See* Dep't of Transp. v. Ass'n of Am. Railroads, 135 S. Ct. 1225, 1233-39 (2015) (Alito, J., concurring) (*Amtrak*); *id*. at 1235 ("Both the Oath and Commission Clauses confirm an important point: Those who exercise the power of Government are set apart from ordinary citizens. Because they exercise greater power, they are subject to special restraints. There should never be a question whether someone is an officer of the United States because, to be an officer, the person should have sworn an oath and possess a commission."); *Buckley*, 424 U.S. at 126.

47 *Amtrak*, 135 S. Ct. at 1238 (Alito, J., concurring).

48 The Supreme Court decided a series of cases in the twentieth century that prohibit the legislature from delegating standardless law-making authority to parties over whom the public has no political or legal recourse. *See, e.g.*, Eubank v. City of Richmond, 226 U.S. 137 (1912); Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Carter v. Carter Coal Co., 298 U.S. 238 (1936). Those cases are still good law. *See Amtrak*, 135 S. Ct. at 1237-38 (Alito, J., concurring) ("When it comes to private entities, however, there is not even a fig leaf of constitutional justification. Private entities are not vested with "legislative Powers." Art. I, § 1. . . . By any measure, handing off regulatory power to a private entity is "legislative delegation in its most obnoxious form." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)."); Larkin, *supra* note 3, at 403-23.

49 J.C. Holt, Magna Carta 461 (2d ed. 1992).

50 C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 Colum. L. Rev. 27, 41(1914).

51 2 Edward Coke, Institutes of the Lawes of England 45 (1798).

52 Charles H. Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property*," 4 Harv. L. Rev. 365, 373 (1891).

53 A.E. Dick Howard, Magna Carta: Text and Commentary 14–15 (Rev. ed. 1998).

54 5 U.S. (1 Cranch) 137, 163 (1803).

55 U.S. Const. art. I,

56 U.S. Const. art. I, § 7, cls. 2 & 3.

57 U.S. Const. art. II, § 3.

58 U.S. Const. art. III, cls. 1; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

59 U.S. Const. art. II, § 2.

60 U.S. Const. art. IV, § 4.

61 Larkin, *supra* note 3, at 417 (footnote omitted).

62 *Id*. at 419-20.

63 *See* Art. VI, cl. 3 ("[A]ll executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution"); *Amtrak*, 135 S. Ct. at 1235 (Alito, J., concurring).