

CASE STUDIES | McNab v. United States
A Lobster Tale: *Invalid Foreign Laws Lead to Years in U.S. Prison*

(November 2003 Case Study)

The Supreme Court is currently considering whether to take the case of four businesspeople sent to prison for importing lobster tails from Honduras. Their convictions are predicated on supposed violations of the Lacey Act, which makes it a crime to import “fish or wildlife taken ... in violation of any foreign law.” Here, the foreign laws are Honduran fishing regulations that have been declared null and void in Honduras, but are somehow still being enforced by American federal courts.

It all began with a supposed anonymous fax to the [National Marine Fishery Service](#) (NMFS) on February 3, 1999. The mystery fax alleged that Honduran businessman David McNab had a shipment of “undersized (3 & 4oz) lobster tails” scheduled to arrive in Bayou La Batre, Alabama on February 5, 1999. The fax also said that the lobster should be packed in cardboard boxes but was in fact packed in clear plastic bags.



Based on this strange, anonymous message, NMFS agents waited for McNab’s ship and captured it on arrival. With no explanation, the federal government held the entire ship for several weeks and then off-loaded and transported McNab’s 70,000 pounds of Caribbean spiny lobster to a government freezer in Florida. There the lobster tails languished for six months while NMFS agents searched Honduran regulations for some reason to keep the lobster meat and prosecute the importers and distributors.

After numerous phone calls, letters, and trips to Honduras, the NMFS focused on three provisions. The first details the processing and packaging of fish harvested in Honduran waters. This 1993 regulation, promulgated pursuant to a 1973 statute, included the mention of packaging in cardboard boxes. The second regulation prohibits harvesting any lobsters with tails shorter than 5.5 inches. This must have surprised the NMFS agents, since the market price lists published by NMFS include prices for two and three ounce Caribbean spiny lobsters from Honduras. A government expert acknowledged at trial that these little lobsters would all have tails shorter than 5.5 inches. The third Honduran provision prohibits destroying or harvesting “eggs, or the offspring of fish, chelonians or other aquatic species for profit.”

Six months after sending them to the cooler, NMFS agents finally began to inspect the locked-up lobster tails. Only about three percent of the lobster tails turned out to be less than 5.5 inches long. Just seven percent showed any evidence of having been egg-bearing lobsters. These small amounts belie the suggestion that McNab or his employees were intentionally harvesting young or egg-bearing lobsters. Nevertheless, prosecutors included these regulations as predicates for alleged violations of the Lacey Act.

Charges based on the size and egg-harvesting regulations would only allow NMFS to seize the small portions of lobster tails that were under 5.5 inches or showed evidence of bearing eggs. This, apparently, was not enough. Because all the lobsters were in clear plastic bags instead of cardboard

boxes, the government declared the entire shipment illegal and formally seized all 70,000 pounds of lobster tails.

Government prosecutors, not satisfied even with 35 tons of lobster, filed criminal charges against McNab. They also charged three American businesspeople who frequently purchased and distributed lobster tails from McNab. All charges against McNab and most charges against the others were predicated on the three Honduran regulations, applied through the Lacey Act. No charges were ever brought against the defendants in Honduras. The alleged Lacey Act violations served primarily to trigger more serious charges. If importing the lobster in bags instead of boxes was illegal, prosecutors reasoned, then planning to import it was criminal conspiracy, the actual importation was smuggling, and payments became felony money laundering.

At the District Court's foreign law hearing, McNab presented copious evidence showing that the Honduran regulations at issue were invalid. The size restriction had never been signed by the President of Honduras, an absolute requirement for such a regulation under Honduran law. The Attorney General of Honduras supplied an opinion, confirming other testimony, that because the size restriction was not signed it could never have had the force of law.

McNab presented other witnesses, including a former Honduran Minister of Justice, who testified that the egg harvesting regulation was never intended to apply to animals that happened to bear eggs when caught. The prohibition against harvesting or destroying eggs for profit was meant to do just that, to prevent the harvesting of eggs themselves (turtle eggs in particular).

Government prosecutors somehow convinced the court to ignore McNab's extensive evidence and instead accept the testimony of a single, mid-level Honduran bureaucrat, Lilibian Paz. For reasons that remain unexplained, the "Secretary-General" of the Honduran Ministry of Agriculture and Livestock – an official whose primary duty is to be "an instrument of communication" and who has no expertise or authority to render legal opinions – boldly testified that all the regulations were valid and had the force of law.

Despite the obvious lack of criminal intent on the part of the defendants, as well as concerns about the validity of the Honduran regulations, all four businesspeople were convicted on a general verdict. In August 2001, McNab and two businessmen were each sentenced to eight years in prison. The fourth defendant, a businesswoman from New Jersey who resold seafood to restaurants like Red Lobster, was sentenced to two years in prison.

The government trumpeted the convictions in [press releases](#) that labeled McNab "the ringleader of a smuggling operation." The [reports](#) misled the public by suggesting that McNab was intentionally harvesting undersized and egg-bearing lobsters, never mentioning that these were a tiny portion of his catch. The government fails to note that the only reason for declaring the entire shipment illegal was that it was packed in bags, not boxes. In effect, the defendants were convicted of smuggling because they packed lobster in clear plastic bags instead of opaque cardboard boxes.

A [press release](#) issued by the National Oceanic and Atmospheric Administration (NOAA), the agency that includes the NMFS, implies that McNab's business success was part of his wrongdoing. NOAA points out that McNab owns a "fleet of vessels, each of which can deploy thousands of lobster traps," as if this is in itself somehow a wrongful act. Striking an even more bizarre note, NOAA declares that "[t]he wealth

from McNab's vast harvest was denied to the common citizens of Honduras." McNab, a Honduran citizen, is apparently not "common" enough for the Sandinistas at NOAA.

After sentencing, the court was prepared to allow all four defendants to remain free pending their appeals. Federal prosecutors objected to allowing a foreigner like McNab to remain free on bond and the 11th Circuit Court of Appeals sent him to prison. McNab is now in his fourth year of incarceration.

On Appeal before the 11th Circuit, two of the three appellate judges effectively declared Honduras a banana republic, unfit to construe its own laws. [The Court decided](#) that it would be unwise to disagree with the prosecutors' interpretation of the foreign law, citing the "political question" doctrine. This ignored the holdings of other Circuits and the proper role of appellate courts in general. Even worse, the two judges asserted that Honduran officials could not be trusted because they might be bribed or manipulated. Somehow this failed to undermine the credibility of Ms. Paz, the mid-level Honduran bureaucrat who testified for the prosecution. In the interests of "finality," the Circuit Court upheld the lower court on every issue, no doubt because if just one of the three Honduran regulations was found to be invalid, all of the convictions would fail.

The decision of the 11th Circuit is only more troubling when considered in light of the critical new evidence that emerged from Honduras during and after the trial. After the foreign law hearing, McNab had filed an action in the Honduran Court of First Instance of Administrative Law challenging the size restriction. Several months after the end of the criminal trial, the Honduran Court formally held that the size limit was void and declared that it had never had the force of law.

McNab's attorneys also discovered that the law authorizing the packaging regulations was repealed in 1995. Under Honduran law, a regulation is automatically repealed when the authorizing statute is repealed. Even the prosecution's witness from the Honduran Ministry of Agriculture and Livestock admitted this in an affidavit. It also became clear that the egg-harvesting provision had been repealed in a way that, under Honduran law, operated retroactively.

McNab additionally filed a motion before the Honduran National Human Rights Commissioner challenging Ms. Paz's testimony about Honduran law. The National Human Rights Commissioner, Dr. Leo Valladares, is an internationally respected constitutional lawyer and human rights advocate. His office in Honduras is charged with addressing complaints that government officials' actions constitute "legal error." Dr. Valladares issued a report, which the Minister of Agriculture signed, stating that Ms. Paz's testimony constituted "an error of law." The scholarly report found that the packaging regulation was repealed in 1995, the size restriction had "never had the force of law," and that the egg-bearing provision had been retroactively repealed.

The government of Honduras, through its embassy, directed all of this information to the U.S. State Department, asking that they forward it directly to the Department of Justice. The Attorney General of Honduras also filed an amicus curiae brief with the 11th Circuit, providing this information and explaining that McNab and the other businesspeople had not violated any Honduran law. All of this was ignored by the Court of Appeals when they concluded that "finality" was, apparently, more important than justice.

The prosecution of four businesspeople for normal business activities highlights the dangerous but growing trend to expand criminal liability against normal social and economic conduct. Historically, a

criminal conviction required proof of criminal intent (mens rea; a guilty mind) in addition to the wrongful infliction of harm (actus reus; a bad act). Even if the Honduran statutes had not turned out to be uniformly invalid, there was never any evidence that showed the businesspeople acted with criminal intent. Rather the evidence seems to prove that they were simply engaged in catching and selling seafood in a way that any businessperson would consider lawful.

This prosecution also reveals the risks of federalizing criminal law. Observers have long warned against allowing the federal government to encroach on the traditional state function of enacting and enforcing general criminal laws. Here, the federal government, through the Lacey Act, claims to enforce foreign laws against foreign and U.S. citizens. These regulations were not made by the U.S. Congress or by some executive agency, but by a foreign government with unfamiliar procedures. If the government of Honduras had actually believed these regulations to be valid, they were free to bring charges. Instead, the U.S. government prosecuted a case on what turned out to be bad law.

Each of the four defendants was trying only to earn a living through normal commercial activity when an anonymous accusatory fax sent the U.S. government to destroy their lives. David McNab waits in prison to see if his appeal to the court of last resort will even take the case. Three other businesspeople wait anxiously for the decision that could save them or send them to prison for years.