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Does the Endangered Species Act Contain an Innocent Owner Defense to Civil Forfeiture?

Stephen D. Andrews†

The world wildlife market services a booming industry. It facilitates the trade of more than twenty-five thousand live primates, two to three million live birds, more than five million live reptiles, over ten million reptile skins, five hundred to six hundred million live fish, between one and two thousand tons of raw coral, and a plethora of other animals and animal products.¹ While quantifying the illegal component of this trade proves difficult, one commentator suggests that it "generates more profits than illegal arms sales, and constitutes a worldwide black market second in size only to the drug trade."²

The United States plays a leading role in this industry. It imports an average of $773 million in wildlife shipments, while its exports take the total over the billion dollar mark.³ These figures represent only officially declared shipments; the General Accounting Office estimates that up to $250 million in shipments cross the border each year through some fraudulent action.⁴ Some studies suggest that in certain parts of the United States, the illegal taking of wildlife equals or exceeds the legal takings.⁵

The United States has formulated a number of laws that respond to this overwhelming problem and the potential threats to endangered species. Three laws serve as the basis of the effort to regulate the possession and sale of wildlife: the Endangered

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† A.B. 1995, Harvard University; J.D. Candidate 1998, University of Chicago.
² Id.
³ Id at 33.
⁴ Id.
Species Act ("ESA"),\(^6\) the Lacey Act,\(^7\) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").\(^8\) In addition, a myriad of laws target more discrete issues. These include the Marine Mammal Protection Act,\(^9\) the Bald and Golden Eagles Protection Act,\(^10\) the Migratory Bird Treaty Act,\(^11\) the Airborne Hunting Act,\(^12\) the Whaling Convention Act,\(^13\) and the African Elephant Conservation Act.\(^14\)

Although the ESA offers an important means of combating the illegal wildlife trade, the government has used it less frequently than the Lacey Act.\(^15\) Among other penalties, the ESA provides for civil forfeiture of material possessed in violation of its provisions.\(^16\) However, the current, muddled state of the law limits the number of forfeiture actions, since some sources indicate that an innocent owner defense exists. For instance, one recent book on the subject of federal endangered species legislation cites a well known case to report that forfeiture cannot occur when the owner had no involvement with the violation of the act.\(^17\) Settling the legal application of the forfeiture provisions under the ESA might increase its use by the government.

This Comment discusses the potential for an "innocent owner" defense under the forfeiture provisions of the ESA. After an analysis of the Act's legislative history, plain meaning, and policy justifications, this Comment concludes that an innocent owner defense does not and should not exist under the ESA. Part I considers the role that the ESA plays in United States wildlife protection policy and the importance of its effective enforcement. Part II evaluates the merits of constitutional challenges to forfeiture provisions. It begins by analyzing a crucial case regarding forfeiture law\(^18\) and then turns to the development of its progeny. Part III examines the paucity of caselaw regarding the forfeiture provisions of the ESA. Part IV outlines caselaw discussing

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\(^8\) 16 USC § 1538 (1994).
\(^10\) 16 USC § 703 et seq (1994).
\(^12\) 16 USC § 742j (1994).
\(^13\) 16 USC § 916 (1994).
\(^14\) 16 USC § 4201 et seq (1994).
\(^15\) See Part I.
\(^16\) 16 USC § 1540(e)(4)(A), (B).
the forfeiture provisions of other wildlife protection statutes in order to place the ESA in a proper context. It compares arguments supporting and rejecting innocent owner defenses under these laws and the relevant legislative history. Finally, Part V develops potential approaches to the use of an innocent owner defense.

I. THE IMPORTANCE OF ENFORCEMENT UNDER THE ENDANGERED SPECIES ACT

The Lacey Act, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the Endangered Species Act (ESA) offer the broadest protection against the illegal trade in wildlife. The Lacey Act prohibits wildlife trade in violation of any foreign law or treaty signed by the United States; it also provides for forfeiture of material that violates its provisions. CITES lists endangered species and establishes provisions governing their import and export, yet provides no independent mechanism to implement its requirements. The United States enforces CITES through the ESA.

In addition to providing sanctions for CITES violations, the ESA specifies a number of prohibited behaviors in an attempt to slow the rate of extinction of endangered and threatened species. The Act defines prohibited actions broadly. A violation occurs whenever someone takes any of the following actions with respect to any species which the Act defines as endangered: import, export, take, possess, sell, deliver, carry, transport, ship, violate a regulation, or solicit any of the above behaviors. The ESA subjects violators to criminal and civil penalties in addition to providing for forfeiture of the involved wildlife.

Overall, the government has used the ESA in far fewer cases than the Lacey Act. This may be due to oversight by the courts or prosecuting attorneys, or to the relative ease of prosecutions

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20 Brooks, 17 Wm & Mary J Envir L at 146.
21 Id.
22 16 USC § 1538.
23 Id. This recital does not provide an exhaustive list. Subsection (a)(1) contains the exact language that specifies prohibited actions with respect to endangered fish or wildlife, while subsection (a)(2) does so for endangered species of plants.
24 16 USC § 1540(e)(4).
25 Brooks, 17 Wm & Mary J Envir L at 148.
under the Lacey Act.\textsuperscript{26} One commentator suggests that federal agents prefer to use the Lacey Act since it provides for stiffer penalties.\textsuperscript{27}

Despite the opportunity for wildlife protection under the Lacey Act, the ESA remains a crucial part of the enforcement provisions. One author notes that while the ESA will never prevent all animal and plant extinction, it remains "an innovative piece of legislation that has become the 'pit bull' of environmental statutes."\textsuperscript{28} The ESA's legislative history demonstrates the importance Congress attaches to the Act, an importance that the Supreme Court has affirmed.\textsuperscript{29}

II. THE CONSTITUTIONALITY OF FORFEITURE PROVISIONS

The Constitution presents the first hurdle to any forfeiture law. A forfeiture provision must not effect an impermissible taking under the Fifth or Fourteenth Amendments.\textsuperscript{30}

The law classifies forfeitable property into three categories. An owner may be forced to forfeit property because (1) it is contraband, and thus illegal to own; (2) it is the proceeds, in some way, of illegal activity; or (3) it somehow facilitated a criminal act.\textsuperscript{31} The law refers to the last type of property as an instrumentality of illegal activity.\textsuperscript{32}

The Supreme Court considered this trifurcation in deciding a landmark case on the issue of an innocent owner claim against a forfeiture statute. In that case, \textit{Calero-Toledo v Pearson Yacht Leasing Co.}, the Court contemplated the seizure of a leased yacht under a drug forfeiture statute.\textsuperscript{33} The leasing company claimed that forfeiture unconstitutionally deprived it of its property without just compensation, since the company did not participate in the criminal endeavor.\textsuperscript{34} The Court rejected an innocent owner

\textsuperscript{26} Id.
\textsuperscript{29} See Part V.B.
\textsuperscript{30} US Const, Amends V, XIV.
\textsuperscript{31} See, for example, \textit{Bennis v Michigan}, 116 S Ct 994, 1004 (1996) (Stevens dissenting).
\textsuperscript{32} For a general discussion, see Lawrence E. Fann, Glenda G. Gordon, and Arthur W. Leach, \textit{Asset Forfeiture: How to Present the Forfeiture Case to the Prosecutor}, (US Department of Justice, 1993).
\textsuperscript{33} 416 US 663 (1974).
\textsuperscript{34} Id at 668 (noting company's claim that the forfeiture violated the Fifth and Four-
defense, noting that such defenses had "almost uniformly been rejected."\(^{35}\) The Court explained that even when the yacht was not contraband per se, but merely served as an instrumentality of the crime, the law considered the thing itself to be the offender.\(^{36}\)

The Court did leave one opening for the innocent owner, however, suggesting that forfeiture under certain circumstances could give rise to "serious constitutional questions."\(^{37}\) The Court outlined a three-part test which it intimated might exempt an owner from forfeiture: an owner would need to prove not only "that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property."\(^{38}\) This test appeared as dicta; the Court went on to note that in the case at bar the leasing company had offered no evidence to prove any of the three factors.\(^{39}\)

The Supreme Court settled the issue of its three-part test from \textit{Calero-Toledo} in a 1996 opinion, \textit{Bennis v Michigan}.\(^{40}\) Lower courts had applied the \textit{Calero-Toledo} test to a number of forfeiture cases, yet they often rejected the innocent owner claim based on the facts of the case.\(^{41}\) In \textit{Bennis}, the Court upheld the forfeiture of an automobile in which a man had sexual relations with a prostitute.\(^{42}\) The wife of the offender, half owner of the car, claimed that the forfeiture violated the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment.\(^{43}\) The Court rejected her "innocent owner" defense.\(^{44}\) In the majority opinion, the Court discussed the use of the \textit{Calero-Toledo} three-part test and suggested that the entire test was merely \textit{obiter dictum}.\(^{45}\)

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\(^{35}\) Id at 683.
\(^{36}\) Id at 684.
\(^{37}\) 416 US at 689.
\(^{38}\) Id.
\(^{39}\) Id at 690.
\(^{40}\) 116 S Ct 994 (1996).
\(^{41}\) \textit{United States v One 1957 Rockwell Aero Commander 680 Aircraft}, 671 F2d 414, 418 (10th Cir 1982) (customs forfeiture); \textit{United States v One 1975 Pontiac Lemans}, 621 F2d 444, 447 (1st Cir 1980) (internal revenue forfeiture); \textit{United States v Six Thousand Seven Hundred Dollars}, 615 F2d 1, 3 (1st Cir 1980) (customs forfeiture).
\(^{42}\) 116 S Ct at 996.
\(^{43}\) Id at 1001.
\(^{44}\) Id.
\(^{45}\) 116 S Ct at 999. Justice Rehnquist somewhat sarcastically pointed out, "[the petitioner] concedes that this comment was \textit{obiter dictum}, and [i]t is to the holdings of our
point, the Court stated that the item could be forfeited even when the owner had no involvement in the criminal enterprise.48

Justice Stevens dissented in an opinion that distinguished among the three categories of forfeitable property.47 He noted that the government possesses the right to seize contraband "however blameless or unknowing their owners may be."48 Justice Stevens also noted that forfeitures in the second category, which typically covers proceeds of stolen property, served the important goal of restitution.49 Still, in Justice Stevens's view, the third category of property, the instrumentality or "derivative contraband," deserved greater protection from forfeiture.50 Due to the greater sweep of the drug law's provisions, Justice Stevens argued that an innocent owner defense serves the crucial and long-standing goal of preventing overbroad liability.51

Thus while Justice Stevens and a number of lower courts52 believe that an innocent owner defense should exist for constitutional reasons, current law does not recognize such a defense to forfeiture proceedings, especially when the seized item is contraband. The current state of the law makes any constitutional claim by an owner of property subjected to forfeiture under the ESA almost certain to fail.

III. CASES CONSTRUING THE FORFEITURE PROVISIONS OF THE ESA

Despite the fact that the government enforces the Endangered Species Act and the Lacey Act through forfeiture more than any other penalty,53 courts have provided little caselaw regarding the use of such penalties for confiscating endangered species. Only three cases explicitly discuss the innocent owner defense to forfeitures under the ESA.54 These cases diverge in

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46 Id.
47 Id at 1004.
48 Id.
49 116 S Ct at 1004.
50 Id at 1004-05.
51 Id at 1009.
52 See, for example, the cases noted in Parts III and IV.
54 United States v One Handbag of Crocoddilus Species, 856 F Supp 128, 134 (E D NY 1994); United States v 3,210 Crusted Sides of Caiman Crocoddilus Yacare, 636 F Supp
result and reasoning. No clear test exists; the two cases that allow for an innocent owner defense differ in their application of the defense to somewhat similar facts. A brief examination of these cases illustrates the confused state of the law.

Only one case clearly rejects an innocent owner defense under the ESA. In *United States v One Handbag of Crocodilus Species*, the court for the Eastern District of New York considered the forfeiture of a number of crocodile skins imported in violation of the ESA. The importer, J.S. Suarez, Inc., lost its property through forfeiture even though Mr. Suarez claimed that he had a longstanding business relationship with a supplier from whom he had requested legal skins. Mr. Suarez thus claimed he did not intend, nor even suspect, that the importation violated the law.

The court rejected his claim that his status as innocent owner could shield his property from forfeiture, relying generally on Lacey Act case law, but also making a number of ESA specific arguments. The court stated that the ESA required strict liability forfeiture to effectuate its intent and that any other rule would "discourage diligent inquiry by the importer, allowing him or her to plead ignorance in the face of an import violation." The court also decided that the ESA does not require a nexus between the property subject to forfeiture and the proscribed conduct since "the endangered species is the contraband."

Contrary to the above analysis, two courts—the majority given the paucity of ESA innocent owner caselaw—have relied on *Calero-Toledo* to suggest that an innocent owner defense may exist under the ESA. *Carpenter v Andrus* provides the central case for this view of the Act. In *Carpenter*, the owner legally shot a leopard in Kenya and directed a shipping company to send it to Haiti without sending the skin through any part of the Unit-
ed States. Due to the mistake of a shipping agent, the skins landed in New York en route from Kenya. The court for the District of Delaware rejected the forfeiture for several reasons. First, it held that a contrary rule would impose a heavy burden on common carriers to know the contents of their freight. Second, the court considered the legislative history of the ESA and concluded that Congress primarily intended the forfeiture provisions to apply to innocent violations by tourists or hunters, not cases where the “owner of the property had no involvement whatsoever in the violation of the Act.” Third, the court noted that a rule that would subject an innocent owner to forfeiture could implicate the due process concerns raised by the Supreme Court in Calero-Toledo. Finally, the court stated that no provision of the law classified the skin as contraband per se and in fact the definition of “contraband article” did not include endangered species.

In United States v 3,210 Crusted Sides of Caiman Crocodilus Yacare, a Florida District court evaluated a forfeiture under the ESA arising from the importation of crocodile hides through Miami International Airport en route to Paris. The court rejected an innocent owner defense on the facts of the particular case. Acknowledging the three-part test from Calero-Toledo, it suggested that a defense did exist, but held that merely raising innocence does not establish it. Instead, the claimant must make an affirmative showing of each of the elements to prevail.

IV. CASELAW CONSTRUING OTHER WILDLIFE PROTECTION STATUTES

Courts almost uniformly reject innocent owner defenses to forfeitures under other federal wildlife statutes. While some

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66 Id at 321.
67 Id.
68 Id at 324.
69 485 F Supp at 322.
70 Id at 323.
71 Id. See Part II.
72 Id at 324. See also 49 USC § 781 (1994) (defining a number of items, but not wildlife, as contraband).
73 636 F Supp at 1282-83.
74 Id at 1287.
75 Id at 1286-87.
76 Id at 1287.
77 See, for example, United States v Proceeds from the Sale of Approximately 15,538
opinions refer to the Calero-Toledo test, the cases seem to accept the important remedial purposes of the statutes and hold that the forfeited wildlife constitutes contraband.78 A brief survey of these cases demonstrates judicial hostility to innocent owner defenses to wildlife forfeiture.

In United States v Proceeds from the Sale of Approximately 15,538 Panulirus Argus Lobster Tails, a Florida District court upheld the forfeiture of a number of spiny lobster tails under the Lacey Act.79 The court noted that the Lacey Act does not provide an innocent owner defense and that the legislative history proves Congress intended to apply strict liability.80 In effect, it ruled that the Calero-Toledo exception could not apply because the Lacey Act involves forfeiture of contraband per se, where in other cases "the connection between the offense and the forfeiture may be attenuated."81 The court concluded that the forfeiture of contraband serves a "strictly remedial" purpose and thus warrants strict liability forfeiture.82

Other courts agree. In United States v 1,000 Raw Skins of Caiman Crocodilus Yacare, the court ruled that because forfeitures under federal law occur in in rem proceedings against the item itself, innocence on behalf of the owner does not prevent forfeiture.83 In Raw Skins the court for the Eastern District of New York rejected the innocent owner defense, even in light of convincing facts to support the owner's claim.84 Likewise, in United States v 2,507 Live Canary Winged Parakeets, the owner claimed that it had done all it could to prevent the shipment from being transported to the United States.85 The court, stating that the merchandise constituted contraband, referred to Calero-Toledo for the proposition that "good faith or innocence on the part of the owner of property subject to seizure is immaterial."86


78 Drake, 655 F2d at 1028.
79 834 F Supp at 392.
80 Id at 390-91.
81 Id at 391.
82 Id.
84 Id.
85 689 F Supp 1106, 1117-19 (S D Fla 1988).
86 Id at 1117. See also United States v Fifty-Three Eclectus Parrots, 685 F2d 1131, 1136-37 (9th Cir 1982) (rejecting an innocent owner defense based on Calero-Toledo since
Finally, in *United States v Drake*, the Tenth Circuit considered a prosecution under the Migratory Bird Treaty Act. The court ruled that even if the indictment did not lead to conviction, possession of the birds in contravention of the statute required forfeiture.

In sum, courts tend to reject innocent owner defenses under federal species protection statutes. The decisions typically rest on two bases: the lack of an enumerated defense coupled with an unsympathetic legislative history and the characterization of the merchandise as contraband. While some courts apply the *Calero-Toledo* test, most refuse to do so.

V. AN APPROPRIATE VIEW OF THE INNOCENT OWNER DEFENSE UNDER THE ENDANGERED SPECIES ACT

Courts could take one of three approaches to an innocent owner defense under the Endangered Species Act. First, the courts could allow a broad innocent owner defense based on a three-part test similar to the one originally offered in *Calero-Toledo*. Second, the courts could draw a narrower line, allowing a limited defense in only the most "innocent" cases. The test might aim to separate a fact pattern such as the one in *Carpenter*, where the owner did all that he could to avoid liability, from those where an owner took less stringent precautions. Thus, a failure either to know that the law listed an animal as endangered or to check the animal's point of origin could still lead to forfeiture. However, actions which attempt to avoid illegal acts with full knowledge of all relevant facts, such as ordering the shipment not to go through the United States, would escape forfeiture. Third, the courts could simply reject the innocent owner defense and declare that the government may seize all material in violation of the statute. The statutory text, legisla-
tive intent, and policy justifications indicate that rejecting an innocent owner defense would best serve the goals of the ESA.

A. Plain Meaning

The wording of the statute indicates that Congress did not provide an innocent owner defense. Section 1540(e)(4)(A) of the ESA contains an unambiguous command: "All fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of this chapter ... shall be subject to forfeiture to the United States." Section 1540(e)(4)(B) sets out the possibility of forfeiture of instrumentalities such as guns, traps, and nets, but requires a conviction of a criminal offense under the statute as a prerequisite. The statute distinguishes between the violating material itself, similar to contraband, and the instrumentalities that further the violation. Section 1540(e)(5) incorporates provisions in other laws regarding the seizure of vessels for violation of the customs laws, including remission and mitigation, and allows the application of that law whenever consistent with the ESA. Section 1540(a)(3) allows an exception to liability: if a person can prove that she acted in good faith to protect herself or any other individual from bodily harm, the law does not subject her actions to civil penalty.

These last two provisions do not include a defense to forfeiture for an innocent owner. The action to protect oneself cannot shield an owner from forfeiture. One cannot imagine how owning an animal, alive or dead, could be required for self-preservation. The other provision, remission under Section 1540(e)(5), initially appears more troublesome. In the Lacey Act, which contains similar language, Congress carefully explained that remission could only occur if the owner could prove that her action did not violate the law. For instance, if the owner had a permit that made importation lawful, but failed to bring it with her, a violation would not actually have occurred. Owners have not used this provision of the ESA, but it appears from the Lacey Act that

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94 16 USC § 1540(e)(4)(A).
95 16 USC § 1540(e)(4)(B).
96 16 USC § 1540(e)(5).
97 16 USC § 1540(a)(3).
98 16 USC § 3374(b) (1994).
it would not shield an innocent owner. In addition, the Section seems to apply only to forfeitures of instrumentalities, because it incorporates the provisions of customs law about vessel forfeitures. In that sense, the innocent owner has a weaker argument against the seizure of the offending animal or plant.

The only other defenses against liability under the ESA come from a section entitled "Exceptions." This section provides other limitations on liability, including: allowance of permits, hardship exemptions for actions taken prior to enactment, takings by natives of Alaska, exemptions for antique articles, non-commercial "transshipments," and experimental populations. These protected actions would otherwise violate the Act. Nevertheless, these provisions differ from an innocent owner defense. An innocent owner would claim that she violated the statute but did not possess the requisite mental state, while one who attempted to use Section 1539 would claim that her action itself was lawful. The innocent owner claim serves as a defense, but Section 1539 makes actions lawful at the outset.

Most significantly, the exception for "noncommercial transshipments" suggests that Congress allowed for an exception which could protect certain innocent owners without creating an innocent owner defense. The noncommercial transshipment subsection shields an importation if it meets five conditions: (1) the fish or wildlife was lawfully taken from the country of origin; (2) after transit through the United States, the importation into the destination country is lawful; (3) the exporter or owner gave instructions not to ship the material through the United States or "did all that could have reasonably been done to prevent transshipment, and the circumstances leading to the transshipment were beyond the exporter's or owner's control;" (4) the shipment meets the requirements of the Convention (CITES); and (5) the importation is not part of a commercial activity. This exception shields the property of a limited class of individuals who might otherwise claim that they deserved protection as innocent owners. The fact that Congress made an explicit list of excep-

100 Id.
101 16 USC § 1540(e)(5).
102 16 USC § 1539.
103 Id. See specifically 16 USC § 1539(d)-(f), (h)-(j).
104 16 USC § 1539(i).
105 Id.
106 In fact, one wonders why the court does not even consider this provision in Carpenter v Andrus, 485 F Supp 320 (D Del 1980), where a noncommercial owner complied
tions but left out any mention of a broad, innocent owner defense, suggests that it did not wish to provide any other protection for innocent owners.107

B. Legislative Intent

Congress expressed the purpose of the ESA in broad terms: "to conserve . . . the various species of fish or wildlife and plants facing extinction . . ."108 The Supreme Court has considered the legislative history surrounding the Act and has established that Congress meant to assign the highest priority to the ESA.109 The Court commented that Congress intended to expand its approach to the endangered species problem and recognized the "dominant theme" of an "overriding need to devote whatever effort" necessary to protect world wildlife resources.110 That Congress attached an overriding priority to the ESA helps clarify its legislative history. Congress did intend for the forfeiture provision to apply broadly to tourists and hunters.111 In addition, Congress amended the criminal provisions of the ESA in 1978 to change the standard for criminal liability from willful to "knowing."112 Lower courts have interpreted this change to indicate that Congress meant to increase the scope of

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107 The canon of construction expressio unius exclusio alterius holds that "[i]f one or more specific items are listed, without any more general or inclusive terms, other items although similar in kind are excluded." Edwin W. Patterson, The Interpretation and Construction of Contracts, 64 Colum L Rev 833, 853 (1964).

108 16 USC § 1531(a)(4).

109 Tennessee Valley Authority v Hill, 437 US 153, 174 (1978) ("Examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.").


112 Endangered Species Act Amendments of 1978, Pub L No 95-632, 92 Stat 3751, 3761, codified at 16 USC § 1540(b)(1) (1994). The House Report noted that the change meant to make clear "that the act's civil and criminal sanctions apply to violations involving an omission or failure to act as well as to violations involving the commission of a prohibited act. The committee does not intend to make knowledge of the law an element of either civil penalty or criminal violation of the Act." Endangered Species Act Amendments of 1978, HR Rep No 95-1625, 95th Cong, 2d Sess 26 (October 14-15, 1978), reprinted in 1978 USCCAN 9463, 9476.
liability under the Act.\textsuperscript{113} The case law seems to establish that the ESA now provides for such "general intent crimes."\textsuperscript{114}

If Congress weakened the knowledge requirements for criminal violations, \textit{a fortiori}, it strengthens the case for the lack of an innocent owner defense to civil forfeiture. The legislative history suggests that Congress was seriously concerned about the problem of species extinction and that it established harsh provisions under the ESA to combat such extinction. In short, the importance Congress and the courts attach to the ESA, as well as the recent changes to increase culpability suggest that a strict forfeiture provision most accurately reflects the intent of the Act.

C. Policy Justifications

Each of the three approaches to an innocent owner defense discussed above strikes a different balance between limiting the number of actions that may lead to forfeiture and protecting the environment. Outlining the arguments for each interpretation leads to the conclusion that an innocent owner defense should not exist.

1. The broad innocent owner defense.

A broad defense creates two interrelated advantages. First, it prevents the infliction of any penalties on any innocent owner, avoiding the dangers of overinclusion and liability disproportionate to fault which adhere in any strict liability regime.\textsuperscript{115} Second, as discussed in the \textit{Carpenter} case, it avoids creating unnecessary burdens on commercial carriers, such as shipping agents.\textsuperscript{116} This approach shields those who run afoul of the ESA provisions without a wrongful intent. As suggested in \textit{Caiman Crocodilus},\textsuperscript{117} the test would no doubt mirror the three-part test from \textit{Calero-Toledo}.\textsuperscript{118}

\textsuperscript{113} United States \textit{v} Nguyen, 916 F2d 1016, 1019 (5th Cir 1990); United States \textit{v} St. Onge, 676 F Supp 1044, 1045 (D Mont 1988); United States \textit{v} Billie, 667 F Supp 1485, 1492 (S D Fla 1987).

\textsuperscript{114} See cases cited in note 113.

\textsuperscript{115} See, for example, Staples \textit{v} United States, 511 US 600, 605-06 (1994) (noting that the law disfavors crimes without a mens rea requirement due to the fear of criminalizing a broad range of conduct).

\textsuperscript{116} Carpenter \textit{v} Andrus, 485 F Supp 320, 322-23 (D Del 1980).

\textsuperscript{117} United States \textit{v} 3,210 Crusted Sides of Caiman Crocodilus Yacare, 636 F Supp 1281, 1286-87 (S D Fla 1986).

\textsuperscript{118} See text accompanying note 38.
While allowing this innocent owner defense comports with one view of justice, it suffers from serious drawbacks as a legal standard. First, while it does reflect the majority of ESA innocent owner caselaw, that majority consists of two cases predating the recent One Handbag decision, one of which only offers qualified support for the defense. Second, reliance on the Calero-Toledo test appears increasingly risky and unfounded in light of Bennis. Bennis clarified Calero-Toledo and its progeny, calling the former, three-part test dicta and implying that an innocent owner defense might not exist under any circumstances.

The third drawback stems from the purposes of the Act itself. As noted above, Congress made clear the overriding importance of species protection and the enforcement mechanisms of the ESA. To allow innocent owners to escape criminal convictions or civil fines may serve a sense of justice. Refusing to apply forfeiture to the offending property itself, however, goes too far and endangers the purposes of the Act. The fact that Congress recently tightened its enforcement regime shows that it favors the enforcement of the ESA over concerns about the dangers of strict liability. Thus, while the broad innocent owner defense does comport with the majority of the cases and does serve some conception of justice, it rests on outmoded judicial opinions and sacrifices the crucial goals of the ESA.

2. The limited innocent owner defense.

The limited innocent owner defense strikes a better balance between competing concerns of fairness and species protection. Advocates could distinguish Carpenter from the cases rejecting the innocent owner defense: its facts seem intuitively appealing and its concern for common carriers seems sincere. A limited innocent owner defense serves the goal of protecting the subset of truly blameless owners, common carriers and those who explicitly attempt to avoid violations, while providing greater protection for species by retaining forfeitures in most cases.

This standard still suffers from several problems. First, the caselaw provides little support. No case has adopted a rule craft-
ing a limited innocent owner defense. While Carpenter notes the dangers to common carriers and allows a defense for the shipper, its decision narrowly rests on its unique fact pattern. The Carpenter court did not establish any particular test for proving innocent ownership. In fact, it referred to Calero-Toledo, which suggests it might have applied the broader standard.

In addition, any middle standard entails a difficult problem of line drawing. Under a limited innocent owner defense, the task of determining truly innocent action may prove impossible. On the facts of Carpenter, orders not to mail something through United States airports shield an owner from forfeiture. Using that as an example, how would a court rule if an owner ordered a shipper to send only the legal items among a group that includes both legal and illegal ones? This scenario also highlights the heightened danger such a rule would pose to threatened species. Creating an ambiguous defense allows individuals to continue impermissible behavior and categorize it as innocent activity. Both Congress and the Bennis court reject this approach. Thus, while the limited innocent owner defense approaches an attractive balance, its definitional problems and its lesser protection for species both militate against its adoption.

3. Abandoning the innocent owner defense.

Abandoning the innocent owner defense best serves the ends of species protection. Government seizure of offending material regardless of excuse guarantees that offenders will at least be penalized to the full value of the property. It prevents disguising wrongful actions under the cloak of an innocent owner defense. Eliminating the defense also best fits the general forfeiture caselaw and the legislative history.

Another reason to abandon the innocent owner defense stems from the classification of offending material as contraband. The courts tend to disagree as to whether or not the material in violation of the ESA constitutes contraband. In one sense, this dispute may prove less important now that Bennis suggests that a sliding scale approach to forfeiture does not exist. Still, the

123 485 F Supp at 324.
124 Id at 323.
125 Id.
126 See Parts III and IV.
127 See text accompanying notes 40-52.
closer any material comes to contraband, the less protection the law has historically afforded innocent owners.

In Carpenter, the court correctly pointed out that the ESA does not define the endangered species as contraband.\textsuperscript{128} The ESA does incorporate the provisions of other titles relevant to seizure, forfeiture, and condemnation (though mostly of vessels) in its enforcement provisions.\textsuperscript{129} Like the ESA, those other titles do not explicitly classify endangered species as contraband.\textsuperscript{130} At the same time, some courts clearly consider the material contraband,\textsuperscript{131} and that classification best fits the descriptions of the three categories of forfeitable property. The taken animal or plant constitutes the offending material, much like drugs or other smuggled goods. It does not represent the proceeds of a criminal act, since the ownership itself is the criminal act. It is not an instrumentality for the same reason. The statute suggests this when it provides for forfeiture of actual instrumentalities, such as guns, traps, and nets, after criminal violations in a different section.\textsuperscript{132}

Nevertheless, eliminating an innocent owner defense involves several problems. First, completely eliminating a defense may violate a sense of fairness or justice, especially in light of fact patterns such as the one found in Carpenter.\textsuperscript{133} While this concern should exist, Congress has already balanced the competing interests and decided in favor of species protection, as evidenced by its choice of strict liability.\textsuperscript{134} Furthermore, the danger of lessened knowledge requirements for criminal or civil penalties present a much larger concern than the lack of an innocent owner defense to forfeiture of offending property.

The second problem arises from the Carpenter court's fear that forfeiture would impose an unfair burden on common carriers.\textsuperscript{135} The forfeiture provision does not lead to civil liability, however, only a loss of the property.\textsuperscript{136} A carrier would need to show that it did not act irresponsibly in order to avoid civil pen-

\textsuperscript{128} 485 F Supp at 324.
\textsuperscript{129} 16 USC § 1540(e)(5).
\textsuperscript{130} See 19 USC § 1594 (seizure provisions); 49 USC § 781 (definition of contraband).
\textsuperscript{131} See, for example, United States \textit{v} One Handbag of Crocodilus Species, 856 F Supp 128, 134 (E D NY 1994).
\textsuperscript{132} 16 USC § 1540(e)(4)(B).
\textsuperscript{133} 485 F Supp at 321.
\textsuperscript{134} See Part V.B.
\textsuperscript{135} 485 F Supp at 322.
\textsuperscript{136} Compare 16 USC § 1540(e)(4)(A) (forfeiture provision) with 16 USC § 1540(a)(1) (civil penalty provision).
alties, yet through forfeiture it would lose material that it did not own. The carrier could avoid liability to the sender in any of three ways. First, in some cases, the noncommercial transshipment exception might apply and prevent forfeiture entirely. Second, in such a contract, if government action prevents a party’s performance by prohibiting it or making it impossible, the law excuses a good faith breacher. The excuse requires that the situation resulted without fault of the party seeking excuse, so in Carpenter, the shipper might still be liable to the hunter. Third, and perhaps most common in a shipping situation, the carrier may contract around liability.

CONCLUSION

Species extinction presents a grave challenge to the United States. Congress has responded with a number of laws determined to slow the rate of destruction. Unfortunately, one of its most broadly applicable weapons, the Endangered Species Act, lacks a strict standard of enforcement. At a fundamental level, Congress designed the statute’s forfeiture provisions to affect the incentives and level of care of all involved in wildlife trade. Any innocent owner defense vitiates that goal by creating loopholes for exploitation. Congress did not intend for an innocent owner defense to exist. The Supreme Court has clarified its view of forfeitures in general and appears to feel that strict liability offers the appropriate solution.

Nevertheless, the few opinions considering the ESA’s forfeiture provisions disagree and some commentators feel that the defense is the rule, not the exception. The cases come from different periods and arose in different federal districts. A court faced with this issue today would write more lines on a fairly jumbled slate. A clear standard that rejects an innocent owner defense would aid the government, who prosecutes these cases, individuals, who suffer from forfeiture, and other courts, who must apply

137 See text accompanying notes 104-107.
138 E. Allan Farnsworth, 2 Contracts § 9.5 at 535 (Little, Brown 1990).
139 Id § 9.6 at 551.
140 This assumes that the noncommercial transshipment exception does not apply. See text accompanying notes 104-107.
141 Farnsworth, 2 Contracts § 9.9a at 581-83 (discussing force majeure clauses to avoid government required breaches). See also Richard A. Epstein, Beyond Foreseeability: Consequential Damages in the Law of Contract, 18 J Legal Stud 105 (1989) (discussing the common provision for liquidated damage clauses in shipping contracts and the attempt to limit damages for lost or delayed packages).
the forfeiture provision. Eliminating the innocent owner defense would best effectuate the legislative purpose and provide a more cohesive approach to endangered species protection.