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TAKING AIM AT CANNED HUNTS WITHOUT CATCHING GAME RANCHES IN THE CROSSFIRE

I. INTRODUCTION

An antelope stands in a field tied to a stake buried in the ground. Fifty yards away a man with a rifle and a guide arrive, exit their jeep, and walk toward the skittish animal. The man with the rifle aims and fires several times at the restrained antelope, striking it twice in the neck. It struggles, falls to the ground, and dies. This is a "canned hunt."¹

The Captive Exotic Animal Protection Act of 1995 (CEAPA), a bill introduced in the 104th Congress that did not reach a vote, endeavored to end canned hunts.² The U.S. House of Representatives' Subcommittee on Crime³ held hearings on the legislation in April 1996.⁴

The relevant portion of the bill states:

§ 48 Exotic animals

(a) Whoever, in or affecting interstate or foreign commerce, knowingly transfers, transports, or possesses a confined exotic animal, for the purposes of allowing the killing or injuring of that animal for entertainment or the collection of a trophy, shall be

1. See *Captive Exotic Animal Protection Act of 1995: Hearings on H.R. 1202 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong. 1 (1996) (the subcommittee hearings produced multiple documents, only some of which have internal pagination) (on file with *Loyola of Los Angeles Law Review*) [hereinafter *House Subcomm. Hearings*] (statement of Frank Lautenberg, Sen. (D-N.J.)).

2. See H.R. 1202, 104th Cong. (1995); S. 1493, 104th Cong. (1995). Similar legislation was introduced during the 103rd Congress, but failed to get to a vote. See Letter from Harvey Hilderbran, Executive Director, Exotic Wildlife Association, to Exotic Wildlife Association Members (Jan. 11, 1996) (on file with *Loyola of Los Angeles Law Review*) (referring to H.R. 4997, 103rd Cong. (1994)). It is reasonable to believe the CEAPA will appear in the 105th Congress.

3. The Subcommittee on Crime falls under the House Committee on the Judiciary. See *House Subcomm. Hearings*, *supra* note 1 (Hearing Witness List).

4. See *id.* (Hearing Witness List).

fined under this title or imprisoned not more than one year, or both.

(b) As used in this section—

(1) the term 'confined exotic animal' means a mammal of a species not historically indigenous to the United States that in fact has been held in captivity for the shorter of—

(A) the greater part of the animal's life; or

(B) a period of one year;

whether or not the defendant knew the length of the captivity; and

(2) the term 'captivity' does not include any period during which the animal—

(A) lives as it would in the wild, surviving primarily by foraging for naturally occurring food, roaming at will over an open area of at least 1,000 acres; and

(B) has the opportunity to avoid hunters.⁵

Congress has the power to regulate interstate commerce.⁶ Because the transfer, transport, and possession of exotic animals (exotics) substantially affect interstate commerce, Congress has the power to regulate these acts⁷ even though the regulation of

5. H.R. 1202; S. 1493.

6. See U.S. CONST. art. I, § 8, cl. 3; *Wickard v. Filburn*, 317 U.S. 111 (1942).

7. Congress can regulate anything having a "substantial relation to interstate commerce." *United States v. Lopez*, 115 S.Ct. 1624, 1629-30 (1995). Only once in recent history has legislation passed under the guise of the Commerce Clause been found unconstitutional for failing to substantially affect interstate commerce. See *id.* In *Lopez* the Supreme Court held the Gun-Free School Zones Act of 1990 unconstitutional because the regulated activity, possession of a firearm in a school zone, had no connection with a commercial activity. See *id.* at 1630-31.

Unlike the activity in *Lopez*, the trade and transfer of exotics is easily classified as a commercial activity. Moreover, the CEAPA only prohibits activities "in or affecting interstate or foreign commerce." H.R. 1202; S. 1493. This jurisdictional element alone satisfies the Commerce Clause. See *Lopez*, 115 S.Ct. at 1631. Congress will often regulate a disfavored activity by prohibiting interstate commerce of an item that is incidental to the activity. See, e.g., *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 550-53 (1944) (using the Commerce Clause to regulate interstate business insurance transactions). For instance, the National Motor Vehicle Theft Act prohibits the transportation of stolen vehicles across state lines. See 18 U.S.C. § 2312 (1994); see also *Brooks v. United States*, 267 U.S. 432, 435-36 (1925) (applying an earlier version of the same Act). The Supreme Court upheld this law as a permissible method to "regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote

hunting and chattel are issues normally left to the states.⁸

The CEAPA has prompted considerable commotion in the hunting community. Although prohunting groups oppose canned hunts—or “caged kills” as most hunters refer to the activity—they see legislation like the CEAPA as a tremendous threat to hunters’ rights.⁹ They question the drafters’ true motives, the vague and confusing language of the bill, and the need for federal regulation in an area usually under the control of the state legislatures.¹⁰

This Comment addresses these concerns while analyzing the CEAPA itself. Part II considers both the articulated and the unarticulated purposes of the bill. Part III analyzes how the CEAPA might be interpreted by those who would be required to implement it. Part IV discusses the extent of the problem being addressed by the CEAPA and some of the current state regulations that deal with the same and similar concerns. Part V contends that allowing states to solely regulate canned hunts is both reasonable and necessary. State regulation protects the exotics efficiently, preserves the exotic animal breeding programs on numerous game ranches, preserves hunting rights for citizens who enjoy the sport, and protects those states that rely financially on the industry. Finally, Part VI proposes two alternatives to the CEAPA: revising the federal statute to truly address the articulated purposes of the CEAPA or allowing states to exclusively regulate canned hunting.

immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin.” *Id.* at 436. Similar reasoning allowed the Court to uphold laws regulating the movement of lottery tickets, women, whiskey, and cattle. *See South-Eastern Underwriters Ass’n*, 322 U.S. at 549 (listing numerous cases decided before 1944 under the Commerce Clause). The CEAPA successfully uses the Commerce Clause to regulate exotics.

8. *See Georgia Power Co. v. 138.30 Acres of Land*, 617 F.2d 1112, 1126 (5th Cir. 1980) (Fay, J., concurring) (“[T]he open question is one of property law, one of the few areas traditionally left to the states.”); *United States v. Chappell Livestock Auction, Inc.*, 523 F.2d 840, 841 (8th Cir. 1975) (stating that the “displacement of state tort law affecting title to personal property [is] an issue traditionally left to the states”).

Not all regulation of hunting is left to the states. For instance, federal law bans hunting from aircraft. *See* 16 U.S.C. § 742j-1 (1994).

9. *See House Subcomm. Hearings, supra* note 1, at 1 (statement of Frank Lautenberg, Sen. (D-N.J.)); *see also* Letter from Congressional Sportsmen’s Caucus, U.S. House of Representatives, to Bill McCollum, Chairman, House Subcommittee on Crime (Mar. 21, 1996) (on file with *Loyola of Los Angeles Law Review*) [hereinafter CSC Letter] (stating that “the Congressional Sportsmen’s Caucus and many others in the hunting and fishing community are strongly opposed to [the CEAPA]”).

10. *See, e.g., House Subcomm. Hearings, supra* note 1 (statement of Bill K. Brewster, Rep. (D-Okla.)).

II. DUE TO THE CONTROVERSIAL CHARACTER OF THE ISSUE AND THE NATURE OF THE POLITICAL PROCESS, THE PURPOSES BEHIND THE CEAPA HAVE BEEN PERMANENTLY OBSCURED

Initially, advocates of the CEAPA articulated only one purpose for the legislation—the prevention of canned hunts.¹¹ Supporters proffered additional reasons for the CEAPA as opposition grew.¹² Meanwhile, groups and individuals opposing the bill saw these various articulated purposes as merely a sham fabricated to disguise the hidden purposes of antihunting groups, such as closing exotic game ranches¹³ in the United States, stigmatizing hunters, and making hunting illegal.¹⁴ Amid the politics of the legislative process, the true purposes of the CEAPA are now permanently obscured.

The original sponsors of the CEAPA in the House of Representatives, Congressman George Brown, Jr. of California and Congressman Porter Goss of Florida, made it clear that the proposed legislation was “not seek[ing] to limit hunting practices involving animals in the wild.”¹⁵ When addressing potential cosponsors of the CEAPA, Brown and Goss emphasized that the bill was devised only to prevent “unsportsmanlike” hunting practices, such as canned hunts.¹⁶ In letters sent to fellow members of Congress, Brown and Goss referred to over “1,000 ‘canned hunting’ operations” in the United States in order to convince colleagues that the legislation was necessary to “protect captive, exotic mammals.”¹⁷

During the April 25, 1996, hearing before the House Sub-

11. See Dear Colleague Letter from George E. Brown, Jr. & Porter J. Goss, U.S. Congress (Apr. 3, 1995) (on file with *Loyola of Los Angeles Law Review*) [hereinafter April Dear Colleague Letter] (writing in support of the Captive Exotic Animal Protection Act); Dear Colleague Letter from George E. Brown, Jr. & Porter J. Goss, U.S. Congress (Feb. 27, 1995) (on file with *Loyola of Los Angeles Law Review*) [hereinafter February Dear Colleague Letter] (writing in support of the Captive Exotic Animal Protection Act).

12. See *infra* notes 19-21 and accompanying text.

13. Game ranches, as referred to in this Comment, are ranches that raise or import native and exotic animals. Many game ranches allow their animals to be tracked and hunted by private hunters, usually for a fee.

14. See *infra* notes 22-32 and accompanying text.

15. April Dear Colleague Letter, *supra* note 11; February Dear Colleague Letter, *supra* note 11.

16. April Dear Colleague Letter, *supra* note 11; February Dear Colleague Letter, *supra* note 11.

17. April Dear Colleague Letter, *supra* note 11; February Dear Colleague Letter, *supra* note 11.

committee on Crime,¹⁸ proponents articulated additional reasons for the CEAPA. The main argument was the need to protect native species of wildlife from the introduction of nonindigenous animals that might transmit diseases, interbreed, or compete for food.¹⁹ Also mentioned was the general need for the regulation of exotics on a national level because of the interstate transportation of the animals.²⁰ At the same time Congressman Goss stated, "The driving force behind the introduction of this legislation was allegations that zoo animals were being sold to certain canned hunt operators for trophy hunting purposes."²¹

Opponents of the bill see the issues in a different light. Because the CEAPA has vague definitions, which require that exotics be kept on 1,000 acres or more in order to avoid classification as "captive,"²² many pro hunting groups view the legislation as a thinly veiled attempt by the Humane Society of the United States to close down most, if not all, exotic game ranches.²³ The minimum acreage requirement alone would likely have such an effect. Game ranches under 1,000 acres would no longer be able to make a profit through the hunting of exotics because under the CEAPA a hunt on a 900-acre ranch would be a canned hunt.²⁴ Although the hunt itself would not be illegal, individuals involved in transportation or possession of exotics killed or injured during the hunt would be criminally liable, putting an end to hunts on smaller game ranches.²⁵

18. See *House Subcomm. Hearings, supra* note 1 (Hearing Witness List).

19. See *id.* at 4 (statement of George E. Brown, Jr., Rep. (D-Cal.)); *id.* at 1 (statement of Frank J. Lautenberg, Sen. (D-N.J.)); *id.* at 2-3 (statement of Wayne Pacelle, Vice President of Government Affairs and Media, Humane Society).

20. See *id.* at 5-6 (statement of George E. Brown, Jr., Rep. (D-Cal.)); *id.* at 2 (statement of Wayne Pacelle, Vice President of Government Affairs and Media, Humane Society).

21. *Id.* at 1 (statement of Porter J. Goss, Rep. (R-Fla.)).

22. See H.R. 1202, 104th Cong. (1995); S. 1493, 104th Cong. (1995).

23. See, e.g., *House Subcomm. Hearings, supra* note 1, at 1 (statement of Richard Winters, Jr., President, Exotic Wildlife Association); see also Alfred Lubrano, *The Trophy Fields: 'Canned Hunts' Become Target of Controversy*, PHILADELPHIA INQUIRER, Feb. 2, 1996, at A1 (referring to the CEAPA as part of a "movement to make the hunting of captive exotics illegal everywhere").

It has been alleged that the Humane Society actually drafted the CEAPA, merely using Congressmen Porter and Goss as a means of effectuating their goals. See *House Subcomm. Hearings, supra* note 1, at 6-7 (statement of Ike C. Sugg, Competitive Enterprise Inst.).

24. See H.R. 1202; S. 1493.

25. The bill only requires "possession" and an effect on interstate commerce. If a hunter from one state pays to kill a boar on a game ranch in another state, it affects

Other hunting advocates see the bill as part of an overall, long-term plan by the Humane Society to vilify hunting and make it unlawful.²⁶ They point to the fact that the "1,000 'canned hunting' operations" referred to by Congressmen Brown and Goss is a figure received from the Humane Society.²⁷ This total includes most, if not all, legitimate game ranches in the United States that do not offer canned hunts.²⁸

In addition, the bill singles out exotics that are killed for entertainment and trophy collection.²⁹ Almost all hunts, both fair-chase hunts³⁰ and canned hunts, are accomplished, at least in part, for entertainment or trophy collection.³¹ As hunting advocates perceive it, these terms have been added solely to stigmatize the sport.³²

The true purposes of the CEAPA probably include all of the

interstate commerce. See 15A AM. JUR. 2D *Commerce* § 8 (1976) (explaining that a court may only invalidate legislation under the Commerce Clause if "the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent"); Vince Lee Farhat, Note, *Term Limits and the Tenth Amendment: The Popular Sovereignty Model of Reserved Powers*, 29 LOY. L.A. L. REV. 1163, 1172 n.81 (1996) ("If the activity subject to regulation affects interstate commerce in any way, the regulation is constitutional."). See generally *Hodel v. Indiana*, 452 U.S. 314 (1981) (holding constitutional an act designed to protect the environment and public health from the dangers of the coal production because of the effect on interstate commerce).

Replacement of exotics with nonexotics is also not an option. Most domestic wildlife cannot be privately owned in the United States unless they are "traditionally farmed or ranched" because they are owned by the state and federal governments. See Ike C. Sugg, *To Save an Endangered Species, Own One*, WALL ST. J., Aug. 31, 1992, at A10.

26. See, e.g., *House Subcomm. Hearings*, supra note 1 (statement of Bill K. Brewster, Rep. (D-Okla.)) (arguing that the CEAPA is "about outlawing sport-hunting" and is a "poorly disguised attempt by animal rights activists to undermine all forms of hunting"); *id.* at 2 (statement of Pete Geren, Rep. (D-Tex.)) ("The proponents of this bill also point to the fees charged to hunt these animals as if this somehow taints the activity. Paying to hunt is not unique to exotics. . . . People pay private land owners for the opportunity to hunt in every state in this nation.").

27. *House Subcomm. Hearings*, supra note 1, at 3 (statement of Ike C. Sugg, Competitive Enterprise Inst.).

28. See *id.*

29. See H.R. 1202; S. 1493.

30. "Fair-chase hunts" are hunts where the animals roam free on the game ranches. This infers that the animal has a reasonable chance of evasion or escape, usually equal to that of a similar hunt in the wild. See Exotic Wildlife Ass'n, Code of Ethics of the Exotic Wildlife Association § 5A(2) (undated) (on file with *Loyola of Los Angeles Law Review*); National Rifle Ass'n, Draft NRA Hunting Policy: Caged Kill 1-3 (1996) (on file with *Loyola of Los Angeles Law Review*).

31. See National Rifle Ass'n, Institute for Legislative Action, Fact Sheet: H.R. 1202 (Jan. 1996) (on file with *Loyola of Los Angeles Law Review*) [hereinafter NRA Fact Sheet].

32. See, e.g., *House Subcomm. Hearings*, supra note 1, at 1 (statement of Lamar Smith, Rep. (R-Tex.)).

articulated and unarticulated justifications and more. All individuals and groups involved, both supporters and opponents of the bill, view the issue differently. If the issue reaches the courts, this may be problematic because most courts feel an "obligation to construe statutes so that they carry out the will, real or attributed, of the lawmaking branch of the government."³³ Because the true purposes of the CEAPA are speculative, courts will have no way to precisely discern the intent of Congress in order to carry it out. As a result, courts will be left to decide the true purposes of the CEAPA, giving the deciding court and the enforcing agency considerable power over the ultimate interpretation of the legislation.

III. INTERPRETING THE CEAPA

A. Ambiguity, Vagueness, and Lack of Sufficient Definitions in the CEAPA Make Interpretation Troublesome

General and ambiguous words and phrases appear throughout the CEAPA.³⁴ The legislation's vague language and lack of many important definitions add to the difficulty in determining how the law would be interpreted if it passed.

1. Killing the messenger: the knowledge requirement

The CEAPA punishes individuals who "knowingly transfer[], transport[], or possess[] a confined exotic animal, for the purpose[] of allowing the killing or injuring of that animal for entertainment or the collection of a trophy."³⁵ It does not punish the person who does the killing. The person punished is not the hunter,³⁶ as the crime is not the killing or injuring but the transporting or possession prior to the killing or injuring. This misdirected effort targets third parties—the truck driver, the veterinarian, and the ranch hand—who somehow allow the killing or injuring to occur by moving or keeping the animal.³⁷

33. 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.05, at 22 (5th ed. 1992).

34. "Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." *Id.* § 45.02, at 6. A well-drafted statute has minimal interpretation problems. *See id.* at 6-7.

35. H.R. 1202, 104th Cong. (1995); S. 1493, 104th Cong. (1995).

36. Although certainly the game ranch owner can be reached as a possessor of the animals.

37. *See* Florida Cattlemen's Ass'n, Comments on H.R. 1202, at 1 (Apr. 25, 1996) (on file with *Loyola of Los Angeles Law Review*) [hereinafter Cattlemen's Com-

It is not clear if the term "knowingly" applies only to the transport, transfer, or possession of the animal or if it also applies to the "allowing" of the injury or death. In other words, while the actor must have knowledge of the transport, transfer, or possession, it is not clear if the actor must also have knowledge of what the third-party owner or hunter intends to do with the animal once it is no longer in the actor's control.

A similar problem arose in *United States v. Yermian*,³⁸ which dealt with the making of false statements to a federal agency. The statute at issue in *Yermian*, 18 U.S.C. § 1001, addresses false statements to the government. It reads as follows:

Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up . . . or makes any false . . . statements or representations, or makes or uses any false writing or document knowing the same to contain any false . . . statement or entry, shall be fined . . . or imprisoned . . . or both.³⁹

The Ninth Circuit read "knowingly and willfully" to modify both the conduct of making a false statement and the fact that the statement is made to a federal agency.⁴⁰ The Supreme Court reversed.⁴¹ The five member majority held that the legislative history and plain language of the statute supported a finding that the knowledge requirement only applied to the actor's knowledge regarding the statement's untruth.⁴² The four member dissent, written by Justice Rehnquist, argued that the statute was ambiguous, requiring a finding in favor of lenity⁴³—a finding that the statute requires knowledge that the statements are being made to a federal agency.⁴⁴ Rehnquist felt that the majority "disregarded the clearest, albeit not conclusive, evidence of legislative intent," creating more confusion than it resolved.⁴⁵

The *Yermian* case demonstrates the difficulty of applying the knowledge requirement to other terms in an unclear statute. In

ments].

38. 468 U.S. 63 (1984).

39. 18 U.S.C. § 1001 (1994).

40. See *Yermian*, 468 U.S. at 67.

41. See *id.* at 68.

42. See *id.* at 68-75.

43. See *infra* note 49 and accompanying text.

44. See *Yermian*, 468 U.S. at 75-77 (Rehnquist, J., dissenting).

45. *Id.* at 83 (Rehnquist, J., dissenting).

the CEAPA the word "knowingly" may apply to: (1) the knowledge of the transportation; (2) the knowledge that the animal falls under the definition of a "confined exotic animal"; (3) the knowledge that the animal will or may be killed or harmed; (4) the knowledge that the killing will be for entertainment or for a trophy; or (5) any combination of these possibilities.

For instance, the level of knowledge a truck driver must have in order to be culpable is unclear. The CEAPA specifically states that the defendant is guilty of a violation "whether or not the defendant knew the length of the [animal's] captivity."⁴⁶ If only knowledge of the animal's transportation is required, and the driver knows a gazelle is being transported to a game ranch, the driver has violated the CEAPA. The driver's knowledge that the destination of the gazelle is a game ranch might alone lead to liability under the CEAPA, as an animal on a game ranch "may" be killed or injured. However, the driver may be comforted by the fact that the game ranch is over 1,000 acres. Unfortunately, the size of the ranch will not do the driver any good if the animal is then shot in a small pen on the ranch; the driver again may be guilty of violating the Act.

How is the driver to determine what the shipper intends to do with the animal after shipment? And how is the truck driver to ascertain the history of each animal to determine if it is a confined exotic animal as defined by the CEAPA? Under strict liability it appears that if the driver diligently sought information on the history of an animal, but was lied to by a third party, that driver would still be liable.⁴⁷ Somehow the driver is expected to know the mental state of another party; the driver must determine if that third party will kill or injure the animal at a later time in a manner that the CEAPA prohibits.

Fortunately for the driver this predicament falls within the rule of lenity, which provides guidance in the interpretation of criminal statutes.⁴⁸ Motivated by the principle that "people deserve warning not only of the boundaries of criminal conduct, but also of the *repercussions* of crossing those boundaries," the rule of

46. H.R. 1202; S. 1493.

47. "Under a strict-liability statute, a defendant can be convicted even though he was unaware of the circumstances of his conduct that made it illegal." *Liparota v. United States*, 471 U.S. 419, 443 n.7 (1985) (White, J., dissenting).

48. See generally *United States v. Edmonds*, 80 F.3d 810, 820-22 (3d Cir.) (discussing cases that have applied the rule of lenity), *cert. denied*, 136 L. Ed. 2d 214 (1996).

lenity requires that ambiguous criminal statutes be interpreted in favor of the defendant.⁴⁹ Unhappily, this did not help the defendant in *Yermian*,⁵⁰ and there is no guarantee it will aid our bewildered driver.

While the truck driver faces these questions in court, the person who pays for a canned hunt is immune, as that person did not transfer, transport, or possess the animal.

2. What is a "confined exotic animal"?

The definition of "confined exotic animal" includes a large number of animals, but many exotics still fail to receive protection from canned hunts because of the definition's wording. To be a confined exotic animal, the animal must be a "mammal of a species not historically indigenous to the United States" that has not been living as it would in the wild in an open area of 1,000 acres or more with the opportunity to avoid hunters for either the greater part of its life or a period of one year.⁵¹

Completely wild, free-roaming exotics living on a 900-acre game ranch for over one year constitute confined exotic animals under the CEAPA. Amazingly, however, if a free-roaming exotic living more than one year on a game ranch of 1,010 acres is caught, staked in place, and shot, the animal does not meet the definition of a confined exotic animal. This anomalous outcome results from the form of the CEAPA's definitions. As long as the exotic lived in the "wild" on over 1,000 acres for the greater part of its life and was not "captive" for more than one year, that animal is not a confined exotic animal under the bill.⁵²

To be a confined exotic animal, the animal cannot be "historically indigenous."⁵³ The words "not . . . historically indigenous" imply that the species did not exist in the United States within the period of written record.⁵⁴ Using this definition, horses, cattle, swine, donkeys, several species of deer, cats, most dogs, and goats are not indigenous to the United States.⁵⁵ An interpretation

49. See, e.g., *id.*

50. *Yermian*, 468 U.S. at 76-77 (Rehnquist, J., dissenting).

51. See H.R. 1202; S. 1493.

52. See H.R. 1202; S. 1493.

53. H.R. 1202; S. 1493.

54. See *Cattlemen's Comments*, *supra* note 37, at 2.

55. See *id.*; *House Subcomm. Hearings*, *supra* note 1 (statement of Bill K. Brewster, Rep. (D-Okla.)) (explaining that many cattle now raised for beef in the United States are not indigenous, such as the Texas Longhorn, which was brought from

limited to the presence or absence of the species when each state entered the Union would eliminate many domestic animals, but determining when and where each animal existed would create serious difficulties.⁵⁶

Unquestionably, the enforcing agency will have to resolve these questions.⁵⁷ The uncertainty of including animals that are not indigenous makes owners of game ranches and ranches that raise animals for human consumption nervous.⁵⁸ Leaving the interpretation to an administrative agency does not allay these fears.⁵⁹

3. What is "entertainment"?

The term "entertainment" is undefined and unbounded. It is the type of term that can apply to virtually any activity in its common usage. The dictionary definition of "entertainment" includes "amusement," an "agreeable occupation for the mind," and "something affording pleasure, diversion, or amusement."⁶⁰ Pleasure and amusement are mental states, leading to impossible problems of evidence and proof.⁶¹

For instance, because "entertainment" is evidently required under the CEAPA, but unbounded in its definition, there is no way to know if the CEAPA applies to an exotic transported for subsistence or for profit. There is no way to know what proof is necessary for an enforcing agency to show that an exotic was killed for entertainment. Once again, the interpretation of this vague term by the enforcing agency will significantly alter the final operation of the CEAPA.⁶²

Europe by the Spanish explorers).

56. See Cattlemen's Comments, *supra* note 37, at 3.

57. See 2B SINGER, *supra* note 33, § 49.05, at 22 ("[I]f a statute is silent or ambiguous the [c]ourt may assume that Congress implicitly delegated the interpretive function to the agency charged with its enforcement.").

58. See CSC Letter, *supra* note 9.

59. See, e.g., *House Subcomm. Hearings, supra* note 1, at 2 (statement of Edgar Stokes, President, Fla. Cattlemen's Ass'n) ("Our experience with bureaucrats back home is . . . they can write the rules and regulations to make it mean whatever they want it to mean.").

60. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 648 (2d ed. 1987).

61. Cf. Cattlemen's Comments, *supra* note 37, at 3-4 (discussing the difficulties with the mens rea requirement of the CEAPA).

62. See Tanya K. Metaksa, *ILA Report: A Canned Attack on Hunting Rights*, AM. HUNTER, Jan. 1996, at 14, 14.

*C. Federal Agency Interpretation Under the Administrative
Procedure Act Often Results in the Agency or the Courts Making
Essential Interpretive Determinations*

A currently unnamed federal agency will be assigned the task of interpreting and implementing the CEAPA should it pass.⁶³ From the text and subject matter of the bill, the obvious choices are the Department of Agriculture, the Department of the Interior's Fish and Wildlife Service, or the Department of Commerce.⁶⁴

Under the Administrative Procedure Act (APA), the agency charged with implementing the statute will have to do so through rulemaking, adjudication, or a combination of the two.⁶⁵ Rulemaking allows the agency to set forth a general rule to interpret or implement the law.⁶⁶ Adjudication is aimed at individuals or particular practices, rather than stating a general rule applicable to everyone under the statute.⁶⁷ For example, an agency hearing that determines how the law applies in a specific factual situation is an adjudication.⁶⁸

Agencies create legislative rules and interpretive rules under the APA.⁶⁹ Legislative rules are as binding as statutes themselves.⁷⁰ Congress must delegate authority to the agency in order for it to make legislative rules.⁷¹ This delegation can be explicit or implicit.⁷² When Congress clearly leaves "a gap for the agency to

63. See *Smiley v. Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1733 (1996) (explaining the presumption by the judiciary that any ambiguity in a statute is intended by Congress to be resolved at the discretion of the implementing agency); cf. *House Subcomm. Hearings*, *supra* note 1, at 3 (statement of Wayne Pacelle, Vice President of Government Affairs and Media, Humane Society) (noting the U.S. Fish and Wildlife Service's administrative ban on the baiting of several types of waterfowl).

64. Why the bill does not select a specific agency is unknown. This merely increases the confusion and vagueness of the legislation. The details, such as the naming of an implementing agency, would probably be worked out by a joint committee of the House and Senate, if the CEAPA ever makes it that far along in the legislative process.

65. See GARY J. EDLES & JEROME NELSON, *FEDERAL REGULATORY PROCESS: AGENCY PRACTICES AND PROCEDURES* § 1.8, at 21-22 (2d ed. 1995).

66. See *id.* § 1.7II, at 18-19 (citing Administrative Procedure Act § 1, 5 U.S.C. § 551(4) (1994)).

67. See *id.* at 19.

68. See *id.* at 18-19.

69. See I KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 7.1, at 287 (3d ed. 1994).

70. See *id.* §§ 6.1, 6.3, at 228, 233.

71. See *id.* § 6.3, at 234.

72. See *id.* at 236.

fill”⁷³ or states specifically in the statute that the agency has the authority to promulgate legislative rules, the delegation is explicit.⁷⁴ When “Congress use[s] ambiguous language in the statute and confer[s] upon the agency a general grant of power to promulgate legislative rules to implement the statute,” the agency is considered to have an implicit delegation of authority.⁷⁵ Interpretive rulemaking is used when an agency is not delegated the authority to promulgate legislative rules in a statute but must still enforce the statute.⁷⁶

1. Legislative rulemaking, while costly and complex, allows substantial input from interested parties

Legislative rulemaking is a very involved process. The APA provides two types of legislative rulemaking, formal and informal.⁷⁷ If the statute does not require the agency to provide a hearing for persons interested in the rulemaking process, the agency uses informal rulemaking.⁷⁸ Formal rulemaking applies when the statute requires that the rules be “made on the record after opportunity for an agency hearing.”⁷⁹ As Congress rarely compels hearings, informal rulemaking is the norm.⁸⁰ The Supreme Court ruled that through the APA Congress generally “established the maximum procedural requirements” of rulemaking.⁸¹ Therefore, although agencies can increase the procedural rights granted by Congress, courts cannot do so unless the agency has chosen to do so.⁸²

Section 553 of the APA sets forth the requirements for infor-

73. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

74. *See* I DAVIS & PIERCE, *supra* note 69, § 6.3, at 236.

75. *Id.*

76. *See id.* at 234. However, agencies that are given the authority to make legislative rules can also promulgate interpretive rules. *See, e.g.*, *National Family Planning & Reproductive Health Ass’n v. Sullivan*, 979 F.2d 227 (demonstrating that the Department of Health and Human Services promulgated both interpretive and legislative rules). A rule that “clarifies a statutory term,” “reminds parties of existing statutory duties,” or explains “something the statute already require[s]” is an interpretive rule. *Id.* at 236-37. A rule that supplements a statute, fills in the gaps, or “effect[s] a change in existing law or policy” is a legislative rule. *Id.* at 237.

77. *See* I DAVIS & PIERCE, *supra* note 69, § 7.1, at 287-88.

78. *See id.* § 7.2, at 290.

79. 5 U.S.C. § 553(c); *accord* I DAVIS & PIERCE, *supra* note 69, § 7.2, at 290.

80. *See* I DAVIS & PIERCE, *supra* note 69, § 7.1, at 288.

81. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

82. *See id.*

mal rulemaking. Notice to the public followed by a comment period for interested parties is obligatory.⁸³ After considering any comments received, the agency must respond to all comments and publish the final rule.⁸⁴ Interested parties who disagree with the final rule then have "the right to petition for the issuance, amendment, or repeal of a rule."⁸⁵

Although the informal rulemaking process appears simple, once the courts are involved, it is not. The courts must use statutory construction techniques to analyze whether the agency followed the correct procedures in reaching its decision and whether the agency reasonably interpreted the statute.⁸⁶ While both areas are cause for concern by administrative agencies, the reasonableness requirement is more difficult to satisfy.⁸⁷

Statutory construction is a process that involves looking at the common meaning of each word, each word in conjunction with the words around it, the statute as a whole, and the legislative history.⁸⁸ If Congress's intent is clear, the agency must give effect to the statute in the manner intended by Congress.⁸⁹ However, when the intent is unclear, the federal agency uses its delegated rulemaking

83. See 5 U.S.C. § 553(b)-(c).

84. See *id.* § 553(c)-(d).

85. *Id.* § 553(e).

86. One example of a case that overturned an agency's decision because of the procedures followed is *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994). In *Beno* the court held that the Secretary of Health and Human Services did not adequately address the opposition to an agency rule. *Id.* at 1076. The case has been criticized as "illustrat[ing] well the ability of judges to manipulate the malleable requirement of reasoned decision-making to reject an agency action that is inconsistent with the judges' personal ideological predilections." DAVIS & PIERCE, *supra* note 69, § 7.4, at 101 (Supp. 1995); accord *Beno*, 30 F.3d at 1077 (O'Scannlain, J., dissenting) ("This court is not empowered to review the merits of [the Secretary's] decision. It certainly has no power to nit-pick nor second guess the policy judgment inherent in the scheme.").

87. See I DAVIS & PIERCE, *supra* note 69, § 7.12, at 364-65 (noting the avoidance of rulemaking procedures by agencies because the judiciary often finds agency interpretations to be arbitrary or capricious).

88. See 2A SINGER, *supra* note 33, § 45.05, at 22-23.

89. See *Chevron*, 467 U.S. at 842-43 (citing *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981); *SEC v. Sloan*, 436 U.S. 103, 117-18 (1978); *Federal Maritime Comm'n v. Seatrain Lines*, 411 U.S. 726, 745-46 (1973); *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261, 272, amended by, 392 U.S. 901 (1968); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *NLRB v. Brown*, 380 U.S. 278, 291 (1965); *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946); *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932); *Webster v. Luther*, 163 U.S. 331, 342 (1896)).

power to clarify the law.⁹⁰ The Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁹¹ held that even when there may be a better or more reasonable construction available, agency regulations that are not "arbitrary, capricious, or manifestly contrary to the statute" will be upheld.⁹²

For example, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,⁹³ the Endangered Species Act's definition of the word "take" included the word "harm."⁹⁴ The Secretary of the Interior, through the Director of the Fish and Wildlife Service, interpreted "harm" as including any significant "habitat modification or degradation" that kills or injures wildlife.⁹⁵ The respondents argued that Congress did not intend for the word "take" to include habitat modification.⁹⁶ The Senate deleted similar language from the Senate bill before passing it.⁹⁷ The Ninth Circuit held that the Director's definition of "harm" was too broad.⁹⁸ Instead, the Ninth Circuit believed the term should be read in the context of the words around it.⁹⁹ The Supreme Court reversed, finding that the Secretary "reasonably construed the intent of Congress when he defined 'harm.'"¹⁰⁰ The Court noted:

In the elaboration and enforcement of the [Endangered Species Act], the Secretary and all persons who must comply with the law will confront difficult questions of proximity and degree; for . . . the Act encompasses a vast range of economic and social enterprises and endeavors. These questions must be addressed in the usual course of the law, through case-by-case resolution and adjudica-

90. *See id.* at 843-44.

91. 467 U.S. 837 (1984).

92. *Id.* at 844; accord *Smiley*, 116 S. Ct. at 1735 ("[T]he question before us is not whether it represents the best interpretation of the statute, but whether it represents a reasonable one."). The deference applied in the *Chevron* case applies to legislative rules but probably does not apply to interpretive rules. *See* I DAVIS & PIERCE, *supra* note 69, § 6.3, at 235. This is because interpretive rules are not binding. *See id.*

93. 115 S. Ct. 2407 (1995).

94. *See id.* at 2410.

95. *Id.*

96. *See id.*

97. *See id.* at 2410-11.

98. *See id.* at 2411.

99. *See id.*

100. *Id.* at 2418. The Court specifically found that the definition was supported by the dictionary definition of the word, by the broad purposes of the statute, and by the grant of authority to the Secretary that excluded incidental acts that caused harm. *See id.* at 2412-14.

tion.¹⁰¹

Even with the deference afforded an agency interpretation by the Supreme Court's holding in *Chevron*, convincing a court that all of the requirements have been met in order to uphold an agency rule promulgated through the legislative rulemaking process is still difficult:

In order to avoid the risk of judicial reversal of a rule as arbitrary or capricious, an agency must respond to all major points made in comments, state the factual predicates for its rule, support the factual predicates by linking them to something in the record of the rulemaking, explain its reasons for resolving issues as it did, relate its findings and its reasoning to decisional factors made relevant by its statute, and give reasons for rejecting plausible alternatives to the rule it adopted.¹⁰²

An agency does not have to reach scientific certainty in interpreting supportive data for rules,¹⁰³ and the Supreme Court has emphasized the need for deference when uncertain facts are involved.¹⁰⁴ Nevertheless, the mandatory amount of factual and evidentiary support varies from court to court.¹⁰⁵ Requirements range from "unrealistic demands that agencies prove legislative facts that cannot be proven or disproven, to acquiescence in rules predicated on an agency's candid recognition that the legislative facts relevant to its choice of rules are highly uncertain."¹⁰⁶

In addition to the other hurdles faced by administrative agencies, the executive branch may exert pressure on an agency to adopt its preferred interpretation.¹⁰⁷ Because the agency's decision-makers are usually the President's own appointees, this type

101. *Id.* at 2418.

102. I DAVIS & PIERCE, *supra* note 69, § 7.1, at 289.

103. *See id.* § 7.5, at 322.

104. *See id.* at 331 (discussing *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983)).

105. *See id.* at 321.

106. *Id.* at 326; *see also id.* at 326-29 (illustrating unrealistically demanding court opinions (citing *International Ladies' Garment Worker's Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983); *National Nutritional Foods Ass'n v. Mathews*, 557 F.2d 325 (2d Cir. 1977); *National Welfare Rights Org. v. Mathews*, 533 F.2d 637 (D.C. Cir. 1976))).

107. *See* I DAVIS & PIERCE, *supra* note 69, § 7.9, at 354. Because the executive branch is directly accountable to the voters, this might be one way for the public to gain some input into the process.

of executive pressure can be hard to resist.¹⁰⁸ Clearly, legislative rulemaking is a difficult process for agencies, requiring input from innumerable segments of society. Interpretive rulemaking involves much less input from outside parties.¹⁰⁹

2. Interpretive rulemaking allows only limited contribution from interested parties and gives greater power to the courts to control interpretations

Interpretive rules are unlike legislative rules in many important respects.¹¹⁰ First and most importantly, interpretive rules are exempt from the notice and comment requirements imposed upon the legislative rulemaking process, removing the chance for interested parties to critique a new interpretive rule before it is published.¹¹¹ Additionally, interpretive rules are not binding and only serve to persuade courts that the agency has correctly interpreted and applied the law.¹¹² A court may give effect to these rules if it agrees with the agency's reasoning, or it may choose another interpretation.¹¹³ Because the agency lacks legislative rulemaking authority delegated by Congress, preenforcement judicial review is not available for interpretive rules as it is for legislative rules.¹¹⁴ Finally, because the deference afforded to interpretive rulemaking "is based solely on common sense,"¹¹⁵ it is much weaker than the deference given to legislative rules under *Chevron*.¹¹⁶

Nevertheless, courts always consider and often follow interpretive rules.¹¹⁷ Judges realize administrative agencies often have the necessary time, experience, and resources for interpreting stat-

108. *See id.* Unless expressly forbidden by statute, such contact between the agency and the executive branch is expected and permitted. *See Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981).

109. *See infra* note 111 and accompanying text.

110. Interpretive rules often appear not as rules, but in other forms, such as guidelines or interpretative bulletins. *See, e.g., General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (EEOC guidelines to Title VII claims); *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944) (interpretative bulletins of the Department of Labor's Wage & Hour Division Administrator).

111. *See I DAVIS & PIERCE, supra* note 69, § 6.3, at 234.

112. *See id.*

113. *See id.* at 239.

114. *Cf. id.* § 7.4, at 312 (discussing the availability of preenforcement review for legislative rules (citing *Abbott Labs., Inc. v. Gardner*, 387 U.S. 136 (1967))).

115. *Id.* § 6.3, at 242.

116. *See id.*

117. *See generally id.* at 242-50 (discussing the persuasive effects of interpretive rules).

utes and considering alternatives.¹¹⁸ In *Skidmore v. Swift & Co.*,¹¹⁹ for example, Congress did not delegate authority to the agency to make legislative rules regarding the Fair Labor Standards Act of 1938, but the Administrator was still charged with the duty to enforce the statute.¹²⁰ In carrying out his duties, the Administrator published agency opinions regarding the Act in "interpretive bulletins."¹²¹ The Supreme Court noted that "while not controlling upon the courts by reason of their authority," the interpretative bulletins did "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."¹²²

As with legislative rulemaking, if the executive branch knows an agency will be issuing interpretive rules, officials may exert pressure on the decision-makers within the agency to decide in accord with the President.¹²³

3. Adjudication almost entirely avoids input from outside administrative agencies and provides little certainty in enforcement

To avoid the political, financial, and legal pitfalls of legislative and interpretive rulemaking, an agency will sometimes announce policies through adjudication, "claim[ing] that it does nothing but resolve contested factual disputes."¹²⁴ Adjudication completely avoids the publication of general rules and merely applies the agency's interpretations to specific individuals or practices.¹²⁵ While adjudication may be easier because of the lack of formal rulemaking processes, legislative rulemaking has considerable advantages, such as: (1) providing higher quality rules, (2) allowing public participation, (3) being subject to more political accountability, and (4) affording clearer public notice.¹²⁶ Unfortunately,

118. *See id.* at 243.

119. 323 U.S. 134 (1944).

120. *See id.* at 137-38.

121. *See id.* at 138.

122. *Id.* at 140.

123. *See supra* notes 107-08 and accompanying text.

124. I DAVIS & PIERCE, *supra* note 69, § 7.11, at 363; *see also id.* at 363-65 (discussing the decline of administrative rulemaking).

125. *See id.* at 363. For example, before adopting a legislative rule through formal rulemaking procedures, the Comptroller of Currency issued interpretive letters and amicus curiae briefs stating the agency's position on whether the definition of credit card interest included late payment fees. *See Smiley*, 116 S. Ct. at 1734.

126. *See I DAVIS & PIERCE, supra* note 69, § 6.7, at 261-66.

courts cannot require that agencies use the rulemaking process over adjudication.¹²⁷

Adjudication involves "announcing a broad basis for a decision in an adjudicatory proceeding and applying the 'rule' of the case as precedent."¹²⁸ No input from interested public parties is taken.¹²⁹ Because the legislative and executive branches rarely have any notice before an agency adjudication sets forth a new policy, there is little political accountability in the adjudicatory process.¹³⁰ It is also significant that an agency cannot apply a policy announced in a prior adjudication to a future case if relevant facts are contested in the subsequent case.¹³¹ This is because adjudicatory decisions are fact specific.¹³²

D. Agency Interpretations of the CEAPA Threaten to Exclude Input From Interested Parties and Avoid Political Accountability

An act as vague and unclear as the CEAPA, which can be interpreted in innumerable ways, really has no meaning until it is interpreted by the enforcing federal agency.¹³³ Depending on what process the agency chooses to employ, the construction of the statute may be removed from the political process entirely because Congress has completely given over its legislative power to the agency.¹³⁴

As currently written the CEAPA does not delegate congressional authority to any agency to promulgate legislative rules. Without a specific mandate the enforcing agency cannot issue leg-

127. *See id.* § 6.8, at 267.

128. *Id.* § 6.7, at 260.

129. *See id.* at 262-63 (comparing the public notice requirement of rulemaking to adjudication).

130. *See id.* at 262.

131. *See id.* § 6.8, at 271.

132. *See id.* Commentators on administrative law often argue that adjudication is inferior to rulemaking because case-by-case adjudication does not "effect future conduct and provide reasonably clear and objective standards for application to adjudicatory proceedings." *Id.* § 6.7, at 261.

133. When laws and policies are unclear, the enforcing agency must still interpret and implement them. *See* EDLES & NELSON, *supra* note 65, § 1.7II, at 18-19.

134. Commentators agree:

Conceptually, it is increasingly difficult to identify a source of political and constitutional legitimacy for most policy decisions. To the extent that Congress declines to make major policy decisions through statutory enactments and chooses instead to delegate policymaking to agencies, it is impossible to link policy decisions to the people through the politically accountable Legislative Branch.

I DAVIS & PIERCE, *supra* note 69, § 7.9, at 351.

islative rules.¹³⁵ Therefore, the notice and comment requirements of the APA for legislative rulemaking do not apply to the CEAPA, and public input is greatly limited.¹³⁶

If the agency enforcing the CEAPA chooses to use interpretive rulemaking, lobbying and political pressure from the interested public to the executive branch might provide the public with some secondhand input into decisions.¹³⁷ This type of input is tenuous at best, considering that the executive branch and the public may be unaware that the agency intends to put forth an interpretation.¹³⁸ Even if input from interested parties reaches the agency through the executive branch and is adopted into the agency interpretation, there is no guarantee the courts will accept the agency's nonbinding interpretation.¹³⁹ Life-tenured federal judges do not necessarily feel the same burden to respond to public demands that elected members of the legislative and executive branches do.¹⁴⁰ A judicial interpretation of the CEAPA would be almost completely removed from the affected members of the public. Because of the personal and financial nature of the interests at stake, leaving the CEAPA in the hands of the unaccountable would be detrimental to individuals on both sides of the canned hunting issue who wish to have a say in the process.

If the enforcing agency chooses to employ adjudication over interpretive rulemaking, the final outcome will be the same. The bill is ambiguous, there is no requirement of public notice and comment for adjudication, and the executive branch does not have any way to exert pressure on an administrative tribunal.¹⁴¹ The agency's tribunal can decide the issue in any way it sees fit.¹⁴² Al-

135. See *supra* notes 71-75 and accompanying text.

136. Interpretive rulemaking is exempt from the notice and comment procedures of the APA. See I DAVIS & PIERCE, *supra* note 69, § 6.6, at 234. Adjudication avoids both the notice and comment procedures and the publication of the rules, as it is merely a method to adjudicate factual disputes. See *id.* §§ 6.7, 7.11, at 261-66, 363-65.

137. Cf. *id.* § 7.9, at 354-55 (discussing the President's ability to pressure administrative agencies).

138. See *id.* at 356-57.

139. See *supra* Part III.C.2.

140. See, e.g., Deanell Reece Tacha, *Independence of the Judiciary for the Third Century*, 46 MERCER L. REV. 645, 645-46 (1995) ("[J]udicial independence means simply that a life-tenured federal judge is free from all political and other outside pressures to decide cases in a wholly impartial manner.").

141. See *supra* Part III.C.3.

142. See I DAVIS & PIERCE, *supra* note 69, § 7.11, at 363 ("If an agency announces all 'rules' in adjudications, it can deny the policy component of its actions, claim that it does nothing but resolve contested factual disputes, and avoid alerting Congress or

though judicial review is available, as it is with interpretive rule-making, the judicial process is equally free from public input.¹⁴³

Interpretive rulemaking and adjudication, the two most likely interpretation mechanisms for the CEAPA,¹⁴⁴ leave much to be desired from the standpoint of the concerned public. By generating legislation as imprecise as the CEAPA without a method for public input, Congress passes the buck, leaving interested parties without recourse.

IV. REGULATING AT THE STATE LEVEL PROVIDES THE DIVERSITY NECESSARY TO PROTECT THE INTERESTS OF THE STATES, THE ANIMALS, AND THE HUNTERS

State regulation currently addresses many of the concerns raised by proponents of the CEAPA, and it does so in a manner that is better suited to the needs of the citizens of each state, the animals, the hunters, and the ranch owners.¹⁴⁵ All states regulate hunting.¹⁴⁶ Many states currently have, or are considering, legislation aimed at canned hunts and other inhumane practices.¹⁴⁷ These laws can be found in state codes and regulations limiting game ranches or in separate legislation aimed directly at canned hunts.¹⁴⁸ These state laws demonstrate the need for the diversity of approaches provided by legislating at the state level.

Section 2124 of the California Fish and Game Code prevents the possession, purchase, sale, or transfer of wild mammals for the purpose of killing or injuring the animals for sport, gain, or amusement.¹⁴⁹ Section 2118 prevents the importation of many species of wild animals into the state.¹⁵⁰ These sections are very broad, preventing the operation of all game ranches within the state and consequently making all canned hunts illegal.¹⁵¹ As a

the White House of its plan to implement a new policy it prefers.”).

143. See *id.* § 6.7, at 262.

144. This is because legislative rulemaking authority is not delegated to any agency under the CEAPA. See *supra* notes 112-13 and accompanying text.

145. See *infra* Part V.C.

146. Cf. Steve Kesteron, *Revenue from Hunting and Fishing Boosts State's Economy*, ORLANDO SENTINEL, Oct. 26, 1994, at Lake Sentinel 8 (stating that “[a]ll 50 states collected \$791 million” in hunting and fishing license revenues in 1993).

147. See *infra* notes 149-56 and accompanying text.

148. For example, compare the general hunting legislation of California, CAL. FISH & GAME CODE § 2124 (West Supp. 1996), with the more specific canned hunt rule in Florida, FLA. ADMIN. CODE ANN. r. 39-12.010(5)(e) (Supp. 1996).

149. See CAL. FISH & GAME CODE § 2124.

150. See *id.* § 2118.

151. See *id.* §§ 2118, 2124; see, e.g., *House Subcomm. Hearings*, *supra* note 1, at 5

protective measure for the venison industry, section 2124 does have a specific exclusion for the "raising [of] deer to produce venison for market."¹⁵²

In 1995 the State of Virginia passed legislation requiring "shooting enclosures"¹⁵³ to be licensed and limiting the animals that can be killed in such enclosures to sheep, goats, and swine, effectively eliminating canned hunts.¹⁵⁴ Among other things, Virginia's Board of Agriculture and Consumer Services is authorized under this legislation to specify the species of animals that may be held, establish the minimum acreage for enclosures, and set the requirements for the humane care and killing of the animals.¹⁵⁵

In Florida canned hunts are banned through the imposition of a minimum acreage requirement that is much smaller than that of the CEAPA. Chapter 39-12.010 of the State's Administrative Code reads: "Game mammals taken on hunting preserves shall not be boxed or caged, but free-roaming on not less than 100 acres."¹⁵⁶

In addition to numerous other laws and regulations placed on hunting in the state, Texas passed an act in 1995 that prohibits the killing of exotics such as lions, tigers, leopards, cheetahs, hyenas, bears, elephants, wolves, rhinoceroses, or hybrids of these animals.¹⁵⁷ The Texas Parks and Wildlife Code provides that no person may kill or attempt to injure these animals when they are held under control, penned, or released from captivity so they can be killed.¹⁵⁸ This legislation is aimed at preventing canned hunts of dangerous exotics.¹⁵⁹

The New York State Assembly and Senate introduced a bill banning canned hunts in March of 1995.¹⁶⁰ This bill, while similar to the CEAPA, is more strict because it stringently regulates the sale of exotics by "exhibition, scientific, educational or amuse-

(statement of George E. Brown, Jr., Rep. (D-Cal.)) (noting that California has "ban[ned] the shooting of exotics outright").

152. CAL. FISH & GAME CODE § 2124(a).

153. See VA. CODE ANN. § 3.1-763.5:1 (Michie 1996) (defining a "shooting enclosure" as any fenced area available to the public for commercial shooting).

154. See *id.* § 3.1-763.5:2, :6.

155. See *id.* § 3.1-763.5:5(B).

156. FLA. ADMIN. CODE ANN. r. 39-12.010(5)(e).

157. See TEX. PARKS & WILD. CODE ANN. § 62.101-.107 (West Supp. 1996).

158. See *id.* § 62.101-.102.

159. See *id.* § 62.101-.107.

160. See A.B. 5363-A, 218th Leg., 1995-96 Sess. (N.Y. 1995); S.B. 3721-A, 218th Leg., 1995-96 Sess. (N.Y. 1995).

ment” organizations to game ranches.¹⁶¹ The bill places a heavy burden on the seller to determine that the buyer does not intend to use the animal in a canned hunt.¹⁶²

On March 20, 1996, the Pennsylvania legislature was presented with a bill to prohibit the unlawful assistance or participation in a canned hunt.¹⁶³ This bill is significantly more far reaching than the CEAPA. The Pennsylvania bill defines a “canned hunt” as a hunt of any mammal held in an enclosure of any size; it would make all canned hunts and game ranches illegal in Pennsylvania.¹⁶⁴

The State of Montana “has not taken a position on the hunting of exotic game animals on game ranches.”¹⁶⁵ However, the State’s Department of Fish, Wildlife, and Parks “is in the process of reviewing statutes regarding importation and possession of exotic animals with an option to propose legislation limiting exotic species in Montana.”¹⁶⁶

Many other states, such as Maryland, Massachusetts, Connecticut, Nevada, New Jersey, North Carolina, Wisconsin, and Wyoming, have strong regulations in place that restrict the hunting or killing of exotics.¹⁶⁷ These state laws are all that is necessary.

V. STATE REGULATION OF CANNED HUNTS ADEQUATELY PROTECTS ALL OF THE ARTICULATED INTERESTS OF THE CEAPA SUPPORTERS

A. Canned Hunts Are Not a Serious Problem Requiring Federal Intervention

Canned hunts are not the serious, widespread problem that proponents of the CEAPA would have the public believe. The 1,000 operations Congressmen Brown and Goss refer to do not exist. Rather, they are legitimate game ranches, which are regulated by their respective states.¹⁶⁸ Proponents of the CEAPA cite

161. N.Y. A.B. 5363-A; N.Y. S.B. 3721-A.

162. See N.Y. A.B. 5363-A; N.Y. S.B. 3721-A.

163. See S.B. 1459, 180th Leg., 1996 Sess. (Pa. 1996).

164. See *id.*

165. Letter from Karen Zackheim, Game Farm Program Coordinator, Montana Department of Fish, Wildlife, and Parks, to Richard M. Patch, Humane Society (Apr. 8, 1996) (on file with *Loyola of Los Angeles Law Review*).

166. *Id.*

167. See *House Subcomm. Hearings, supra* note 1, at 5 (statement of George E. Brown, Jr., Rep. (D-Cal.)).

168. See *supra* notes 27-28 and accompanying text.

four specific instances of canned hunts.¹⁶⁹ Of these four, three of the offenders were prosecuted under existing laws.¹⁷⁰ There are some reports of canned hunts in states that currently have no preventative regulations,¹⁷¹ but very little evidence demonstrates that canned hunts occur on a regular basis in the United States.¹⁷² In addition, any perceived problems in states without laws prohibiting canned hunts can be addressed by additional legislation at the state level.

B. The CEAPA Does Not Adequately Address the Interests of the Individual States

Different interests exist in each state with regard to the regulation of hunting within its borders.¹⁷³ Some states derive significant income from the operation of game ranches,¹⁷⁴ in others hunting may be the only viable use of land that is environmentally sensitive.¹⁷⁵ These states would be substantially harmed if the CEAPA were enacted because all game ranches under 1,000 acres would be closed.¹⁷⁶ In contrast, some states have little to no interest in the issue because of the limited number of game ranches within their borders.¹⁷⁷ There is also the fact that citizens of less urban states hunt more for sport and recreation, often viewing

169. See *House Subcomm. Hearings, supra* note 1, at 3-4 (statement of Wayne Pacelle, Vice President of Government Affairs and Media, Humane Society); *id.* at 4 (statement of Ike C. Sugg, Competitive Enterprise Inst.).

170. See *id.* at 4 (statement of Ike C. Sugg, Competitive Enterprise Inst.); *id.* at 3 (statement of Pete Geren, Rep. (D-Tex.)).

171. See Lubrano, *supra* note 23 (reporting on canned hunts in Pennsylvania).

172. One of the canned hunts used as an example by the Humane Society may have been perpetrated by undercover animal rights activists in order to get film footage of a canned hunt for publicity purposes. See *House Subcomm. Hearings, supra* note 1 (statement of Bill K. Brewster, Rep. (D-Okla.)).

There is an undercover investigator for the Humane Society who claims to have been to "more canned hunts than any other person in America." Lubrano, *supra* note 23.

173. "Texas is fortunate to have unique climate and topography that permits the introduction and propagation of nonindigenous wildlife. The expertise of Texas officials—working with our ranching and agriculture community—has permitted our state to effectively manage and enhance this wildlife diversity." *House Subcomm. Hearings, supra* note 1, at 1 (statement of Lamar Smith, Rep. (R-Tex.)).

174. See, e.g., *id.* at 2-3 (statement of Lamar Smith, Rep. (R-Tex.)) (emphasizing the importance of the game ranching industry to Texas).

175. See, e.g., *Cattlemen's Comments, supra* note 37, at 4.

176. See *supra* notes 24-25 and accompanying text.

177. For example, only two large game ranches operate in the State of New Hampshire. See *New Hampshire Fish and Game Commission Resolution* (adopted Sept. 21, 1994) (on file with LOYOLA OF LOS ANGELES LAW REVIEW).

hunting as part of their heritage.¹⁷⁸ Certainly it cannot be argued that the average citizen of New York City and the average citizen of Helena, Montana have the same general views toward hunting.¹⁷⁹

For similar reasons arbitrary national standards, such as the 1,000 acre requirement of the CEAPA, are not a sensible means of regulating the size of enclosures. Each state has its own topography. One thousand acres of mountainous terrain is significantly different from 1,000 acres of desert or swamp. Each state can take terrain into account when drafting laws with minimum or maximum enclosure size.¹⁸⁰

In addition, land availability in the fifty states is extraordinarily diverse. While most game ranches in Texas and many in Florida are extremely large,¹⁸¹ such large continuous tracts of land are not necessarily available or affordable anymore in other states.¹⁸² Also, due to both the terrain and the animals' natural instincts, some animals need very little space to avoid hunters, while others need large amounts.¹⁸³ State legislatures can take these variances into account when considering minimum acreage requirements.

As compared to state laws, which can be well tailored, the CEAPA does not allow for variation. States where canned hunting is not a problem and states that do not allow any hunting of exotics may have no need to pass additional animal cruelty laws to

178. See Andy Hansroth, *Husky Musky Anglers Release Their Biggest Fish*, SUNDAY GAZETTE MAIL, Sept. 10, 1995, at 9D (explaining that the most popular outdoor sports range from saltwater fishing and hunting in Houston to calisthenics in Chicago to tennis in New York City).

179. See *Fair Game Only*, ECONOMIST, Aug. 21, 1993, at 25, 25 (stating that people who live in cities view "hunters not as muscular outdoorsmen, but as blood- and beer-seeking bambi killers").

180. Tennessee, for example, limits the size of game ranches to a maximum of 640 acres. See TENN. WILD. RESOURCES AGENCY R. ch. 1660-1-11-.02(4)(a) (1994). For that reason passage of the CEAPA would close all game ranches in the state.

181. See *House Subcomm. Hearings*, *supra* note 1, at 6 (statement of Wayne Pacelle, Vice President of Government Affairs and Media, Humane Society); FLA. ADMIN. CODE ANN. r. 39-12.010(2) (Supp. 1996) (limiting the maximum size of game ranches to 5,000 acres).

182. In 1992, for example, two million acres of farmland and over 300,000 acres of wetlands were developed. See *Fair Game Only*, *supra* note 179.

183. See *House Subcomm. Hearings*, *supra* note 1 (statement of John Tanner, Rep. (D-Tenn.)) (explaining that a boar needs very little land area to evade hunters); NRA Fact Sheet, *supra* note 31 ("Many species of exotic animals require much less than 1000 acres to . . . elude a hunter. . . . Russian boar, for example, require much less than 1000 acres to forage successfully and to have the ability to elude a hunter.").

adequately protect exotics from canned hunts.¹⁸⁴ States that derive significant income from the operation of game ranches can narrowly tailor their canned hunt laws to ensure that the only kills prevented under the statutes are those where the animals are in small enclosures or are staked in place.¹⁸⁵ Where large areas of undeveloped land exist, states can require minimum acreage for game ranches; states with less land availability can restrict the species of exotics to be hunted, taking into consideration the terrain, rather than compelling a minimum size.¹⁸⁶

C. Laws Banning Canned Hunts and Preventing Other Inhumane Practices Are More Effective and Less Expensive at the State Level

Enforcement of laws prohibiting canned hunts will be more effective at the state level. States already have mechanisms in place to enforce their hunting regulations and their laws prohibiting cruelty to animals.¹⁸⁷ For example, consider the four instances of canned hunting cited by proponents of the CEAPA. The shooter, the ranch owner, or both were punished for their crimes under state laws and federal endangered species laws in at least three of the four cases.¹⁸⁸

Furthermore, the cost of enforcing the CEAPA is prohibitive

184. Cf. CAL. FISH & GAME CODE § 2124 (West Supp. 1996) (eliminating all hunting of exotics on game ranches in California); *House Subcomm. Hearings, supra* note 1, at 2 (statement of John Tanner, Rep. (D-Tenn.)) ("Ron Fox, the [Tennessee Wildlife Resources Agency's] [A]ssistant [D]irector, tells us that over the past decade they have had no significant problems with the management of [game ranch] facilities."); New Hampshire Fish and Game Commission Resolution (adopted Sept. 21, 1994) (stating that New Hampshire has two game ranches); Letter from Doug Hansen, Director, Wildlife Division, South Dakota Department of Game, Fish, and Parks, to Richard M. Patch, Legislative Assistant, Humane Society of the United States (Mar. 21, 1996) (on file with *Loyola of Los Angeles Law Review*) (explaining that South Dakota has no canned hunting laws and there is no known canned hunting problem in the state).

185. Texas already has a canned hunt law on its books, TEX. PARKS & WILD. CODE ANN. § 62.101-.107 (West Supp. 1996), as does Florida, FLA. ADMIN. CODE ANN. r. 39-12.010(5)(e).

186. Cf. TENN. WILD. RESOURCES AGENCY R. ch. 1660-1-11-.02(4)(a) (limiting the size of game ranches to 640 acres).

187. See *House Subcomm. Hearings, supra* note 1 (statement of Randy "Duke" Cunningham, Rep. (R-Cal.)).

188. See *supra* note 170 and accompanying text; see also *House Subcomm. Hearings, supra* note 1 (statement of Bill K. Brewster, Rep. (D-Okla.)) (stating that one of the individuals convicted received a sentence with a \$25,000 fine and jail time); *Caged Hunting*, WASH. TIMES, Apr. 25, 1996, at A20 (referring to the killing of a black leopard where the hunter was fined \$2,000 and the guide was sentenced to prison).

and inequitable. The agency would have to set up rules through rulemaking or adjudication at a substantial cost to taxpayers, and any amount spent in the set up and administration of the Act would be increased by the cost of enforcement.¹⁸⁹ A federal program under the CEAPA would undoubtedly be expensive to enforce.¹⁹⁰ There would be a nightmare of paperwork, requiring a method of tracking the transportation, transfer, and possession of exotic animals both within and between states.¹⁹¹ In addition, large scale record keeping on the history and whereabouts of each animal would be necessary to determine which exotics were covered by the CEAPA.¹⁹² Where the federal government will get the money for enforcement is not addressed in the CEAPA.

When an individual state finds the need to enhance its laws, the citizens of that state bear the cost of the additional enforcement measures.¹⁹³ Under a national program all citizens share the tax burden equally.¹⁹⁴ As a result, whether fair or not, the citizens of a state that contains five game ranches and the citizens of a state that contains five hundred will pay an equal share of the CEAPA's cost of enforcement. Such cost sharing only makes sense if the purpose of the bill is to preserve exotics for all Americans. Unfortunately, the CEAPA's more likely result would be to decrease populations of exotics.¹⁹⁵

189. Agency rulemaking can be time-consuming and expensive. See I DAVIS & PIERCE, *supra* note 69, § 7.11, at 363, 365. Each instance of adjudication involves the time and expense associated with a proceeding before an administrative law judge. See EDLES & NELSON, *supra* note 65, § 1.8, at 28. This can be more time consuming than rulemaking. See *id.*

190. The cost of enforcement is unknown. However, there are always costs associated with enforcing a new statute that requires active monitoring, such as the CEAPA. Cf. Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1083-84 (1995) (discussing why Congress would want to pass unfunded mandatory federal laws to be implemented by each state in order to save the federal government the expense of implementation on a national scale).

191. Record keeping would be required to implement the CEAPA's goal of congressional oversight over the interstate transport of exotics. See *House Subcomm. Hearings, supra* note 1, at 6 (statement of George E. Brown, Jr., Rep. (D-Cal.)).

192. Without some record keeping on the history of each exotic, there would be no way to determine if an animal killed or injured met the definition of a confined exotic animal under the CEAPA. See *supra* notes 51-56 and accompanying text.

193. See Caminker, *supra* note 190, at 1083-84.

194. See *id.*

195. See, e.g., *House Subcomm. Hearings, supra* note 1 (statement of Bill K. Brewster, Rep. (D-Okla.)).

D. The CEAPA Threatens Private Breeding Programs

The CEAPA does not take into account the importance of the game ranching industry to the preservation of many species of exotic wildlife.¹⁹⁶ Private game ranches raise exotics in order to make a profit.¹⁹⁷ This is true whether the animals are hunted; slaughtered for human consumption; or sold to zoos, other game ranches, or individuals for breeding purposes.¹⁹⁸ The profit motive encourages game ranches to breed animals that many people would not otherwise breed.¹⁹⁹ If these animals are dying off in the wild, game ranches can serve as a method of preserving the species.²⁰⁰

For example, the Bontebok Antelope, an endangered species, was almost extinct in the wild, but there are now over 1,750 on South African game ranches.²⁰¹ Twenty-nine of the remaining thirty-one bloodlines of the rare Scimitar-horned Oryx have been preserved by a Texas game rancher.²⁰² Approximately 200 Upland Barasingha Deer are left in central India, and over 180 of the same species live on a game ranch in Texas.²⁰³ The Indian Blackbuck Antelope and the North African Aoudad Ram were both reintroduced into their native habitats using animals raised on game ranches.²⁰⁴

As long as there is a commercial market for exotics, private game ranches will help to preserve species at no cost to the government or taxpayers.²⁰⁵ If the CEAPA abolishes the majority of game ranches, the unlimited potential of these operations as a method of exotic animal conservation will also be destroyed.²⁰⁶

196. *See id.*

197. *See Sugg, supra* note 25.

198. *Cf. Jim Steinberg, Deer Framing Comes to S. Texas*, CORPUS CHRISTI CALLER-TIMES, June 5, 1994, at D1 (discussing a game ranch in Texas that raises Axis Deer for hunting, venison, and commercial purposes).

199. *See House Subcomm. Hearings, supra* note 1 (statement of Bill K. Brewster, Rep. (D-Okla.)); *see generally Sugg, supra* note 25 (explaining how the profit motive resulted in increased populations of exotics).

200. *See House Subcomm. Hearings, supra* note 1 (statement of Bill K. Brewster, Rep. (D-Okla.)).

201. *See id.* at 10-11 (statement of Ike C. Sugg, Competitive Enterprise Inst.).

202. *See Sugg, supra* note 25 (referring to game ranch owner David Bamberger).

203. *See House Subcomm. Hearings, supra* note 1, at 1-2 (statement of Richard Winters, Jr., President, Exotic Wildlife Association).

204. *See id.* (statement of Bill K. Brewster, Rep. (D-Okla.)).

205. *See Sugg, supra* note 25 (noting the important role of economic incentives in conserving endangered species).

206. *See House Subcomm. Hearings, supra* note 1 (statement of Bill K. Brewster, Rep. (D-Okla.)).

VI. CONCLUSION

Two good alternatives to the CEAPA are available: (1) revising the CEAPA so it genuinely addresses the issue of canned hunts or (2) eliminating the bill entirely, relying instead on the states to legislate hunting of exotics.

If federal legislators insist on responding to the issue of canned hunts, even though it is not a serious problem, the CEAPA must be rewritten. In its current form, the CEAPA's ambiguity causes it to reach far beyond the prevention of canned hunts without even necessarily protecting exotics from canned hunts. The ambiguity of the text removes the interpretation of the statute from the politically accountable and places it into the hands of administrative agencies or the judiciary at a significant cost to United States taxpayers.

If legislators desire to rewrite the CEAPA, they should refer to some of the legislation at the state level. For example, Florida's canned hunt legislation has been in place for several years. The applicable provision states, "Game mammals taken on hunting preserves shall not be boxed or caged, but free-roaming on not less than 100 acres."²⁰⁷ This simple statement is more narrowly tailored than the CEAPA, and if successful in Florida,²⁰⁸ it might serve as a model for federal legislation.

The wording of any new federal statute should be clear and well defined. In addition, the individuals targeted by the law must be explicitly stated in the revised bill; the focus should be on punishing the shooter and the person who arranges the canned hunt, rather than on third parties. The legislation should not be limited to animals killed for sport or trophies; this requires reading the shooter's mind. The law should instead include all game animals killed in the prohibited manner, including exotic as well as native wildlife. All game animals are thus protected from the inhumane practices because a canned hunt has occurred whether the animal killed is native or exotic. Exemptions for animals that are ranched for human consumption and animals that must be put down by veterinarians for medical reasons should be added. In addition, if

207. FLA. ADMIN. CODE ANN. r. 39-12.010(5)(e) (Supp. 1996). Changing the wording to "boxed, caged, tied, or otherwise unable to flee" would be better than limiting it to "boxed or caged."

208. No statistics discussing the number of prosecutions under Florida's law are publicly available. However, Florida legislators most likely have access to such information. They could provide it to the drafters of the CEAPA if it is rewritten.

native wildlife are included in the legislation, exceptions for farmers and other land owners disposing of troublesome native animals will be necessary. The federal agency selected to implement the CEAPA should be stated in the bill at the outset for the information of interested parties. Congress should require formal rule-making, so interested parties will have input into the interpretation of the CEAPA through the administrative agency. Most importantly, the purpose of the statute should be plainly set forth in anticipation of the inevitable need for additional interpretation.

Because it will be very difficult for Congress to draft a clear, unambiguous bill prohibiting canned hunts, the preferable alternative is to let individual states, which are better equipped, enact and enforce legislation preventing canned hunts. States can address the needs of their citizens and the needs of the animals in a more appropriate manner than the federal government. Any attempt to regulate at a national level will only serve to create an expensive exercise in statutory construction and government bureaucracy.

These alternatives are assuredly unacceptable to people who desire to put an end to game ranches in the United States. However, the genuine will of the public can be more easily discerned by allowing the states to regulate exclusively or by narrowly tailoring new federal legislation. Either of these solutions will overcome any veiled attempt to mislead Congress into enacting legislation that seriously damages the game ranching industry and threatens the continued existence and growth of many species of exotics.

*Jamie Elizabeth Wrage**

* This Comment is dedicated with love to Bernice Addy Grubbs and James C. Grubbs, Jr.