

# SILENT NO MORE: THE LOGAN ACT AS A CONSTITUTIONALLY ENFORCEABLE TOOL IN FOREIGN POLICY

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## I. INTRODUCTION

It is no secret that the modern American political battle has developed a decidedly bitter character. Every misstep is exploited, and the violation of a federal law provides a particularly inviting opportunity for smear. The quadrennial presidential election regularly returns the discussion of private diplomacy as federal crime to the consciousness of Americans.<sup>1</sup>

The 2008 election was no different. President Obama's forays into Iraqi diplomacy generated scrutiny in circles far wider than the conservative blogosphere.<sup>2</sup> The accusations are not limited to the competitive political realm though. Indeed they spread much further, as evidenced by the similar treatment afforded former President Jimmy Carter after his recent trips to Palestine to speak with leaders of Hamas.<sup>3</sup> None of these well-publicized instances involving prominent political leaders went any further than bare accusations.

The law at issue in these often politically charged disputes is a 1799 law known as the Logan Act.<sup>4</sup> The Logan Act provides:

Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of

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1. See Ed Magnuson & Jack E. White, *Stirring Up New Storms*, TIME, July 9, 1984, at 8, <http://www.time.com/time/printout/0,8816,950072,00.html> (recounting presidential candidate Jesse Jackson's trips to Cuba and other countries during his 1984 presidential bid and the Logan Act chatter these trips brought about).

2. Barbara Slavin, *Obama Tried to Sway Iraqis on Bush Deal*, WASH. TIMES, Oct. 10, 2008, at A1. The Obama campaign contended that the discussions were carried out in Senator Obama's capacity as a member of the foreign affairs committee. *Id.* Though the mainstream media took note, the conservative blogosphere relentlessly derided Senator Obama for his actions. See, e.g., *Barack Obama in Violation of the Logan Act*, WAKE UP AMERICA, Sept. 17, 2008, <http://www.wakeupamericanspree.blogspot.com/2008/09/barack-obama-in-violation-of-logan-act.html>.

3. See Melvin Konner, *Carter's Rogue Diplomacy Hinders Peace*, ATLANTA J. CONST., May 13, 2008, at 11A (recounting President Carter's former policy initiatives alongside his most recent trip to Palestine); Robert Siegel, *All Things Considered: Jimmy Carter Gives Logan Act a Boost* (NPR broadcast Apr. 24, 2008), transcript available at <http://www.npr.org/templates/transcript/transcript.php?storyId=89922213>.

4. Logan Act, 18 U.S.C. § 953 (2006).

any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined under this title or imprisoned not more than three years, or both.

This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.<sup>5</sup>

This prohibition of citizen-diplomacy “without authority” has lived in academic infamy for some time, with commentators collectively asserting that though the Act may be a useful political tool in its dormant state, it would most certainly be deemed unconstitutional if enforced.<sup>6</sup> The periodic accusations made under the law are dismissed as “sabre-rattling” and, indeed, have thus far amounted to little more.<sup>7</sup> However, the law provides a necessary protection of constitutionally provided foreign affairs powers, and does so without violating the Constitution it protects.

This paper first examines the continued international significance of the Logan Act and similar legislation through the lens of globalization, specifically considering how the threat of unauthorized citizen-diplomacy has evolved since the inception of the Logan Act. It next reviews the background of the law to provide the early-American context necessary to understand the law with sufficient legislative specificity to satisfy constitutional challenges. This paper then analyzes the primary constitutional challenge traditionally leveled against the law: vagueness. Though the Logan Act may be ambiguous at points, such ambiguities fall short of constitutional vagueness and are sufficiently resolved by a review of Congress’s obvious policy objectives and the Act’s legislative history and intent. A federal

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5. *Id.*

6. See Kevin M. Kearney, *Private Citizens in Foreign Affairs: A Constitutional Analysis*, 36 EMORY L.J. 285, 346 (1987) (asserting that, if prosecuted, the Logan Act would most likely be unconstitutional for vagueness and overbreadth).

7. Brad R. Roth, *The First Amendment in the Foreign Affairs Realm: “Domesticating” the Restrictions on Citizen Participation*, 2 TEMP. POL. & CIV. RTS. L. REV. 255, 266 (1993).

court has the power to narrow many broad or vague statutes when necessary,<sup>8</sup> and, if presented with an appropriate case, a court could and should narrow the language of the Logan Act to facilitate its enforcement in accordance with the Legislature's intentions.

## II. INTERNATIONAL SIGNIFICANCE AND WHY THE LOGAN ACT REMAINS NECESSARY TODAY

Citizen-diplomacy can be a useful tool when undertaken with authority from the government or when carried on between two private individuals or bodies.<sup>9</sup> However, when undertaken in the absence of authority, independent diplomats can usurp the constitutionally granted foreign affairs powers of the Executive and Legislative Branches and lead to confusion or splintered policy objectives.

Although the Logan Act itself is a domestic law, its implications in the international arena are readily apparent. Communications between nations are at the heart of international law, and the steady advancement of both commercial and political globalization forces the continued evolution of understandings and applications of domestic law as well as international law. The Logan Act is critical to the character of American interaction with the world, and although it is codified in the United States Code rather than a treaty or other source of international law, its enforcement will no doubt resonate, for better or worse, throughout the most critical international relationships: those between the United States and other nations with which the United States is involved in a dispute or controversy.

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8. See Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 295 (2003).

9. See Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 669–71 (2002) (asserting that the breadth of experiences and resources in the public could and should supplement government diplomacy to achieve maximum results).

*A. Foreign Policy Powers in the Constitution*

An understanding of the constitutional source of foreign affairs powers is necessary to understand the threat of unauthorized citizen-diplomats. Though the debate continues as to which foreign affairs powers are vested in the Executive Branch and which are based in the Legislature, this debate has little effect on the usurpation of these powers by private diplomats.<sup>10</sup>

It is clear that the Logan Act was passed as a measure designed to specifically protect the foreign affairs powers of the Executive.<sup>11</sup> The Annals of Congress is essential to the debates regarding the Logan Act “Usurpation of Executive Authority,” and that is the legitimizing principle consistently touted by the proponents of the Act.<sup>12</sup>

The constitutional accuracy of the seat of certain foreign affairs powers presumed by the Fifth Congress may prove critical in narrowing the scope of the Act today to defeat vagueness claims and explain ambiguity, but the language of the Act itself treats the Government of the United States as a single entity.<sup>13</sup> Therefore, the powers technically or arguably granted to a certain branch are not facially relevant. Instead, at issue is the breadth of constitutionally granted foreign affairs powers vested in the federal government as a whole. The backbone of the Logan Act is that the powers granted by the Constitution—whatever they are—should not be overtaken by an unauthorized citizen.<sup>14</sup> The location of the powers is germane only to the discussion of what authority is necessary to be

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10. See Louis Fisher, *A Constitutional Structure for Foreign Affairs*, 19 GA. ST. U. L. REV. 1059, 1063–69 (2003) (attempting to identify the core values in the Constitution that support various powers for different branches).

11. See 9 ANNALS OF CONG. 2488–89 (1798).

12. *Id.*

13. Specifically, the Logan Act prohibits acting “without authority of the United States” with intent to influence the “measures of the United States.” Logan Act, 18 U.S.C. § 953 (2006). The requisite authority and the measures sought to be influenced are that of the whole government rather than those of one particular branch or the other. See *id.*

14. Although the Logan Act was unequivocally passed to protect the province of the executive, the underlying goal of protecting constitutionally delegated powers naturally extends to the protection of legislative power. See 18 U.S.C. § 953.

outside of the law's scope, but the breadth of the powers vested in the federal government as a whole dictates the necessity of the law.

Some commentators argue that whatever powers are granted are subtextual and are granted primarily by pragmatic consideration.<sup>15</sup> Others argue that the language of the Constitution itself provides the basis for all foreign affairs powers and their proper divisions among the branches.<sup>16</sup> In either instance, it is generally accepted that the Constitution does confer exclusive power over foreign affairs to the federal government rather than individuals or states.<sup>17</sup> The U.S. Supreme Court's seminal dissertation on the subject in *Curtiss-Wright* falls somewhere in between the two viewpoints but agrees that powers related to foreign affairs are exclusively reserved for the federal government.<sup>18</sup>

Therefore, one must first discern what these foreign affairs powers are that are granted to the federal government in the Constitution. The powers specifically enumerated to the Legislature include the power to declare war<sup>19</sup> and to decide appropriations.<sup>20</sup> The President and Congress jointly hold the

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15. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION*, 14–15 (2d ed. 1996) (listing “missing” powers and acknowledging that these powers were intended for the federal government and are exclusively exercised therein, yet they are not specifically provided for by the Constitution).

16. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 *YALE L.J.* 231, 233–36 (2001).

17. See HENKIN, *supra* note 15, at 13 (“[T]he United States Government (not the governments of the states) conducts those relations [with other nations] and makes national foreign policy.”).

18. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (granting the President plenary powers as the “sole organ” of foreign affairs). With regard to the case locating foreign affairs powers somewhere between a subtextual pragmatic approach and thorough delegation in the language itself, *Curtiss-Wright* seems to find the bulk of federal foreign policy power to be a relic of history, opining that the centralized nature of this power was vested not with the writing of the Constitution, but instead in the whole of the colonies upon their declaration of independence from England. See *id.* at 316 (referencing the former power of foreign affairs as resting exclusively in the crown, and then passing to the new nation as a unified body upon independence).

19. U.S. CONST. art. I, § 8, cl. 11.

20. U.S. CONST. art. I, § 9, cl. 7.

treaty power.<sup>21</sup> Under the unity principle addressed in *Curtiss-Wright*, it is necessary for the President to speak for the country because the United States must have one stance or voice.<sup>22</sup> In short, the federal government has exclusive and far-reaching powers over foreign affairs and diplomacy.

Citizen-diplomats usurp these powers when they take unauthorized action that advances policy on a national scale. The unity preserved by the President's appointment as foreign policy administrator and the powers granted to Congress as necessary and proper means to achieving its enumerated powers are fundamentally undermined when an unauthorized citizen addresses these issues with an official or agent of a foreign government. A single actor undertaking something was designed for an elected body is ill-advised at best. The threat of multiplicity alone is a sufficient deterrent to warrant the Logan Act's existence.

### *B. Globalization*

Certainly this reasoning was present in the midst of international tension when the law was passed, but how have changes in international relationships and foreign diplomacy changed the validity of the law's original purpose?<sup>23</sup> Globalization has created a markedly different world than the drafters could ever have imagined. However, even in a world made infinitely smaller by advances in travel and technology, many of the same threats considered by the drafters remain causes for concern today.

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21. U.S. CONST. art. II, § 2, cl. 2.

22. *Curtiss-Wright*, 299 U.S. at 317. A more thorough review of the scope of the executive power—as it was likely understood by the Fifth Congress—is undertaken later in this paper. See *infra* notes 145–51 and accompanying text. The contemporary thinkers of the late eighteenth century played a major role in sculpting this power, and it was viewed as essentially encompassing all foreign affairs powers not otherwise specifically granted. *Id.*

23. See 9 ANNALS OF CONG. 2542 (1798) (arguing that representing splintered policy objectives to the French government would hinder the country's objectives and harm any chance of maintaining a working relationship with France).

Diplomacy has broadened in its most expansive definitions, but governmental foreign policy is the focus here.<sup>24</sup> The definition of diplomacy in a globalized world is now related to popular culture and commercialism as well as governmental policy, but this paper argues that the Logan Act applies only to state-sanctioned objectives or actions, not to film advertisement or wine tasting.<sup>25</sup>

International business has become an integral part of the economic structure of world powers.<sup>26</sup> Businesses inevitably conduct communications and represent countries overseas in ways that might be construed as diplomatic.<sup>27</sup> These interactions need not be inhibited at all, but instead must be undertaken as “track-two” diplomatic relations, those between nongovernmental entities in different countries.<sup>28</sup> Commercial diplomacy is inherently motivated by concerns beyond those of the diplomat’s country, and therefore carries a minimal threat of representing splintered policy objectives or other detrimental policy implications.<sup>29</sup>

Communications exclusively between civilian individuals are not prohibited by the Logan Act; only interactions with a “foreign government or any officer or agent thereof” are

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24. See WILFRIED BOLEWSKI, *DIPLOMACY AND INTERNATIONAL LAW IN GLOBALIZED RELATIONS* 3–5 (2007) Diplomacy, as it is used here, includes all purposeful international interaction between organizations, individuals or other bodies. *Id.* This includes media and commerce, and is contrasted here with more concentrated governmental foreign policy and/or affairs, which are significantly more restricted in their participation and scope. *Id.*

25. See BOLEWSKI, *supra* note 24, at 71 (“Since diplomacy is about representation the wide variety of purposes such as advertisement for products, public entities, cities or humanitarian organizations also exemplifies the popularization of diplomatic titles in modern society.”).

26. See BOLEWSKI, *supra* note 24, at 17–18, 53–55.

27. See *id.*

28. *Id.* at 39. “[Track-two diplomacy] consists of informal and unofficial interaction between influential private citizens or groups of people within a country or from different countries who are outside the formal government power structure (people-to-people diplomacy) with the goal of developing strategies to influence public opinion and to help resolve an inter- or intra-state conflict.” *Id.*

29. See *Id.* at 17–18, 54–58. These other individualized concerns include public relations and profit. See *id.* at 54–58.

prohibited.<sup>30</sup> The threat posed by such communications is as real today as it was in 1799. Arguably, with the increase in globalization has come a heightened threat of rogue diplomacy. Increased speed of travel and communications allow private diplomats to carry on communications with foreign governments with little investment of time or money.<sup>31</sup> The Logan Act is not an obsolete or antiquated restriction of a modern trend, but is more necessary than ever in an increasingly accessible diplomatic world.<sup>32</sup>

### III. THE ORIGINS OF THE LOGAN ACT

The Logan Act was passed in 1799 in the midst of severe political tension between the United States and France.<sup>33</sup> The Act was a response to the actions of Dr. George Logan, who made diplomatic overtures to France in an attempt to ease tensions between the two powers.<sup>34</sup> On his trip he met with French diplomats—including the influential Talleyrand.<sup>35</sup> Dr. Logan's trip proved fruitful, and France raised its embargo and freed American ships and seamen in an attempt to relax political dealings.<sup>36</sup> However, upon his return home Dr. Logan received a chilly reception from the Federalist government and was widely accused of actions fit for a criminal.<sup>37</sup>

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30. Logan Act, 18 U.S.C. § 953 (2006).

31. Presumably the same channels that have narrowed the resources necessary to carry on this type of diplomacy, thereby increasing its threat to the executive and legislative powers, have likewise made the remedies to these threats more readily available. However, the ability of one government to immediately contact another government to verify the authenticity or authority of a diplomatic agent does not override the threats inherent in a nongovernmental agent's unauthorized contradiction of legitimate foreign policy.

32. Cf. Spiro, *supra* note 9, at 727–28 (contending that modern scholars confront newly globalized foreign affairs problems with methods conceived on “old-world” premises).

33. Detlev F. Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 AM. J. INT'L L. 268, 270 (1966). The political climate was tense. Fresh off of the “XYZ Affair,” France had placed embargoes on trade and had imprisoned American seamen. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* It is generally held that France had already intended to take such action, but this visit provided a convenient outlet for doing so. *See id.*

37. *Id.*

During the debates surrounding the Act, there was much discussion as to whether the Act was actually a response to Dr. Logan's actions, or if it had a more independent motivation.<sup>38</sup> The law's proponents maintained that the law was entirely unrelated to any specific instance, but was generally necessary to protect the mandates of the Constitution.<sup>39</sup> They also contended, however, that even if it were motivated by Dr. Logan's journey, such a motivation would ultimately be entirely proper because many laws are passed as a response to some action or another, in order to assure the particular action never happens again.<sup>40</sup> It seems clear, in retrospect, that the law was passed as a response to his particular trip, and the nature of his correspondence as well as the political climate of the time are useful tools for determining the policy objectives and legislative intent necessary to narrowly construe the law.

Soon after Dr. Logan's return, the Legislature undertook to pass the unpopular Alien and Sedition Acts for certain domestic words and actions, as well as the Logan Act for similar foreign dialogues.<sup>41</sup> The notorious Alien and Sedition Acts were short-lived, but the Logan Act survives today.<sup>42</sup> The Logan Act looks different than it did when passed, but the changes are merely a product of the 1948 recodification and were not meant to be substantive at all.<sup>43</sup> The law was amended in 1994, but only with regard to the wording of the available penalty.<sup>44</sup>

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38. See, e.g., 9 ANNALS OF CONG. 2494 (1798) (insisting that the law's opponents "had mistaken the object of this resolution, in supposing it had reference to any particular person.").

39. See *id.* at 2500 (describing the Act as "a general provision, unconnected with any particular case").

40. See *id.* at 2502 (alleging that the bill "had no reference to a particular and recent case," but that "[i]t was from particular cases, he said, that general legislative measures almost always originated; and this was necessarily the case; because, in general, it was impossible to foresee the necessity of preventing an evil, or punishing an offence, until some instance of the evil or offence had occurred.").

41. Logan Act, 18 U.S.C. § 953 (2006); An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798); An Act for the Punishment of Certain Crimes against the United States (Sedition Act), ch. 74, 1 Stat. 596 (1798).

42. *Id.*

43. In its original form, the Logan Act read:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if any person, being a citizen

The law has received more political attention than judicial attention since its inception. The only indictment known under the Logan Act was brought against a Kentucky farmer in 1803 for an article he wrote for a German publication advocating a separate nation allied to France.<sup>45</sup> The case was never prosecuted, nor has any other case ever been prosecuted under this law.<sup>46</sup>

Seventeen court cases reference the Act, but only one addresses it directly and with significant substance.<sup>47</sup> In *Waldron v. British Petroleum Co.*, the federal district judge opined that the Logan Act was likely unconstitutional because of vague wording, citing examples as “defeat” and “measures.”<sup>48</sup>

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of the United States, whether he be actually resident, or abiding within the United States, or in any foreign country, shall, without the permission or authority of the government of the United States, directly or indirectly, commence, or carry on, any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government, or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or defeat the measures of the government of the United States; or if any person, being a citizen of, or resident within the United States, and not duly authorized, shall counsel, advise, aid or assist in any such correspondence, with intent, as aforesaid, he or they shall be deemed guilty of a high misdemeanor, and on conviction before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding five thousand dollars, and by imprisonment during a term not less than six months, nor exceeding three years: Provided always, that nothing in this act contained shall be construed to abridge the right of individual citizens of the United States to apply, by themselves, or their lawful agents, to any foreign government, or the agents thereof, for the redress of any injuries in relation to person or property which such individuals may have sustained from such government, or any of its agents, citizens or subjects.

1 Stat. 613 (1799).

44. See 18 U.S.C. § 953 (“1994-Pub.L. 103–322 substituted ‘under this title’ for ‘not more than \$5,000’ wherever appearing”).

45. MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., CONDUCTING FOREIGN RELATIONS WITHOUT AUTHORITY: THE LOGAN ACT 3 (2006).

46. *Id.*

47. See *Id.* at 3–9 (noting that the bulk of the other sixteen cases contain only passing references to the Logan Act, but have no occasion to analyze it any deeper than a simple analogy or the acknowledgement of its existence).

48. *Id.* at 6; see *Waldron v. British Petroleum Co.*, 231 F. Supp. 72, 89 (S.D.N.Y. 1964).

However, in defense of the Act he also noted that it had not been abrogated by the mere fact that it had not been enforced, and he invited Congress to amend the Act by clarifying certain terms.<sup>49</sup> This case, alone, is the entire body of case law direct enough to be cited as judicial reference to the Logan Act in American Jurisprudence Second.<sup>50</sup>

Political attention has been far more frequent. Professor Vagt's recitation of the Act's history provides a thorough review of the litany of political battles in which Logan Act accusations have been made; a review of each is not necessary, but it is clear that the Act has had a more powerful existence with reference to its potential than to its power.<sup>51</sup> Although the instances where the Logan Act is used as mere "sabre-rattling" are plentiful, no violation of the Act has yet been carried through to federal charges.<sup>52</sup> The two instances mentioned in the introduction, of President Obama and former President Carter, are only the most recent examples in a long line of foreign affairs incidents. The Department of Justice has addressed the issue at least twice, each time finding that the potential offender either was attending to private matters excepted by the final paragraph or that he lacked the necessary intent for criminal correspondence.<sup>53</sup> The House Committee on Standards of Official Conduct has even publicly questioned the law's constitutionality.<sup>54</sup> Attorney General Robert F. Kennedy at one point described the underlying intent of the law in much the same way this paper frames it—"to prohibit 'an interference of

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49. *Waldron*, 231 F. Supp. at 89 n.30.

50. 70 AM. JUR. 2D *Sedition, Subversive Activities, and Treason* § 6 (2005). This statement ignores two other cases, one related to legislative power but not the substance of the Logan Act, and one jurisdictional only. See *U.S. v. Peace Info. Ctr.*, 97 F. Supp. 255 (D.D.C. 1951); see also *Martin v. Young*, 134 F. Supp. 204 (N.D. Cal. 1955).

51. See generally Vagts, *supra* note 33, at 269–80 (describing how the Act has been bandied about as a threat with some frequency, but never prosecuted).

52. See SEITZINGER, *supra* note 45, at 3.

53. *Id.* at 9–10. The Justice Department's actions were in response to concern over correspondences carried out by Senator George McGovern and former President Nixon. *Id.*

54. HOUSE COMM. ON STANDARDS OF OFFICIAL CONDUCT, 95TH CONG., 1ST SESS., MANUAL OF OFFENSES AND PROCEDURES, KOREAN INFLUENCE INVESTIGATION 18–19 (Comm. Print 1977).

individual citizens in the negotiations of our Executive with foreign governments.”<sup>55</sup> The Logan Act has been threatened and defended against with some frequency, just never in the official confines of a federal court.

Many of the most contemporarily relevant objections to the law were also voiced on the House floor during the 1798 and 1799 debates about the law, but Congress passed it all the same.<sup>56</sup> Several articles have touched on the law within discussions of broader topics like foreign affairs or First Amendment rights,<sup>57</sup> but only two articles have specifically and directly addressed the Logan Act itself.<sup>58</sup> These articles both concluded that the Logan Act is likely unconstitutional, and the scholarly objections to the law have focused primarily on a few common lines of attack.<sup>59</sup> These attacks include claims of vagueness, overbreadth, extraterritoriality, lack of governmental power to make such a law, and violation of the First Amendment.<sup>60</sup> The inclusive words chosen for the statute are said to make it vague, inasmuch as a citizen may not know what actions are prohibited under the law, and a case may be arbitrarily enforced.<sup>61</sup> However, though it is arguably imprecise, the Logan Act is not constitutionally vague.

#### IV. VAGUENESS

This paper is not meant to be an at-length dissertation on the constitutional void-for-vagueness doctrine.<sup>62</sup> Instead, it

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55. Vagts, *supra* note 33, at 279.

56. *See generally id.* at 270–71.

57. *See* HENKIN, *supra* note 15, at 74, 287; Spiro, *supra* note 9, at 697–702; Roth, *supra* note 7, at 266.

58. *See* Kearney, *supra* note 6; Vagts, *supra* note 33.

59. *See* Kearney, *supra* note 6, at 346–47; Vagts, *supra* note 33, at 292–300.

60. *See* Kearney, *supra* note 6, at 346–47; Vagts, *supra* note 33, at 292–300.

61. *See* Kearney, *supra* note 6, at 339–42; Vagts, *supra* note 33, at 299–300.

62. For such a thorough explanation of the doctrine, two journal articles are particularly helpful. *See* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279 (2003); John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241 (2002). Because of the necessary brevity in explanation of such a complex doctrine, these comprehensive reviews will serve as a base point from which to cursorily explain the doctrine itself, allowing this paper to devote its time instead to a more in-

seeks to provide a relatively brief but comprehensive explanation of the most critical elements of the doctrine as explained by courts and scholars in order to ultimately focus most attention on the application of this nebulous doctrine to the Logan Act.

Fundamentally, the vagueness doctrine has evolved to embody the traditional common law principle that a statute must be sufficiently definite and specific that a person of ordinary intelligence knows what conduct would violate of the statute.<sup>63</sup> The doctrine originates in the due process requirements of the Fifth and Fourteenth Amendments as a substantive due process claim.<sup>64</sup> The doctrine has come to be embodied most fundamentally in a two-part elemental test: (1) Does the statute provide “fair notice” as to what actions are or are not prohibited by it, and (2) Does the statute provide an “ascertainable standard of guilt” sufficient to minimize any threat of “arbitrary and discriminatory enforcement?”<sup>65</sup> If a statute is sufficiently definite to affirmatively answer each of these two questions, then it is likely valid.<sup>66</sup> Failure of either prong is failure of the whole.<sup>67</sup>

The problem is that the criteria used to evaluate these questions are, ironically, quite vague.<sup>68</sup> Although no hard and fast rules exist to guide a vagueness evaluation, there are some

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depth analysis of the doctrine as it applies specifically to the Logan Act.

63. 16B AM. JUR. 2D *Constitutional Law* § 972 (2009).

64. *Id.* *But see Waldron*, 231 F. Supp. at 89 (arguing that the Logan Act in particular risks being found unconstitutional when subjected to a vagueness claim under the provisions of the Sixth Amendment rather than the due process provided in the Fifth and Fourteenth Amendments). However, it is generally accepted that this doctrine is a due process claim. *See Decker, supra* note 62, at 245.

65. *Decker, supra* note 62, at 246. One other rationale advanced is the separation of powers; under this rationale, the second prong’s prohibition of arbitrary enforcement exists to leave law-making power to the legislative rather than judicial branches because the ability to arbitrarily enforce a law would be tantamount to making the law. *See Goldsmith, supra* note 62, at 284–86.

66. *See Decker, supra* note 62, at 246.

67. *Id.* at 246–47.

68. *Id.* at 243 (alleging that vagueness analyses are “devoid of objective tests” and instead are decided by the “I know it when I see it” test).

factors and/or guiding principles that may be predictive in light of past rulings.

The “fair notice” requirement is applied as understood by a person of ordinary intelligence; such a person must not be required to guess at the statute’s meaning.<sup>69</sup> The degree of definiteness required may shift or slide depending on the type of law at issue as well.<sup>70</sup> For instance, the degree of definiteness required is higher when individual behavior is prohibited as opposed to corporate behavior.<sup>71</sup> Additionally, notice requirements are stricter for criminal statutes than for civil statutes.<sup>72</sup> It is also more difficult to show that a given statute is unconstitutionally vague when that statute has a scienter requirement demanding intent or knowledge by the actor to warrant punishment.<sup>73</sup> Sensitivity to imprecision in a law is also heightened when the prohibited conduct encompasses action protected by the Constitution, specifically with regard to action protected under the First Amendment.<sup>74</sup> Courts may also consider the significance of the legislation as it relates to broader social objectives and the necessity of the claimed ambiguity in properly applying the law.<sup>75</sup> This paper specifically addresses the factors relating to (1) the scienter requirement and (2) the heightened sensitivity for prohibitions on actions arguably protected by the First Amendment. Both of these factors are particularly relevant to the Logan Act.

The “ascertainable standard of guilt” prong is less certain in its application. It is situated to stop police officers, prosecutors, judges, and juries from applying the law variably in the absence of legally fixed standards that can be applied across all cases.<sup>76</sup> Although there is less guidance in applying this prong to a vagueness challenge, it is recognized as the more important

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69. 16B AM. JUR. 2D *Constitutional Law* § 972 (2009).

70. See Decker, *supra* note 62, at 248–49.

71. *Id.* at 249.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 253.

element of the substantive due process claim because it is the primary preventer of discrimination between defendants.<sup>77</sup>

A statute may be imprecise without being vague.<sup>78</sup> Where a statute provides a somewhat definite description of prohibited conduct but that description is still susceptible to two or more plausible interpretations, the statute is probably ambiguous rather than vague.<sup>79</sup> Ambiguous criminal statutes are often interpreted in the most lenient way, meaning whichever direction favors the defendant.<sup>80</sup> Vague statutes are unconstitutional, but statutes that are merely ambiguous are subject to numerous interpretive rules that a court can and should employ to avoid striking down the legislation.<sup>81</sup> A vague law contains a greater degree of uncertainty than an ambiguous law, but even arguably ambiguous legislation is acceptable unless “after seizing everything from which aid can be derived, the court can make no more than a guess as to what Congress intended.”<sup>82</sup> Only after this standard is met can a court even apply rules of statutory interpretation to ambiguous statutes.<sup>83</sup>

Invalidating a law via a constitutional void-for-vagueness challenge is the exception rather than the rule; it is a difficult burden to carry because a statute is presumed valid.<sup>84</sup> Even more importantly, “federal courts have the power to adopt narrowing constructions of federal legislation.”<sup>85</sup> Where a

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77. See Goldsmith, *supra* note 62, at 289.

78. See Decker, *supra* note 62, at 260–61.

79. *Id.*

80. *Id.* at 261–62.

81. See *id.* at 261. Others argue that there are valid defenses and excuses to vagueness challenges without addressing ambiguity. See Goldsmith, *supra* note 62, at 282–83, 294–309. This defense/excuse dichotomy contrasts governmental arguments on behalf of the statute arguing that the statute is not vague at all with defensive arguments admitting imprecision, but justifying it by some other means. *Id.* Some vagueness defenses include narrowing by judicial interpretation, illumination via legislative history, specialized definitions, or common understanding of meanings. *Id.* at 294–300. Some excuses for vagueness include a scienter requirement or simplicity in practical application. *Id.* at 301–03.

82. See Decker, *supra* note 62, at 264 (quoting *Reno v. Koray*, 515 U.S. 50, 65 (1995)).

83. *Id.*

84. *Id.* at 247.

85. See Goldsmith, *supra* note 62, at 295 (citing *Boos v. Barry*, 485 U.S. 312, 330–

reasonable construction can be discerned, “if fairly possible, [the court] must construe congressional enactments so as to avoid a danger of unconstitutionality.”<sup>86</sup>

To execute this narrowing maneuver, there are several tools in the judicial toolbox available to interpret any given statute. A court can use almost any resource to provide clarity to a statute, but several have become standards.<sup>87</sup> The infrequency with which the Logan Act has come before any court automatically excludes many of the standard methods of narrowing statutes, but some options remain.<sup>88</sup> This paper focuses on providing a more definite construction of the Logan Act by reviewing the weight against vagueness provided by the law’s requirement of intent, the policy considerations behind the law’s creation and perpetuation, and the legislative history and intent behind it.

#### A. *Facial Vagueness*

Although potential First Amendment violations play a critical role in discussions of overbreadth, they have a more restricted place in a discussion of vagueness. They are, however, still relevant.<sup>89</sup> Vagueness challenges may be made in a specific case by alleging that the law is vague as applied to the particular defendant, or they may be brought by anyone if that person alleges that the law is unconstitutional in all its applications.<sup>90</sup> This burden is high.<sup>91</sup>

Overbreadth claims are also primarily made up of First Amendment claims. Vagueness and overbreadth are often challenged simultaneously, and they bear many similarities as to the nature and characteristics of the legislation generally

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31 (1988).

86. *United States v. Harriss*, 347 U.S. 612, 618 n.6 (1954).

87. *See Decker*, *supra* note 62, at 291–331.

88. *See supra* note 81 and accompanying text (listing possible vagueness defenses and excuses). Many of those options are unavailable because they require prior judicial construction and there is little case law discussing the Logan Act. *See id.*; *see also* SEITZINGER, *supra* note 45.

89. *See Decker*, *supra* note 62, at 265–80.

90. *Id.* at 275, 280.

91. *Id.* at 277.

subject to each.<sup>92</sup> Vagueness, like overbreadth, can be challenged on its face.<sup>93</sup> This means that even if the person challenging it has not specifically been accused of violating the law, he is at risk of having constitutionally protected actions “chilled” by the law or he is being prohibited from acting by the mere existence of the law, rather than acting and then challenging the consequences after being arrested or otherwise punished.<sup>94</sup> In order for a statute to be facially challenged for vagueness, one of two circumstances must apply: either the law forbids some action that is protected by the First Amendment, or it is vague in all its applications, such that it can never be validly applied.<sup>95</sup>

As for a facial challenge alleging that the Logan Act infringes on rights protected by the First Amendment, it is well-established that Congress has the power to legislate to protect the Executive power.<sup>96</sup> Because the Executive has the power to carry on communications with foreign governments with which the United States is in dispute, Congress has the power to limit speech in foreign realms.<sup>97</sup> This stance on speech rights in foreign affairs has come under intense scrutiny as an archaic holdover, but even today domestic First Amendment protections are not applied in the same form to foreign affairs.<sup>98</sup> Therefore, communications that are purely foreign do not have the same protections; only limitations on domestic communications run the risk of infringing on these rights. In that regard, scholars have been particularly worried by the inclusion of “indirect” correspondence as part of the communication outlawed by the Logan Act.<sup>99</sup> It is argued that this might include written or

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92. See *id.* at 266 (discussing confusion over and similarities between vagueness and over-breadth doctrines).

93. *Id.* at 275–76.

94. *Id.* at 275.

95. *Id.* at 275–76.

96. See Roth, *supra* note 7, at 281 (quoting *Haig v. Agee*, 453 U.S. 280 (1981)).

97. 70 AM. JUR. 2D *Sedition, Subversive Activities, and Treason* § 6 (2005).

98. See Roth, *supra* note 7, at 257–58; see also Spiro, *supra* note 9, at 701 (noting that the Logan Act restricts free speech that would otherwise be protected in the domestic context under the First Amendment).

99. See Vagts, *supra* note 33, at 284; see also Kearney, *supra* note 6, at 302.

spoken words apparently aimed at predominantly domestic use and later picked up by foreign governments, potentially influencing their actions.<sup>100</sup> If this kind of domestic speech is prohibited under the Act, it would suffer severe constitutional problems. However, this speech would still require the intent to influence a foreign government.<sup>101</sup> Although this does not alleviate all of the First Amendment implications, it does return the prohibited conduct to the foreign affairs realm and therefore moves it in the direction of legitimate legislative restriction.

With respect to the second ground for a facial vagueness challenge, the likelihood that the Logan Act would be vague in all its applications, the Act simply does not fit. It is always sufficiently definite to survive a constitutional vagueness challenge.

That leaves, however, an “as-applied” vagueness challenge to be brought, in which the challenger claims that a given law is vague under the circumstances for the crime with which he is charged.<sup>102</sup> Although it is impossible to conceive of every circumstance, this paper seeks to uncover sufficient evidence to provide clarity capable of surviving a vagueness challenge in any case.

## V. ANALYSIS

Although the Logan Act has more recently been attacked by scholars as constitutionally vague, these concerns are not novel.<sup>103</sup> Indeed, the original drafters of the law were keenly aware of this threat and discussed it at length in the debates.<sup>104</sup> The primary concerns regarding the allegedly less-than-definitive legislation related to whether the law was worded such that it would criminalize correspondence by private individuals regarding private matters.<sup>105</sup> Accusations ranged as

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100. See Vagts, *supra* note 33, at 284.

101. *Id.* at 285.

102. See Decker, *supra* note 62, at 280.

103. See Vagts, *supra* note 33, at 299; see also Kearney, *supra* note 6, at 346 (similarly concluding that the Act is unconstitutionally vague and overbroad in 1987).

104. See 9 ANNALS OF CONG. 2637–38 (1798).

105. See, e.g., *id.* at 2497 (“The proposition here covers far too much ground. He would suppose a merchant, or owner of a vessel . . . [who] were to enter into a

far as to allege that the vague wording itself was a political ploy to punish the anti-federalist party.<sup>106</sup>

Congressmen debating this bill spelled out the principles of definitive criminal statutory construction much as they stand today, more than 200 years later.<sup>107</sup> Those opposing the law took issue with each of the two modern prongs of the vagueness test: fair notice<sup>108</sup> and arbitrary enforcement.<sup>109</sup> The law's detractors clarified their concerns with the breadth of the bill to include its failure to distinguish between private correspondence and public negotiation, between an individual representing himself as such and one corresponding as an agent of a political party.<sup>110</sup> These issues, which were valid concerns during the debates, are no longer alarming insofar as they relate to the vagueness of the law because both were remedied prior to the passage of the law. The former was remedied by including the final clause excepting private matters,<sup>111</sup> and the latter resolved later in the debates by drawing attention to the intent requirement and thereby negating any criminalization of correspondence for any other reason than an intent to influence.<sup>112</sup> The primary concerns of the drafters were lodged under the same banner as those advanced by scholars, but their thrust is no longer potent.

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correspondence with that Government for the restoration of his property . . . would certainly come within the meaning of this resolution.”). This concern was assuaged with an amendment to the law that added the clause excepting individual attempts to redress private injury at the hands of a foreign government. *See Vagts, supra* note 33, at 268.

106. 9 ANNALS OF CONG. 2647 (1798) (“You are making your law too indefinite; it will rest wholly in the discretion of a court whether a man is an offender, or not. So that a federal man will be found innocent, and an anti-federal, guilty.”).

107. *Id.* at 2687 (“Laws of this description ought also to be unequivocal in their language; they should operate equally; their penalties should bear a due proportion to the offence, and they should be adequate to the end proposed.”).

108. *Id.* at 2637 (“[I]t is expressed in so general a manner as to include a number of acts which ought not to be punished; because it is drawn in the loosest possible manner; and wants that precision and correctness which ought always to characterize a penal law.”).

109. *Id.* at 2638 (“ . . . a sort of general bill, giving merely authority to the courts without defining how it is to be applied, and leave them to punish or not punish, as they judge proper; to explain and define the law as they please . . . ”).

110. *Id.* at 2538.

111. *See* 18 U.S.C. § 953 (2006).

112. *See* 9 ANNALS OF CONG. 2617 (1798).

This paper will address the clauses that are most often said to be constitutionally vague. First, the statute requires that the criminal act be done “without authority,” but fails to specify from whom the authority must come. After reviewing the authority requirement, this paper will examine the law’s intent requirement as a remedy for many of its alleged ills. It will then look to the legislative history and intent of the law to attempt to clarify its purpose, and in doing so will flesh out and define the nature of prohibited “correspondence” as well as what type of “dispute or controversy” would be necessary to risk “defeating the measures” of the United States.

A. “Without Authority”

There is a secondary concern that is equally as relevant today as it was when voiced in 1799: the question of the authority required to be justified in intentionally influential foreign correspondence. The Logan Act seeks to punish only those who act “without authority of the United States.”<sup>113</sup> The original wording required the authority of the “Government of the United States” and proved worrisome for either an extremely broad or extremely narrow interpretation of what authority such a requirement might demand.<sup>114</sup>

Continually evolving understandings of the foreign affairs powers make this requirement of the Act a potential point of contention today as well because it is arguably unclear whether the authority vested in an actor must come from the Executive or the Legislature. However, this should be considered an ambiguity rather than vagueness. In fact, this is a prime example of ambiguity because, wherever any given foreign affairs power is vested, only two options exist: the Executive or the Legislature.<sup>115</sup> There is no sliding scale or indiscrete group of sources from which a citizen may gain authority, but instead are two distinct bodies, each of which has some power to

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113. See 18 U.S.C. § 953.

114. See 9 ANNALS OF CONG. 2584 (1798) (voicing concern that this might unduly restrict executive powers of foreign ministerial employment).

115. *Id.*; see Kearney, *supra* note 6, at 312 (noting that the Constitution gives powers to both Congress and the President in the realm of foreign affairs).

participate in foreign affairs (even if that power is quite unevenly distributed).<sup>116</sup> Therefore, any citizen must have the authority of at least one of those two bodies.

The rule of lenity is a common judicial tool applied in the face of an ambiguous statute that adopts the potential interpretation that is most beneficial to the defendant.<sup>117</sup> This rule applies only where great ambiguity exists—such ambiguity that the court can only guess at which of two or more interpretive options Congress intended.<sup>118</sup> This rule is a perfect tool for interpreting the Logan Act: contributing to the survival of the law in the face of a constitutional vagueness challenge but giving the benefit of the doubt to the defendant. When the government seeks to enforce the Logan Act, courts should allow the authority of either body to suffice as the authority of the government. The “without authority of the United States” clause of the Logan Act is not vague; it is merely ambiguous. As such is aptly remedied by the rule of lenity.

### *B. Intent*

The Logan Act’s requirement that any violator carry on correspondence with the *intent* to influence a foreign government played a critical role in its passage into law.<sup>119</sup> This requirement must also play a critical role in defeating a vagueness challenge today. The inclusion of a mens rea element is a significant factor in defeating a vagueness challenge, especially with regard to the fair notice prong of the vagueness test.<sup>120</sup> The scienter requirement ensures no person will accidentally violate the law, and that a person will suffer peril and punishment only if he intentionally undertook to participate in prohibited conduct.<sup>121</sup> Such a mens rea element does not

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116. Kearney, *supra* note 6, at 350 (noting that the foreign affairs power has gained more executive influence and that the role of Congress is now secondary to that of the executive branch).

117. *See* Decker, *supra* note 62, at 261–62.

118. *Id.* at 264.

119. *See* 9 ANNALS OF CONG. 2617 (1798).

120. *See* Decker, *supra* note 62, at 286–91; *see also* Goldsmith, *supra* note 62, at 301–03.

121. *See* Goldsmith, *supra* note 62, at 301 (noting that the absence of a scienter

necessarily defeat a vagueness challenge, but is certainly a factor in doing so.<sup>122</sup>

To its proponents, the requirement of intent legitimized the whole character of the bill.<sup>123</sup> This single word—"intent"—was called "the essence of the offence."<sup>124</sup> Without this word, the breadth of the crime in instances like those discussed in the previous section may have killed the bill. With it, a man is not guilty at all unless he is carrying on correspondence that he specifically means to use as a vehicle to influence the beliefs or actions of a foreign government.<sup>125</sup> The law, "in order to constitute the offence, required that the act should be done with an intent to interfere with the functions of the Government, and intermeddle with the political relations of two countries."<sup>126</sup>

The academic literature, at least in part, argues that intent cannot be used to defend against a vagueness challenge because the meaning of the requisite intent is itself a critical issue.<sup>127</sup> This contention is premised on the idea that the terms "dispute or controversy" and "defeat the measures" are themselves vague,<sup>128</sup> and if this is the intent required to be in violation, the intent is consequently vague because one cannot know what it is he must have an intent to do. However, the challenged phrases are not terminally vague; they are adequately clarified by a review of the congressional record. Once these phrases are clarified, as they can and will be, the intent necessary becomes clear, thus undercutting the law's alleged failure to provide notice of criminally prohibited activity.

During the debates preceding passage of the Logan Act, a hypothetical situation presented by Congressman Harper of

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requirement constitutes "little more than a trap for those who act in good faith" (internal quotation marks omitted).

122. See Decker, *supra* note 62, at 290.

123. See 9 ANNALS OF CONG. 2617–18 (1798) (explaining that the congressman who was speaking would not worry even if he were indicted, so long as he lacked the requisite intent, because the requirement alone would require sufficient proof of intent such that he felt certain the law would be applied correctly).

124. *Id.* at 2617.

125. *Id.*

126. *Id.* at 2619.

127. See, e.g., Vagts, *supra* note 33, at 300.

128. See Kearney, *supra* note 6, at 341–42.

South Carolina illustrated both the weight of the intent requirement and the way in which such a requirement counters a vagueness claim.<sup>129</sup> Congressman Harper's hypothetical situation placed him in France, where he was invited by a senior French diplomat to dinner (which might be the case, he noted, because they were old acquaintances).<sup>130</sup> While at dinner, the diplomat asked Congressman Harper his opinion about political relations between the countries.<sup>131</sup> Congressman Harper insisted that it would be entirely legal and proper under the rule of the Logan Act to present a fair and honest representation of his own opinion, even where his opinion might have been ill-aligned with that of the American people or where his better judgment might have advised against it.<sup>132</sup> The absence of the Logan Act's requisite intent removes him from its umbrella.<sup>133</sup> It is only "interference . . . and not an accidental conversation, which the bill forbids."<sup>134</sup>

This intent changes the entire complexion of the law. The limitation not only provides a mens rea element to combat vagueness claims, but it also goes hand-in-hand with the narrowing constructions discussed below.

### C. Legislative History and Policy Considerations

A court may use legislative history and intent as well as obvious policy considerations behind the law when an act appears otherwise imprecise.<sup>135</sup> In weighing policy considerations, a court should consider "the reason and necessity for the law, the evils to be remedied and the objects and purposes to be obtained."<sup>136</sup>

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129. See 9 ANNALS OF CONG. 2618 (1798).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. See Decker, *supra* note 62, at 306–13; see also Goldsmith, *supra* note 62, at 296–97.

136. See Decker, *supra* note 62, at 306 (quoting *People v. Haywood*, 515 N.E.2d 45, 49 (1987)).

Where a substantial body of legislative history exists, a court determining legislative intent may look at the Legislature's word selection or at the entire legislative record, including the debates taking place while the law was under consideration.<sup>137</sup> The congressional record from the Logan Act debates sheds significant light on the Legislature's motives and provides useful guidance as to why the law is written the way it is and how the Legislature intended for it to be applied. A careful review provides enough insight to validly interpret the law's language with sufficient clarity to defend the law against a vagueness challenge. The debates address what type of conduct is and is not to fall under the law and why such distinctions were made.

Understanding the obvious policy objectives behind the law requires an initial foray into the justifying principles presented by the proponents of the Act. It was expressly created to protect against usurpations of the constitutionally granted Executive powers over foreign affairs, but the actions criminalized are said to more broadly undermine the fundamental principles of republicanism.<sup>138</sup> Individual correspondence of the kind outlawed by the Act impliedly suggested that the man carrying on the correspondence wished his "private sentiments . . . to prevail over the legal Government of his country."<sup>139</sup> The Act's proponents argued that, whenever anyone corresponds with a foreign government with an intent to influence beyond or outside of the proper means, "[i]t is proclaiming to the enemy the division of your country."<sup>140</sup>

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137. *Id.* at 310–11.

138. *See* 9 ANNALS OF CONG. 2501 (1798) (arguing that individuals who carried on such correspondence in the interest of peace should not be considered criminals, but this argument was said to be flawed: It was "subversive of every principle of Republican Government" inasmuch as a republican government allows the sense of the majority to govern. "[W]hen this sense is proclaimed by the proper organs, it shall be absolute; [ ]no one can pretend to interfere so as to counteract the proceedings of the people of this country as expressed by its legal organs.").

139. *Id.*

140. *Id.* at 2500. Members of Congress recognized that the ardor with which these republican principles were advanced may not always remain. A restriction like this was said to be contrary to the "new light" or "new code of the rights of man" by which a few could gather and call themselves the people and advance their own agenda liberally in

A critical point of contention tangential to the policy of preserving republican principles was the question of whether it was virtuous to criminalize citizens who carried on correspondence with foreign governments in order to procure peace for the United States.<sup>141</sup> It was generally accepted that anyone planting seeds of war with foreign bodies without authority was fit to be punished, but many took issue with the notion of punishing those seeking peace out of religious or benevolent motivations.<sup>142</sup> It was eventually successfully argued that any correspondence intended to influence a dispute or controversy with the United States outside of the Executive authority would subvert the aforementioned republican principles, even where that correspondence sought peace.<sup>143</sup> In the final analysis, even peace must only be achieved by the whole people rather than an individual. Peace is “a desirable thing[,] but the honor and independence of a country are still more desirable.”<sup>144</sup>

The most basic policy thrust within this traditionally structured governmental framework was the protection of the Executive powers—as they were understood when the Logan Act was discussed and implemented. Congress sought to deter acts that usurped those powers, so a brief analysis of the contemporary view of what those powers were is helpful.<sup>145</sup>

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spite of the proper constitutional organ, but this evolutionary political principle was discarded for the traditional principle under the Constitution, which has not changed. *See id.* at 2509.

141. *See id.* at 2524 (addressing the argument that correspondence in search of peace should be cause for celebration or honor rather than incarceration, and that the end should sometimes justify the means).

142. *See id.* at 2522 (arguing that those whose motivations are not political at all, but wholly separate from politics, are often successful in obtaining peace and should be encouraged and applauded for doing so).

143. *Id.* at 2501 (“Upon what principle is it, said he, that an individual should interfere in the general management of the affairs of his country, even to procure peace to it? It must be on the ground, that his private sentiments ought to prevail over the legal Government of his country . . .”).

144. *Id.* at 2604.

145. *See id.* at 2488–89 (initially describing the matter as a measure to protect against usurpation of executive power over foreign affairs). A deeper understanding of the general conception of the executive foreign affairs powers during this time period is provided by the Prakash and Ramsey article, which will be used to understand which

Eighteenth-century understanding of the U.S. Executive was almost exclusively molded by the political thinkers of the age, including Locke, Montesquieu, and Blackstone.<sup>146</sup> The Executive power was generally viewed as the seat of most, if not all, foreign affairs powers.<sup>147</sup> President Washington, in fact, viewed himself as the “sole channel of official intercourse” with foreign nations.<sup>148</sup> Secretary of State Thomas Jefferson expounded on this power in a letter to a French diplomat, insisting that the President was “the only channel of communication between this country and foreign nations, [and] it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation.”<sup>149</sup> It was under this broad view of the Executive that the Logan Act was passed.

The philosophers mentioned above shared in their view of which powers were uniquely Executive: These included the powers of war and peace, the power to send ambassadors, and the power to make treaties, leagues, or alliances with foreign nations.<sup>150</sup> The congressional debates surrounding the passage of the Logan Act make it clear that it is only actions like these, those with the potential to encroach on the powers of the Executive, which are outlawed by the Act.<sup>151</sup>

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foreign affairs powers were intended to be protected, and by extension, which acts the Logan Act specifically sought to prohibit. *See generally* Prakash & Ramsey, *supra* note 16, at 265–355.

146. *See* Prakash & Ramsey, *supra* note 16, at 265–72.

147. *Id.* at 265–69.

148. *Id.* at 317.

149. *Id.* at 321.

150. *See id.* at 266–69. Montesquieu further imparted the executive with the powers to establish public security and protect against invasions. *Id.* at 268. Blackstone added the power to issue letters of “marque and reprisal” when the executive’s people had been injured by some foreign government. *Id.* at 269.

151. *See* 9 ANNALS OF CONG. 2499 (1798) (“It was not intended, by this resolution, to provide against all correspondence with foreign Governments, but against such only as ought to be carried on by the executive; and when an individual undertakes to correspond in such a manner, it is then, and then only, that he usurps the executive authority.”).

### 1. *Correspondence*

Beyond merely proclaiming that the law is designed to punish the usurpation of Executive powers, the proponents of the bill go far to provide specific guidance as to what types of conduct are and are not intended to be punishable under the law as it is written. “The offence proposed to be punished by this law . . . is that of an individual taking upon himself to settle a dispute with a foreign Government, after the proper authority in his own Government has vainly attempted to do it.”<sup>152</sup> This concern is further motivated by the desire to protect against “an arrogation of power in public factions,” as evidenced by the adherence to previously advanced republican principles.<sup>153</sup>

The use of the word “correspondence” may seem problematic because it appears to cover any and all forms of communication between parties. However, not all communications with foreign governments are prohibited; rather, a quite narrow window is intentionally restricted: correspondence intended to influence the foreign government’s actions regarding a dispute with the United States.<sup>154</sup>

As made clear in Congressman Harper’s hypothetical, not all communications with an agent of a foreign government fall under the Logan Act’s restrictions.<sup>155</sup> The type of correspondence specifically prohibited is that which usurps the Executive power.<sup>156</sup> In practice, this includes correspondence by someone holding himself out as one occupying a position akin to a representative or foreign minister of the United States.<sup>157</sup> Although a violator need not specifically claim to be authorized, and even may admit to having no official authority at all, the person corresponding may not carry on communications of a character like that of a representative or foreign minister.<sup>158</sup> If

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152. *Id.* at 2603–04.

153. *Id.* at 2604.

154. *See* Logan Act, 18 U.S.C. § 953 (2006).

155. *See* 9 ANNALS OF CONG. 2618 (1798).

156. *See id.* at 2488–89.

157. *See id.* at 2496 (insisting that it must be improper for an individual to be able to present himself to any foreign assembly as a representative of the country when even the states are prohibited from taking part directly in federal foreign affairs).

158. *See id.* at 2541.

just anyone were allowed to carry on these types of communications abroad, then what would be the point in appointing foreign ministers?<sup>159</sup>

The outlawed correspondence is that which takes the shape of negotiation rather than genuinely benign correspondence. Indeed, the word “negotiate,” rather than “correspond,” is used in introducing the bill for debate.<sup>160</sup> Throughout the debates, proponents of the bill focused on attempting to prevent individuals from usurping Executive powers inasmuch as anyone might interfere or negotiate without authority.<sup>161</sup> Professor Vagts notes that some proponents promote this substitution as a potential cure to the broader “correspondence,” but says that even though such a “reading might be desirable, there is little warrant for it in the legislative history and little to guide a court in giving content to such a term.”<sup>162</sup> However, there is sufficient legislative history to use this term to provide the clarity necessary for a court to consistently and accurately apply it in practice.

If the drafters intended to prohibit negotiation, why didn’t they simply change the wording of the statute to reflect that intent by outlawing only negotiations rather than all correspondence? This question was not lost on the Fifth Congress.<sup>163</sup> Although this was as valid a concern at the passage

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159. *See id.* (“During the last session, the House was employed for four weeks in discussing the propriety of sending certain Ministers abroad. Gentlemen were for having few or none, but now they are in favor of any individual who chooses to become a negotiator.”).

160. *Id.* at 2488–89 (stating that the object of the act was to punish “that description of crime which arises from an interference of individual citizens in the negotiations of our executive with foreign Governments.”).

161. *See id.* at 2604 (inquiring as to whether one might honestly believe “that an individual has a right to assume this power to negotiate[.] For what purpose have we an executive and foreign Ministers, if any unauthorized individual may assume the power placed in them?”). The crux of the law is an intent to *interfere* with political relations. *Id.* at 2617.

162. Vagts, *supra* note 33, at 284.

163. *See* 9 ANNALS OF CONG. 2512 (1798) (“We are told that, when an individual carries on a negotiation with a foreign Government, it is an usurpation of the executive power, yet the word is *correspond*, and not *negotiate*. . . .”); *see also id.* at 2637 (“It is worthy of remark, that neither the words assumption of power, nor the word negotiation, appear in the bill now on the table. The crime there described, is not to enter into a

of the law as it is today, proponents of the bill provided a perfectly sufficient explanation for the wording of the law and for their clear legislative intent in response.

The law's supporters insisted that the detrimental effects of the subversion of republican principles and the presentation of division might occur within communication that is intended to influence foreign governments but is not outwardly apparent negotiation.<sup>164</sup> The intent requirement makes it safe to use a broader word, like correspondence, so that whatever the form of the correspondence, if the intent is to influence, then it is punishable.

The critical element to the drafters was the intent or purpose of the prohibited communications, which must be akin to negotiation to violate the law, in that it must have a directed purpose to influence in some particular way.<sup>165</sup> The correspondence should have the nature of negotiation, even if not the direct and pointed give and take of its general form or character.<sup>166</sup> The embodiment of that communication was far less critical because the bill was designed to encompass as much communication as possible, relying not on the form of the communication, but on its character or purpose.<sup>167</sup> Therefore, "any correspondence" was elected to cover any and all communications, regardless of their form, so long as they were intended to interfere by influencing foreign governments outside of the constitutional Executive power.<sup>168</sup>

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negotiation with a foreign Power, with an intent to usurp or assume the powers vested in the executive authority.").

164. *See id.* at 2496 (predicting a breach of national security could be possible when private correspondence with foreign nations is allowed). When confronted with the assertion that negotiation and correspondence were different animals, the former criminal and the latter perfectly proper, the law's proponents countered that there is no difference if the purpose is the same; that mere correspondence is in practice negotiation if it regards the subject matter of foreign ministers and political discussion. *Id.* at 2544.

165. *Id.* at 2617.

166. *See id.* at 2525–26 (noting that seemingly innocuous correspondence can pave the way for unpatriotic negotiations). The informal communications, the conversations at dinners and parties, is where the real business is done, and any law that is not broad enough to encompass this often innocent-seeming conversation is not broad enough to achieve the purpose of the Act. *Id.* at 2526.

167. *Id.* at 2617–18.

168. *Id.* at 2618.

It is also worth noting that a paramount concern of those opposing the law was that it reached too far and risked criminalizing correspondence undertaken on one's own behalf regarding purely individual or private concerns.<sup>169</sup> This concern was eventually remedied by including the final phrase excepting correspondence for the redress of an individual injury, but the legislative record makes it abundantly clear that the law never applied to any matters which are purely private in nature, even if that private matter might be tangentially related to some dispute with the United States, but applies only to those relating specifically and intentionally to political or public concerns.<sup>170</sup>

## 2. *Disputes or Controversies*

Understanding the nature of the prohibited correspondence still does not satisfy the question of what constitutes a “dispute[] or controvers[y] with the United States.”<sup>171</sup> There was some uncertainty within the congressional debates as to this question as well. Some interpreted the law very strictly and would have applied it only to direct negotiations of peace and war.<sup>172</sup> Others espoused an interpretation that applied the bill “to restrict improper correspondence at all times, both of peace and of war.”<sup>173</sup> The latter interpretation is technically correct because the law does apply all the time, but is misleading in its simplicity because the words clearly require some degree of dispute in order for the law to apply.

The policy objectives and the legislative intent become apparent with a closer review of the political environment under

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169. See, e.g., *id.* at 2586 (expressing concern that the wording was so broad as to criminalize correspondences of individuals merely in relation to their own private rights).

170. See Logan Act, 18 U.S.C. § 953 (2006); see also 9 ANNALS OF CONG. 2608 (1798) (“[I]t lays no restrictions upon individuals in the prosecution of their individual claims.”).

171. See 18 U.S.C. § 953.

172. See 9 ANNALS OF CONG. 2502 (1798) (“[T]his resolution has no reference to any other negotiations but those of peace or war between a foreign nation and the United States.”).

173. *Id.* at 2587.

which the law was passed. The congressmen went to great lengths to debate the issue of whether this bill was a reactionary law motivated by the recent developments of Dr. Logan's trip to France.<sup>174</sup> The law's opponents insisted that such a law is made in haste, and that laws should not be created in response to specific acts.<sup>175</sup> Its backers replied that, if the bill were in response to Dr. Logan, then it would still be proper because all laws are made in just this fashion: the law was not proposed in response to any particular individual, but rather as a general protection of the Constitution.<sup>176</sup>

Regardless of whether the law was passed specifically in response to Dr. Logan's trip, the political climate in which Dr. Logan's trip occurred and in which the legislators were acting provides guidance as to what types of disputes or controversies this law is intended to forbid. The United States was not at war, and correspondence like that outlawed was not high treason, yet the "peculiar situation" in which the United States found itself necessitated a high crime for interference in a delicate atmosphere.<sup>177</sup> This peculiarity is the defining characteristic of the "dispute or controversy." It was not and is not necessary for Congress to have declared war, but merely that the tone be that of negotiation, such that any correspondence an unauthorized individual might carry on with the foreign government could interfere with the formal and legitimate national negotiation.<sup>178</sup> The crime is for an individual to interfere at a time when any negotiation is going forward by legal authority.<sup>179</sup> When this is the case, correspondence by an unauthorized individual

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174. *See, e.g., id.* at 2494 (insisting that the law's opponents "had mistaken the object of this resolution, in supposing it had reference to any particular person").

175. *See id.* at 2496–97 (saying that the resolution would not have been brought forward if not for Dr. Logan's actions).

176. *See id.* at 2494, 2502–03.

177. *Id.* at 2498 (noting that because we were not at war, the conduct would not be treason, but that the state of tense political affairs may justify making such correspondence a high crime).

178. *See id.*

179. *See id.* at 2593 ("The disputes and controversies mentioned in this bill are those which exist between the Government of the United States and foreign Governments—disputes and controversies of a political nature . . .").

interferes with, and thereby potentially usurps the Executive power, which is prohibited by the Act.

Ultimately, the Logan Act seeks to protect the Executive power. In order to violate this law, one must correspond with a foreign government in a manner that infringes on powers constitutionally granted to the Executive.<sup>180</sup> This is limited to correspondences like those of a representative or foreign minister, regardless of whether the person holds himself out to be such in name, and regardless of whether they seek peace or war.<sup>181</sup> The purpose of the correspondence must maintain the character of negotiation and be intentionally directed at influencing the recipient, and it must relate specifically to a dispute or controversy characterized by ongoing negotiations.<sup>182</sup>

## VI. CONCLUSION

This paper has not addressed all of the constitutional challenges leveled against the Logan Act. It is still unclear whether the federal government does in fact have the power to limit this particular speech and whether the statute is overbroad in its coverage. Instead, this paper focused on attacking the validity of claims that the Logan Act is unconstitutionally vague. Through a review of the congressional record, one can see the obvious policy objectives and the legislative intent underpinning this law. These show that the drafters intended to protect the Executive power, and did so by drafting a law that gives fair notice to citizens of what acts are and are not a violation of the law and provides judges with sufficient clarity to enforce that law without being arbitrary or using unpredictable discretion.

Though it may still be beneficial to consider amending the law to remedy many of the shortcomings alleged by scholars and officials alike, this type of action is not a prerequisite to useful enforcement of the law. As it stands today, the Logan Act is at

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180. *See id.* at 2488–89.

181. *See id.* at 2542.

182. *See Logan Act*, 18 U.S.C. § 953 (2006); *see also supra* notes 163–70 and accompanying text (discussing the need for the correspondence to maintain the purpose of negotiation, even if not the appearance of such).

least sufficiently clear to warrant its own enforcement, and it should be enforced accordingly. Most who have come close to its wrath have escaped it through one of two routes: Either they were determined to have been corresponding regarding private matters or their correspondence lacked the requisite intent. Though any accused party is likely to present both of these defenses, certainly some interference fails to legitimately land within their coverage. For these, the law must be enforced.