The Logan Act

The Logan Act, which bars U.S. citizens from engaging in certain communications with foreign governments without authority of the United States, was constitutional when enacted, and unless or until repealed by Congress, remains valid and enforceable.

December 18, 2020

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

In 1798, at the outset of the Quasi-War, Dr. George Logan traveled to France carrying a letter of introduction from Vice President Jefferson and what many viewed to be a message from the political opponents of President Adams.[1] President Adams believed that Logan's mission both undercut his constitutional authority over foreign affairs and encouraged the French to delay peace negotiations pending the upcoming U.S. presidential election. In a question that has been repeated in substance on multiple occasions since, the President asked: "Is this constitutional, for a party of opposition, to send embassies to foreign nations to obtain their interference in elections?" To T. Pickering, Secretary of State (Nov. 2, 1798), *in* 8 *The Works of John Adams* 615, 615 (Charles Francis Adams ed., 1853). Addressing the President's concerns, Congress adopted the Logan Act, which barred U.S. citizens from conducting private diplomacy without the authorization of the United States. Act of Jan. 30, 1799, ch. 1, 1 Stat. 613 (codified as amended at 18 U.S.C. § 953).

Well over two centuries later, Congress has kept the law on the books, even while the Logan Act remains in search of its first criminal conviction. Far from ignoring it, Congress has repeatedly codified, re-codified, and amended the law, most recently in 1994, and has relied on it as a model for additional legislation. The Supreme Court has cited it while construing other statutes. The State Department has administratively enforced its provisions. And in the political arena, many have invoked it while urging enforcement against unofficial diplomatic efforts with which

[1] Under the original constitutional framework, the runner-up in the electoral college became Vice President, which created a situation (rectified by the Twelfth Amendment) whereby the Vice President could be a political opponent of the President. In 1798, Vice President Jefferson was the leader of the Democratic-Republican party and the head of the political opposition to the Adams Administration.

they disagree. Others have periodically questioned the law's constitutionality, but in the absence of prosecutions, the courts have lacked occasion to definitively settle that question.

The Department of Justice has a duty to faithfully enforce the criminal statutes validly enacted by Congress. If constitutional, the Logan Act is one of those laws. But with limited precedents available, it may not always be easy for Department officials to know what to investigate. To provide guidance on these matters, you have asked us to examine the requirements of the Logan Act and to address whether the statute is constitutional on its face.

In its current form, the Logan Act bars a citizen of the United States (1) "without authority of the United States" (2) from "directly or indirectly commenc[ing] or carr[ying] on any correspondence or intercourse with any foreign government" (3) "with intent to influence the measures or conduct of any foreign government . . . in relation to any disputes or controversies with the United States, or to defeat the measures of the United States." 18 U.S.C. § 953. We believe that the statute, properly construed, is constitutional. Congress adopted the statute as a permissible exercise of its authority under the Necessary and Proper Clause to authorize prosecutions of those who seek to "usurp the Executive authority of this Government." 9 Annals of Cong. 2489 (1798–99) (resolution introduced by Rep. Griswold). Although the last indictment under the statute of which we are aware occurred more than 150 years ago, "[t]he failure of the executive branch to enforce a law does not result in its modification or repeal." *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113–14 (1953).

We also believe that the statute is consistent with the constitutional guarantees of due process and free speech. The Supreme Court has made clear that some ambiguity does not, standing alone, render a statute unduly vague under the Fifth Amendment. *See, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1214 (2018); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 21 (2010). The Logan Act's terms are not only susceptible of an intelligible construction, but its intent requirement also minimizes the risk of inadvertent violations. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007). And while the Logan Act surely regulates some forms of expression, it does not seek "to suppress ideas or opinions in the form of 'pure political speech,'" and leaves individuals free to "say anything they wish

on any topic." *Humanitarian Law Project*, 561 U.S. at 25–26. Its restrictions are "carefully drawn to cover only a narrow category of speech," *id.* at 26, namely communications with foreign governments made with an intent either to influence their activities on matters concerning U.S. diplomacy or to defeat U.S. endeavors. The statute is not materially different from other laws that regulate the interactions between U.S. citizens and foreign actors. We therefore conclude that the Logan Act falls within Congress's constitutional authority and, unless or until repealed, remains enforceable.

I.

A.

The Logan Act was enacted during a time of intense partisan strife over the young American Republic's relations with the revolutionary French government. Although the King of France had been an ally during the Revolutionary War, the United States maintained its neutrality during the wars of the French Revolution, declining to side with the French over the British. Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815*, at 181–89 (2009) ("Wood"); Stanley Elkins & Eric McKitrick, *The Age of Federalism* 336–41 (1993) ("Elkins & McKitrick"). In 1796, the French Directory authorized the seizure of American merchant ships trading with the British. Wood at 239; Elkins & McKitrick at 537–39. Seeking to resolve the conflict, President Adams sent envoys to Paris, but they were rebuffed and insulted by the French foreign minister, Talleyrand—a failed mission that was reported back in diplomatic correspondence. Wood at 240–43; Elkins & McKitrick at 549–50, 569–79. This so-called "XYZ Affair" inflamed anti-French sentiment within the United States, which drifted into the Quasi-War, a series of naval battles primarily in the Caribbean, while the Federalist allies of President Adams considered congressional measures to authorize a full-blown war against France. Wood at 243–46; Elkins & McKitrick at 581–90; *see also* Charles Warren, Assistant Attorney General, *Memorandum on the History and Scope of the Laws Prohibiting Correspondence with a Foreign Government, and Acceptance of a Commission to Serve a Foreign State in War* (1915), *reprinted in* S. Doc. No. 64-696, at 4 (1917) ("Warren Memorandum").

Against this backdrop, Dr. George Logan, a Pennsylvania Republican, sailed to France on an unofficial diplomatic mission in 1798. *See* Frederick B. Tolles, *George Logan of Philadelphia* 153–56 (1953) ("Tolles"). Logan carried a letter of introduction from Vice President Jefferson, and he was warmly greeted by the French Directory, which by then desired to avoid an expansion of the existing conflict. *Id.* at 155–56, 161–67.[2] Logan returned to the United States proclaiming the message that France sought a diplomatic resolution. *Id.* at 174–84.

Although Logan maintained that his sole aim was to avoid war, and that he disclaimed any public authority, President Adams and his political supporters believed Logan had acted with partisan intent. As this Office has explained, "Logan's mission was regarded by Congress as giving the French Government a choice whether to negotiate with the Federalist Party in power or the Republican Party who might assume power after the election of 1800, and thus as undercutting the authority of the President's envoys." Memorandum for Edwin O. Guthmann, Special Assistant for Public Information, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: Tractors for Cuba* at 1 (June 20, 1961) ("Katzenbach Memorandum"). President Adams expressed the same sentiment, writing to Secretary of State Pickering that "[t]he object of Logan in his unauthorized embassy seems to have been, to do or obtain something which might give opportunity for the 'true American character to blaze forth in the approaching elections.'" To T. Pickering, Secretary of State, *in* 8 *The Works of John Adams* at 615; *see also* 9 Annals of Cong. 2499 (1798–99) (statement of Rep. Dana) ("[T]his unauthorized correspondence must have led to an opinion in the French Government that they had numerous friends in this country, and have encouraged them in their measures against us."); *id.* at 2504 (statement of Rep. Harper) ("It was wholly of a political nature, and arose wholly from political considerations. It was, in fact, a plain and direct interference with the powers of Government."); *id.* at 2716 (statement of Rep. Bayard) ("He went to represent a party against the Government.").

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[2] Logan also carried letters from Thomas McKean, another Republican and Chief Justice of Pennsylvania; Philippe-André Joseph de Létombe, French consul general and French consul in Philadelphia; and possibly Edmond Charles Genet, former French minister to the United States. *See* Tolles at 155–56; To T. Pickering, Secretary of State, *in* 8 *The Works of John Adams* at 615.

President Adams and Members of Congress viewed Logan's unofficial mission not merely as a partisan affront but also as a threat to the Executive Branch's control over the conduct of U.S. diplomacy. The Senate sent a message to the President objecting to France's "neglecting and passing by the constitutional and authorized agents of the Government" and sending diplomatic messages "through the medium of individuals without public character or authority." Address of the Senate to John Adams, President of the United States (Dec. 11, 1798), *in* 1 *A Compilation of the Messages and Papers of the Presidents: 1789–1897* ("*Messages and Papers*") 275, 276 (James D. Richardson ed., 1896). President Adams agreed, advising that "the officious interference of individuals without public character or authority is not entitled to any credit, yet it deserves to be considered whether that temerity and impertinence of individuals affecting to interfere in public affairs between France and the United States . . . ought not to be inquired into and corrected." Reply of the President (Dec. 12, 1798), *in* 1 *Messages and Papers* 277, 277.

Shortly thereafter, Representative Roger Griswold introduced a resolution in the House of Representatives to authorize a committee to draft a bill to bar interference in Executive Branch diplomacy. *See* 9 Annals of Cong. at 2488–89. As he explained, the "object" of the measure would be "to punish a crime which goes to the destruction of the Executive power of the Government," meaning "that description of crime which arises from an interference of individual citizens in the negotiations of our Executive with foreign Governments." *Id.* Such interference, he argued, usurped a power that "has been delegated by the Constitution to the President; and . . . the people of this country might as well meet and legislate for us, or erect themselves into a judicial tribunal, in place of the established Judiciary, as that any individual, or set of persons, should take upon him or themselves this power, vested in the Executive." *Id*. at 2494.[3] The House

[3] *See also, e.g.*, 9 Annals of Cong. at 2494 (statement of Rep. Griswold) ("I think it necessary to guard by law against the interference of individuals in the negotiation of our Executive with the Governments of foreign countries."); *id.* at 2499 (statement of Rep. Dana) ("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."); *id.* at 2521 (statement of Rep. N. Smith) ("But, it was said, the interference of an individual could not be improper, because he could not usurp the Executive authority. If the gentleman . . . will give himself the trouble

then authorized a committee to draft the bill, extending "penalties . . . to all persons, citizens of the United States, who shall usurp the Executive authority of this Government, by commencing or carrying on any correspondence with the Governments of any foreign Prince or State, relating to controversies or disputes which do or shall exist between such Prince or State and the United States." *Id.* at 2489, 2545–46.

After the committee drafted the bill, the House extensively debated the measure. Again, members described the law as essential protection against interference with the Executive Branch's diplomatic authority. *See, e.g.*, *id.* at 2588 (statement of Rep. Bayard) ("The object of this law is to prevent these private interferences altogether, since the Constitution has placed the power of negotiation in the hands of the Executive only."); *id.* at 2598 (statement of Rep. Edmond) ("[I]t will be wise and prudent, at this time, to frame a law to prevent individuals from interfering with the Executive authority, in a manner injurious to the community."); *id.* at 2607 (statement of Rep. Griswold) ("Its object must be known to be to prevent all interference with the Executive power in our foreign intercourse."); *id.* at 2637 (statement of Rep. Rutledge) ("[I]n all well constituted Governments, it is a fundamental principle, that the Government should possess exclusively the power of carrying on foreign negotiations."); *id.* at 2677 (statement of Rep. Isaac Parker) ("This bill . . . is founded upon the principle that the people of the United States have given to the Executive Department the power to negotiate with foreign Governments, and to carry on all foreign relations, and that it is therefore an usurpation of that power for an individual to undertake to correspond with any foreign Power on any dispute between the two Governments, or for any State Government, or any other department of the General Govern-

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of reading the Constitution, he will find that the carrying on of all foreign intercourse is placed in the hands of the Executive, as fully as the Legislature is possessed of all legislative power, or the Judiciary, of judicial. When an individual, therefore, attempts to negotiate with a foreign Government on national concerns, he is certainly doing the business of the Executive."); *id.*at 2544–45 (statement of Rep. N. Smith) ("It is true the Government would not be bound to adopt any of these [private] treaties, but they will be obliged to sit down and form an opinion on them. Thus, the power of carrying on foreign negotiations would be taken from the Executive, and placed in the hands of any individual who might choose to enter upon the business, which would be defeating a power placed in the President by the Constitution of the United States, and which is so guarded that even he cannot exercise it without the concurrence of the Senate.").

ment, to do it."). The House thereafter adopted the bill on January 17, 1799. *Id.* at 2721. The Senate approved the measure the next week, 8 Annals of Cong. 2205–06 (1799), and the President signed it into law on January 30, 1799, 1 Stat. 613.

B.

In its original form, the Logan Act prohibited a U.S. citizen, "without the permission or authority of the government of the United States," from "commenc[ing], or carry[ing] on, any verbal or written correspondence or intercourse with any foreign government" with "intent to influence the measures or conduct of any foreign government . . . in relation to any disputes or controversies with the United States, or defeat the measures of the government of the United States." 1 Stat. at 613. A violation was punishable by a sentence of imprisonment of "not less than six months, nor exceeding three years," and a fine of up to $5,000. *Id*. Over the past two centuries, Congress has repeatedly revisited the Logan Act, all the while keeping that prohibition in place.

Congress first amended the statute in the 1870s in the course of adopting the Revised Statutes of the United States. *See* Rev. Stat. § 5335 (1st ed. 1875), 18 Stat. pt. 1, at 1041. In 1909, in the course of revising the federal penal code and otherwise "omit[ting] redundant and obsolete enactments" and "embod[ying] in the revision such changes in the substance of existing law as . . . were necessary and advisable," S. Rep. No. 60-10, pt. 1, at 6 (1908), Congress made minor amendments that included extending the statute's reach to all territory subject to the jurisdiction of the United States, *see* Pub. L. No. 60-350, § 5, 35 Stat. 1088, 1088–89 (1909); *see also* H.R. Rep. No. 80-304, at 3 (1947) (explaining that the Criminal Code of 1909 "omitted redundant and obsolete laws").[4] Congress re-codified the Logan Act in 1926 as section 5 of title 18 in the newly formed U.S. Code. Pub. L. No. 69-440, 44 Stat. pt. 1, at 459

[4] The Logan Act previously applied to "[e]very citizen of the United States, whether actually resident or abiding within the same, or in any foreign country." Rev. Stat. § 5335. The 1909 amendments changed that phrase to "[e]very Citizen of the United States, whether actually resident or abiding within the same, *or any place subject to the jurisdiction thereof*, or in any foreign country." Pub. L. No. 60-350, § 5, 35 Stat. at 1088 (emphasis added). Senator Bacon specifically raised the prospect of omitting the Logan Act from the recodification. 42 Cong. Rec. 1531–33 (1908).

(1926). Six years later, Congress amended the law to implement grammatical changes recommended by the Attorney General. Pub. L. No. 72-96, 47 Stat. 132 (1932); *see also* H.R. Rep. No. 72-1045, at 1 (1932) (quoting a letter from Attorney General William Mitchell); S. Rep. No. 72-380, at 1 (1932) (same).

In 1948, Congress again amended the Logan Act, in connection with a general revision and codification of title 18, *see* Pub. L. No. 80-772, § 953, 62 Stat. 683, 744 (1948), and moved the statute to its current section, 18 U.S.C. § 953. The House Report described the bill as making "[m]inor changes of arrangement and in phraseology" to the Logan Act and omitting an explicit reference to those who counsel, advise, or assist in a violation, because title 18's definition of a "principal" would now cover such persons. H.R. Rep. No. 80-304, at A76. The House Report separately observed that the recodification had dropped several federal offenses that were now "obsolete," or "superseded by later law," *id.* at A233, but the Logan Act was not among the deleted offenses. Most recently, as part of the Violent Crime Control and Law Enforcement Act of 1994, Congress amended the statute to eliminate a $5,000 statutory cap on the fine for a violation. Pub. L. No. 103-322, sec. 330016(1)(K), § 953, 108 Stat. 1796, 2147.

Congress has not only affirmatively retained the Logan Act, but also rejected or failed to act on numerous attempts at repeal. In 1802, the House of Representatives first considered repealing the measure along with other initiatives from the Adams Administration, but the proposal was defeated. *See* 11 Annals of Cong. 185–87 (1802). Attempts to repeal the Logan Act have occurred periodically ever since, including earlier this year. *See, e.g.*, H.R. 6784, 116th Cong. (2020) (attempted repeal); H.R. 7269, 96th Cong. (1980) (same); S. 762, 55th Cong. (1897) (same); S. 1483, 54th Cong. (1896) (same); *see also* H.R. 6511, 114th Cong. (2016) (attempt to amend the Logan Act to clarify its application to the President-elect or anyone acting on the President-elect's behalf).

In 1977, the Senate debated and rejected an effort to repeal the Logan Act as part of a broader congressional effort to revise title 18 of the U.S. Code. *See* S. 1437, 95th Cong. (as reported by S. Comm. on the Judiciary, Nov. 15, 1977). The Department of Justice expressly supported the repeal of the Logan Act. *See* Letter for Paul Simon, U.S. House of Representatives, from Denis J. Hauptly, Task Force on Criminal Code Revision,

Office for Improvements in the Administration of Justice, U.S. Dep't of Justice, at 1 (June 7, 1978) ("Hauptly Letter"), *in Revision of the Federal Criminal Code: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 96th Cong. 3277, 3277 (1982). After Senator Edward Kennedy introduced the title 18 revision, Senator James Allen objected to the removal of the Logan Act as "an important omission." 124 Cong. Rec. 1367 (1978). Senator Kennedy responded that only "archaic" provisions were to be dropped, such as the crime of "seducing a female passenger aboard a ship, the Logan Act, and so forth," but Senator Allen retorted, "[t]he Senator thinks that ought to be permitted?" *Id*. Senator Allen introduced an amendment to retain the Logan Act, because without it "every man in the country or every woman in the country would be a secretary of state," and because the law serves as "a deterrent to individuals, whether they be in an official capacity, outside of the State Department or the President, from seeking to carry on foreign negotiations." *Id.* at 1371. Senator Allen specifically objected to the actions of "some Senators going abroad and, apparently, seeking to advocate policies contrary to the policy of the U.S. Government." *Id.* Faced with this objection, Senator Kennedy demurred, and the Senate agreed to restore the Logan Act to the proposed revision. *Id.* at 1371, 1457. Ultimately, the bill to revise and recodify title 18 lapsed at the end of the 95th Congress. Other attempts to repeal the Logan Act as part of a recodification of title 18 fell short as well. *See, e.g.*, S. 1630, 97th Cong. (as referred to S. Comm. on the Judiciary, Sept. 17, 1981); H.R. 6915, 96th Cong. (1980) (as referred to H. Comm. on the Judiciary, Mar. 25, 1980); S. 1722, 96th Cong. (as reported by S. Comm. on the Judiciary, Jan. 17, 1980).

Beyond retaining the Logan Act in the federal code, Congress has also relied on the statute when drafting new laws. Congress added the Logan Act to the criminal code for the governments of the Louisiana Territory, Act of Mar. 26, 1804, ch. 38, § 7, 2 Stat. 283, 285, and the Territory of Florida, Act of Mar. 30, 1822, ch. 13, § 9, 3 Stat. 654, 657. In 1863, Congress enacted legislation that, in the words of Senator Charles Sumner, was "somewhat similar in character" to the bill enacted "during the troubles between the United States and the Republic of France." Cong. Globe, 37th Cong., 3d Sess. 214–15 (1863). The legislation applied the Logan Act's substantive prohibition to correspondence or intercourse "with the present pretended rebel Government," the Confederacy. Act of

Feb. 25, 1863, ch. 60, § 1, 12 Stat. 696, 696. Following the attack on the RMS *Lusitania* that precipitated U.S. entry into World War I, Congress adopted a provision "[t]o punish acts of interference with the foreign relations . . . of the United States," Pub. L. No. 65-24, 40 Stat. 217, 217 (1917), prohibiting false statements under oath "in relation to any dispute or controversy between a foreign government and the United States," when the person knows or has reason to believe the statement "will, or may be used to influence the measures or conduct of any foreign government . . . to the injury of the United States," *id.* tit. VIII, § 1, 40 Stat. at 226 (codified as amended at 18 U.S.C. § 954). That provision, too, tracked the Logan Act. *See* Dep't of Justice, *Recommendations by the Attorney General for Legislation Amending the Criminal and Other Laws of the United States with Reference to Neutrality and Foreign Relations* 22 note (1916) ("The phraseology used in the bill submitted herewith is substantially copied from that used in section 5 of the Federal Penal Code, which was originally known as the Logan Act.").

C.

Although Congress has maintained the Logan Act in substantially the same form since 1799, no one has yet been convicted of violating it. The United States has charged two people under the statute, and a court-martial convicted a service member of a parallel offense. Yet despite the scant prosecution history, the statute has never been a dead letter. To the contrary, it has been repeatedly relied upon by federal courts in construing other statutes, administratively enforced by the State Department, and invoked in too many political debates to mention.

1.

The first Logan Act indictment of which we are aware came shortly after the statute's enactment. In 1803, a grand jury indicted a Kentucky farmer, Francis Flournoy, for writing an article in a Frankfort, Kentucky, newspaper in support of an alliance between an independent Western United States and France. Charles Warren, *Odd Byways in American History* 168–76 (1942). The article railed against oppression by Flournoy's "native rulers, the Eastern Americans," whom he considered "inimical to [the] prosperity and happiness" of the other states and territo-

ries. A Western American, Letter to the Editor, Guardian of Freedom, Mar. 2, 1803, at 1, 2. Speaking in favor of France, he argued "that 'tis better to have a friend for a master . . . than an enemy." *Id.* Flournoy was subsequently indicted for violating the Logan Act. *See* Warren, *Odd Byways in American History* at 173–74 (reprinting the indictment of Flournoy). But he apparently fled Kentucky, and no further prosecution followed. *See id.* at 174–75.

That same year, a Senate committee recommended that the Jefferson Administration pursue criminal charges against several prominent American lawyers who had advised the Spanish government with respect to French condemnations of U.S. ships in Spanish ports. Charles Pinckney, the U.S. minister to Spain, reported that Spain had relied on the legal opinions of those lawyers in rebuffing his efforts to compensate U.S. citizens; Pinckney included the opinions in question with his correspondence. From Charles Pinckney (Aug. 2, 1803), *in* 5 *The Papers of James Madison: Secretary of State Series* 260, 265–68 (David B. Mattern et al. eds., 2000); Mr. Pinckney to the Secretary of State (Aug. 2, 1803), *in* 2 *American State Papers: Foreign Relations* ("*American State Papers*") 597, 598–99 (1832).[5] Both Secretary of State Madison and Minister Pinckney believed that the lawyers' assistance had violated the Logan Act.[6] After President Jefferson reported the matter to the Senate, *see* To

[5] *See* Jared Ingersoll, William Rawle, J.B. McKean, & P.S. Duponceau, Abstract Question (Nov. 15, 1802), *in* 2 *American State Papers* 605; Edward Livingston, Answer of the Attorney General of the District of New York to the Same Question (Nov. 3, 1802), *in* 2 *American State Papers* 605.

[6] *See* To Charles Pinckney (Feb. 6, 1804), *in* 6 *The Papers of James Madison: Secretary of State Series* 438, 440 (Mary A. Hackett et al. eds., 2002) ("It was probably unknown to the Spanish Government that the lawyers in giving the opinion to which it attaches so much value, violated a positive statute of their own Country forbidding communications of any sort with foreign Governments or Agents on subjects to which their own Government is a party[.]"); From Charles Pinckney (Apr. 8, 1804), *in* 7 *The Papers of James Madison: Secretary of State Series* 12, 16 (David B. Mattern et al. eds., 2005) ("Some of the inclosures, & particularly the Gentlemen of the Laws opinions, will no doubt surprise you, so far at least as respects their consenting to give any opinion at all. I recollected that a few years since, a Question had arisen, how far a Citizen had a right, or ought to interfere in questions depending between, or in negociation with a foreign Government & their own, & that a Law had been passed about it, but not being able to find the Law in the Collection here, . . . I could not exactly describe its extent, nor could I say whether it was still in force." (footnote omitted)).

the Senate of the United States (Dec. 21, 1803) (with attachments), *in* 2 *American State Papers* 596, 596–608, a Senate committee opined that the lawyers had violated the statute, 1 *Journal of the Executive Proceedings of the Senate of the United States of America* 468, 468 (1828) ("[Y]our committee noticed certain unauthorized acts and doings of individuals, contrary to law, and highly prejudicial to the rights and sovereignty of the United States, tending to defeat the measures of the government thereof[.]"). The committee recommended requesting that the President seek the Attorney General's opinion whether the evidence supported prosecution, and, if so, commencing a prosecution. *Id.* at 469–70. The full Senate never acted on the resolution, with one Senator indicating that it was "not . . . within the province of their duty to do so." *Id.* at 470. And the Jefferson Administration did not otherwise move forward with a prosecution.[7]

Another Logan Act indictment came in 1852, when a grand jury indicted Jonas Phillips Levy for writing a letter to President Arista of Mexico advocating the rejection of a treaty negotiated between the United States and Mexico. *See* General Observations Relative to the Tehuantepec Route and the Garay Grant (June 20, 1853), *in* 9 *Diplomatic Correspondence of the United States: Inter-American Affairs: 1831–1860* ("*Diplomatic Correspondence*") 135 n.1 (William R. Manning ed., 1937).[8] The treaty

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[7] There are several other instances in which the Jefferson Administration considered potential Logan Act prosecutions. *See, e.g.*, From Jacob Wagner (Sept. 24, 1805), *in* 10 *The Papers of James Madison: Secretary of State Series* 370, 371 (Mary A. Hackett et al. eds., 2014) ("I have looked at the Logan Act and have satisfied myself that it could not be made to bear upon the purchasers at N. Orleans of the W. Florida lands."); To Levi Lincoln (June 24, 1804), *in* 43 *The Papers of Thomas Jefferson* 642, 643 (James P. McClure ed., 2017) ("Thus it seems a citizen invites a belligerent to come on our coast to protect a commerce, in which he is interested, from the other belligerent. [A]nother citizen may with equal right, to protect his commerce with the other belligerent, invite him also on our coast, and thus make that the principal theater of war, and defeat all the measures of the government for the preservation of peace and neutrality. [I]s not this a criminal correspondence under the act of Jan. 1799?"); From Thomas Jefferson (Aug. 28, 1801), *in* 2 *The Papers of James Madison: Secretary of State Series* 70, 71 (Mary A. Hackett et al. eds., 1993) ("You will be sensible that in [Joseph Allen Smith's] assumption of diplomatic functions he has not shewn much diplomatic subtlety. He seems not afraid of Logan's law in our hands."). During the Madison Administration, Attorney General Richard Rush advised that the Logan Act did not itself prohibit commerce with British ships along the American coast. *See* Richard Rush, Attorney General, *Intercourse with the Enemy* (July 28, 1814), *in* 28 Annals of Cong. 1821, 1823 (1814–15) (app.).

[8] As reported in the *Richmond Enquirer*:

would have authorized a group of U.S. citizens to build a railway connecting the Gulf of Mexico and the Pacific Ocean, but Levy had procured a separate authorization from the Mexican Congress that he encouraged President Arista to sign. *See* Tomas P. Levy to Mariano Arista, President of Mexico (Nov. 7, 1851), *in* 9 *Diplomatic Correspondence* 439 n.1. He warned President Arista "of the pending danger, of your Govt and loss of your Territory" if Mexico ratified the treaty. *Id.*; *see* Robert P. Letcher, United States Minister to Mexico, to Daniel Webster, Secretary of State of the United States (Dec. 14, 1851), *in* 9 *Diplomatic Correspondence* 438. With the support of Secretary of State Daniel Webster, the United States indicted Levy for violating the Logan Act. *See* Daniel Webster, Secretary of State of the United States, to Robert P. Letcher, United States Minister to Mexico (Jan. 31, 1852), *in* 9 *Diplomatic Correspondence* 109. The prosecution later moved to dismiss the indictment, however, after President Arista refused to cooperate and share Levy's letter. *See* General Observations Relative to the Tehuantepec Route and the Garay Grant, *in* 9 *Diplomatic Correspondence* at 136 n.1; Robert P. Letcher, United States

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> Mr. Jonas P. Levy, who has been arrested on the charge of holding political correspondence with the Mexican Government, and endeavoring to defeat the purposes of the U. States, claims to have himself purchased from the Mexican Government the right to construct and use a road across the Isthmus of Tehuantepec. Therefore, he no doubt attempted to defeat the ratification of the Tehuantepec Treaty, which, as is supposed by our Government, will enable the Tehuantepec Company to go on with their enterprize.
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> . . . .
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> Mr. Levy, it appears, deemed it quite necessary to the validity of his own alleged grant, that the Tehuantepec treaty should be rejected. It is quite probable that Mr. Levy had some influence in the defeat of the treaty, and it may cost the Tehuantepec company a considerable sum to get over the difficulty.
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> Some weeks ago, a notice was officially published purporting to be a warning to American citizens that they rendered themselves liable to punishment, under existing laws, by intriguing with foreign governments against the objects on this government. The case of Levy was then in view.

U.S. Supreme Court and Mrs. Gaines' Cause—Letter of Lieut. Maury—Mr. Levy and the Mexican Government—The Tehuantepec Treaty, Rich. Enquirer, Feb. 6, 1852, at 2. The newspaper article described the statute as "an obsolete law of 1799" and advised that a North Carolina congressman, Abraham Venable, "will bring a bill to repeal the law." *Id.*; *see also The Arrest of Mr. Levy—History of the Case—The Nicaragua Route*, N.-Y. Daily Times, Feb. 5, 1852, at 3; S. Press, Feb. 5, 1852, at 2 (reprinting the indictment of Levy).

Minister to Mexico, to Daniel Webster, Secretary of State of the United States (Apr. 4, 1852), *in* 9 *Diplomatic Correspondence* 486; *see also* Jeremy Duda, *A Foreign Affair*, History Today: History Matters (June 13, 2017), https://www.historytoday.com/history-matters/foreign-affair.

During the Civil War, there were a number of recorded instances in which Logan Act prosecutions were considered against U.S. citizens for engaging in diplomatic communications with the United Kingdom. The *Federal Cases* reporter records that Judge Peleg Sprague of the District of Massachusetts charged juries investigating potential Logan Act violations. In 1861, he observed that "a member of the British parliament declared, in the most public manner, that he had received many letters from the Northern states of America, urging parliament to acknowledge the independence of the Southern Confederacy." *In re Charge to Grand Jury—Treason & Piracy*, 30 F. Cas. 1049, 1050–51 (C.C.D. Mass. 1861) (No. 18,277). The Logan Act "was especially designed to prevent such unwarrantable interference with the diplomacy and purposes of our government." *Id.* at 1051. He similarly charged in 1863: "We have seen it stated in such form as to arrest attention, that unauthorized individuals have entered into communication with members of parliament and foreign ministers and officers, in order to influence their conduct in controversies with the United States, or to defeat the measures of our government." *In re Charge to Grand Jury—Treason*, 30 F. Cas. 1042, 1046 (D. Mass. 1863) (No. 18,274). "It ought to be known," he continued, "that such acts have long been prohibited by law." *Id.* We have not identified any record, however, of either grand jury's bringing charges.

2.

Separate from prosecutions, the Supreme Court and lower federal courts have repeatedly addressed the statute in the course of deciding cases involving other federal laws. For instance, in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), the Supreme Court held that the antitrust laws did not apply to extraterritorial conduct. In the course of so holding, Justice Holmes, writing for the Court, explained that the general presumption against the extraterritorial application of federal law could be overcome "[i]n cases immediately affecting national interests," of which "[a]n illustration from our statutes is found with regard to criminal correspondence with foreign governments." *Id.* at 356 (citing the Logan Act);

see also EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 258 (1991) (citing the Logan Act as an example of Congress using a clear statement to legislate with extraterritorial application).

The Supreme Court has also cited the Logan Act as an example of Congress's constitutional authority to regulate the actions of its citizens abroad. *See Skiriotes v. Florida*, 313 U.S. 69, 74 (1941) (citing "the statute relating to criminal correspondence with foreign governments" as one illustration of a criminal statute that by its nature applies to citizens abroad); *Blackmer v. United States*, 284 U.S. 421, 437 n.3 (1932) ("Illustrations of acts of the Congress applicable to citizens abroad are . . . the provisions relating to criminal correspondence with foreign governments." (citation omitted)). In *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), the Court held that the Smith Act had preempted Pennsylvania's anti-sedition act; in dissent, Justice Reed examined the federal interests at stake and observed that the "States are barred by the Constitution from entering into treaties and by 18 U.S.C. § 953 [i.e., the Logan Act] from correspondence or intercourse with foreign governments with relation to their disputes or controversies with this Nation." *Id.* at 516 n.5 (Reed, J., joined by Burton and Minton, JJ., dissenting). The Logan Act has similarly been relied upon in numerous lower court decisions.[9]

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[9] *See, e.g.*, *United States v. De León*, 270 F.3d 90, 94 (1st Cir. 2001) (citing the Logan Act as an example of Congress's power to legislate with extraterritorial effect); *ITT World Commc'ns, Inc. v. FCC*, 699 F.2d 1219, 1231 (D.C. Cir. 1983) (concluding the district court had misread a complaint under the Administrative Procedure Act as alleging only a violation of the Logan Act), *rev'd on other grounds*, 466 U.S. 463 (1984); *Agee v. Muskie*, 629 F.2d 80, 103, 112–13 (D.C. Cir. 1980) (MacKinnon, J., dissenting) (endorsing the government's argument that Agee's passport could be revoked because his conduct had violated the Logan Act), *rev'd sub nom. Haig v. Agee*, 453 U.S. 280 (1981); *Briehl v. Dulles*, 248 F.2d 561, 587 (D.C. Cir. 1957) (Bazelon, J., joined by Edgerton, C.J., dissenting) (citing the Logan Act as a less restrictive alternative to imposing travel restrictions on persons who support the Communist movement); *United States v. Craig*, 28 F. 795, 801 (C.C.E.D. Mich. 1886) (observing that under the Logan Act "every citizen of the United States, whether resident within the same, or *in any foreign country*, who shall carry on any criminal correspondence with a foreign government, may be punished by fine and imprisonment"); *United States v. Elliott*, 266 F. Supp. 318, 326 (S.D.N.Y. 1967) (rejecting the argument that 18 U.S.C. § 956 had been abrogated by desuetude and citing *Waldron*'s similar conclusion concerning the Logan Act); *Waldron v. Brit. Petrol. Co.*, 231 F. Supp. 72, 88–89, 89 n.30 (S.D.N.Y. 1964) (rejecting the argument that the Logan Act had been abrogated by desuetude and expressing the view that the statute may be unconstitutionally vague); *Martin v. Young*; 134 F. Supp. 204, 207 (N.D. Cal. 1955)

Outside of Article III courts, military prosecutors have invoked the Logan Act as a model for court-martial charges. In 1950, a member of the U.S. Air Force was convicted in part for "commenc[ing] correspondence with an agency of a foreign government . . . with intent to defeat the measures of the United States." ACM 2878, Mueller (BR), 3 CMR(AF) 314, 316. The airman had contacted the Soviet embassy in Switzerland and later tried to convey various intelligence and classified information. After his arraignment, he objected that the relevant specification "was too vague and incomplete and that it did not properly state an offense." *Id.* at 323. The Board of Review observed that the specification was "designed and modeled to conform in substance to the offense denounced by 18 USC 953" and rejected the vagueness challenge. *Id.* at 323–24. The Logan Act also featured in a habeas corpus proceeding challenging the pending court-martial of a U.S. Army private who was charged with aiding the enemy based on actions taken while a prisoner of war during the Korean War. *See Martin v. Young*, 134 F. Supp. 204 (N.D. Cal. 1955). In concluding that the court-martial lacked jurisdiction over an offense committed by the private prior to a break in his military service, a federal district court held that the conduct described in the specifications stated a violation of the Logan Act, among other offenses, and therefore could only be tried in an Article III court. *See id.* at 206–07.

3.

Because the Logan Act protects the Executive Branch's control over diplomatic communications, the State Department has long played a role

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(concluding that conduct described in a court-martial specification stated a violation of the Logan Act that could be tried in an Article III court); *United States v. Peace Info. Ctr.*, 97 F. Supp. 255, 261 (D.D.C. 1951) (comparing the Foreign Agents Registration Act of 1938 to the Logan Act and describing them both as "matters [that] are equally within the field of external affairs of this country, and, therefore, within the inherent regulatory power of the Congress"); *United States v. Bryan*, 72 F. Supp. 58, 62 (D.D.C. 1947) (using the Logan Act as an example of possible legislation that would justify investigating un-American and subversive activities); *Burke v. Monumental Div., No. 52*, 286 F. 949, 952 (D. Md. 1922) (comparing the sentiments of a union when one of its members helped a railroad company during negotiations to the sentiment of Congress that led to the Logan Act), *aff'd*, 298 F. 1019 (4th Cir. 1924) (per curiam), *aff'd*, 300 F. 1003 (4th Cir.) (per curiam), *rev'd with directions to dismiss for lack of jurisdiction*, 270 U.S. 629 (1926) (per curiam).

in authorizing communications or in employing available diplomatic tools to police violations. In 1925, for example, the State Department advised a U.S. citizen, Eldon R. James, that the government did not need to consent to his appointment by the King of Siam as a minister plenipotentiary, unless it was his "intention to advise the Siamese Government with respect to any disputes or controversies which might be pending between that Government and the United States," in which case, he must send "an official letter to the Secretary of State, requesting the permission of this Government so to do." 4 Green Haywood Hackworth, *A Digest of International Law* § 413, at 610 (1942) ("Hackworth") (quoting the Under Secretary of State's response to James). In 1934, the State Department adopted Departmental Order 601, which required U.S. citizens seeking to "counsel, advise, or assist foreign governments" in matters before the State Department "to make full disclosure under oath of the circumstances of their employment." *Id.* The State Department similarly promulgated regulations thereafter to ensure "a uniform practice in considering requests that American citizens be permitted to counsel, advise, or assist foreign governments, officers, or agents thereof in matters coming before the Department." 22 C.F.R. § 3.1 (1958); *e.g.*, Letter for Secretary of State, from Franklin F. Russell, Legal Advisor to the Emperor of Ethiopia's Representative in Eritrea, *Re: Logan Act* (May 5, 1958). The State Department administered those regulations until 1960. *See* 25 Fed. Reg. 13,138, 13,138 (Dec. 21, 1960) (revoking 22 C.F.R. pt. 3).

In addition, the State Department has invoked the Logan Act to prevent interference with U.S. diplomacy. In 1805, the State Department relied in part upon the Logan Act to request the withdrawal of the Spanish minister, the Marquis de Yrujo, who had evidently sought to hire a Philadelphia newspaper editor to advocate for Spanish interests in opposition to the United States. *See* 4 John Bassett Moore, *A Digest of International Law* § 640, at 509 (1906) ("Moore") ("The Government of the United States strongly censured his action, especially on the ground that it constituted a violation of the act of Congress commonly known as the 'Logan statute.' . . . It was on this ground of an attempt to tamper with the press that the recall of the marquis was asked for." (footnote omitted)); *see also* John W. Foster, *A Century of American Diplomacy* 219 (1901) ("[The Secretary of State] directed our minister in Madrid to ask for his recall, alt-

hough the chief ground for the request was his attempt to bribe a Philadelphia editor to publish attacks upon the government.").

In 1861, Secretary of State William H. Seward invoked the Logan Act in dismissing the British consul at Charleston, Robert Bunch, after intercepting dispatches reflecting his correspondence with the Confederacy. *See* 5 Moore § 700, at 20–22. According to Secretary Seward, Bunch "was clearly and distinctly in violation" of the Logan Act because "the only authority in this country to which any diplomatic communication whatever can be made is the government of the United States itself." Mr. Seward to Mr. Adams (Oct. 23, 1861), *in* S. Exec. Doc. No. 37-1, vol. 1, at 164, 165–66 (1861); *see also* 5 Moore § 700, at 21 ("Mr. Seward, in saying that Mr. Bunch had violated a law of the United States, alluded to the so-called Logan Act[.]").[10]

The State Department has also sought to enforce the Logan Act by restricting the foreign travel of U.S. citizens. In 1917, shortly after the United States entered World War I, the State Department denied passports to private citizens seeking to attend the Stockholm Peace Conference. Secretary of State Lansing warned that such attendance would violate the Logan Act. *See Gompers Rebuffs New Peace Scheme*, N.Y. Times, May 25, 1917, at 9; *Warns Americans to Take No Part in Peace Conclave*,

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[10] The Logan Act was similarly implicated in a 1915 incident in which an American journalist, James F.J. Archibald, was found carrying letters from the German and Austrian embassies in the United States to their home capitals. *See* The Ambassador in Great Britain (Page) to the Secretary of State (Aug. 31, 1915), *in Foreign Relations of the United States, 1915 Supplement: The World War* ("*Foreign Relations of the United States*") 932 (1928). The correspondence included a proposal by the Austrian Ambassador to instigate strikes in American factories supporting the war effort. The Ambassador in Great Britain (Page) to the Secretary of State (Sept. 1, 1915), *in Foreign Relations of the United States* 932, 932–33. Secretary of State Robert Lansing instructed the U.S. Ambassador in Austria-Hungary to request the recall of the Austrian Ambassador over the incident, *see* The Secretary of State to the Ambassador in Austria-Hungary (Penfield) (Sept. 8, 1915), *in Foreign Relations of the United States* 933, 933–34, and the Department of Justice considered charging Archibald under the Logan Act, *see* Warren, *Odd Byways in American History* at 175; *Officials Confer on Archibald Case*, Wash. Times, Sept. 14, 1915, at 1; *see also* Report by the Secretary of State to the President (Oct. 29, 1888), *in Foreign Relations of the United States* pt. 2, at 1670 (1889) (recommending that the Attorney General investigate whether Charles F. Murchison, a U.S. citizen, violated the Logan Act by engaging in certain correspondence with the British minister, Lord Sackville, and further recommending the dismissal of Lord Sackville over the incident).

N.Y. Times, May 24, 1917, at 1.[11] Similarly, in *Agee v. Muskie*, 629 F.2d 80 (D.C. Cir. 1980), *rev'd sub nom. Haig v. Agee*, 453 U.S. 280 (1981), the State Department revoked the passport of Philip Agee, a former agent of the Central Intelligence Agency ("CIA"), who, among other things, had reportedly advised agents of the Iranian government in connection with the Iran hostage crisis. *See* 629 F.2d at 112–13 (MacKinnon, J., dissenting). A D.C. Circuit panel held that the Secretary of State lacked the authority to revoke passports on national security grounds, but in dissent, Judge MacKinnon agreed with the government that Agee's passport could be denied, among other reasons, because his conduct had violated the Logan Act. *See id.* The Supreme Court subsequently reversed the D.C. Circuit, albeit without addressing the potential Logan Act violation.

Although our focus here has been upon instances in which government officials have affirmatively relied upon the Logan Act, there are numerous other instances where public officials or others have accused American citizens of contravening its prohibitions, particularly during times of diplomatic controversy.[12] Despite the absence of criminal convictions, the

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[11] The State Department stated that it would not "invoke the Logan act against persons attending conferences and conventions of an unofficial character, here or abroad, where peace in the abstract was to be discussed, and where the conference did not seek to interfere in the action of Governments as involved in the final terms of peace in the present war," although "no passports will be issued to delegates to gatherings like the projected Socialist conference at Stockholm, some of the delegates to which have at least a quasi-official status conferred by Governments now hostile to the United States." *Gompers Rebuffs New Peace Scheme*, N.Y. Times, May 25, 1917, at 9.

[12] *See generally, e.g.*, Daniel B. Rice, *Nonenforcement by Accretion: The Logan Act and the Take Care Clause*, 55 Harv. J. on Legis. 443 (2018) (cataloguing examples); David Detlev Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 Am. J. Int'l L. 268, 271–80 (1966) (same). Members of Congress have also regularly invoked the Logan Act in congressional debates. *See, e.g.*, 153 Cong. Rec. 9041–42 (2007) (Rep. Burton accusing the Speaker of the House of violating the Logan Act by meeting with the Syrian president); 134 Cong. Rec. 19,672 (1988) (Rep. Broomfield discussing the Logan Act in response to Jesse Jackson's negotiations over the release of American hostages in Lebanon); 133 Cong. Rec. 32,152–56, 32,872–73 (1987) (Members of Congress debating whether the Speaker of the House had violated the Logan Act in communications with Daniel Ortega Saavedra of Nicaragua); 130 Cong. Rec. 10,501, 10,556–62 (1984) (Rep. Gingrich criticizing members of Congress for writing a letter to Nicaraguan president); 122 Cong. Rec. 4216, 4919 (1976) (Sen. Goldwater accusing former President Nixon of violating the Logan Act); 107 Cong. Rec. 8538–43 (1961) (Members of Congress debating whether the Tractor Committee's attempts to trade for prisoners in Cuba violated the

Logan Act has not been moribund, but instead has remained in the background of federal law, having been invoked by all three branches of the U.S. government.

II.

We turn now to the scope of the Logan Act. We interpret the statute both to provide guidance about its reach and to evaluate potential constitutional questions. *See United States v. Stevens*, 559 U.S. 460, 474 (2010) ("[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers." (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008))). In its current form, the statute reads as follows:

> 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 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.

18 U.S.C. § 953.

To establish a violation, the United States must show that a U.S. citizen (1) "without authority of the United States," (2) "directly or indirectly commence[d] or carrie[d] on . . . correspondence or intercourse with any foreign government or any officer or agent thereof," (3) "with intent to influence the measures or conduct of any foreign government . . . in relation to any disputes or controversies with the United States, or to

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Logan Act); 106 Cong. Rec. 8625 (1960) (Sen. Fulbright discussing the Logan Act's application to the activities of special pressure groups in areas of foreign policy); Rice, 55 Harv. J. on Legis. at 443 (cataloguing examples).

defeat the measures of the United States."[13] The statute excepts from that prohibition acts by citizens who are seeking redress for private injuries suffered at the hands of a foreign government or "its agents or subjects." We consider in turn each element of the Logan Act and then the exception.

A.

The Logan Act currently prohibits citizens from engaging in certain communications with a foreign government "without authority of the United States." The original text differed slightly, prohibiting acts without "authority of *the government* of the United States." 1 Stat. at 613 (emphasis added). We interpret the "authority of the government of the United States" to refer to the legal prerogative of the Executive Branch to conduct the Nation's diplomacy, and believe that the current phrasing, "without authority of the United States," has the same meaning.

At the time it was adopted, the Logan Act required that a person receive "authority" from a responsible official within the "government of the United States."[14] Although "government of the United States" in other contexts may refer to the government as a whole, we think that this phrase plainly referred to the authority of the Executive Branch—the locus of the power to conduct diplomacy under the Constitution.[15] Article II vests the

[13] Although the Logan Act applies only to U.S. citizens, anyone who "aids, abets, counsels, commands, induces or procures" a violation would be "punishable as a principal." 18 U.S.C. § 2(a).

[14] Then, as now, "authority" referred to a person's "[l]egal power" to act. 1 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) ("Johnson's Dictionary") (def. 1); *accord* 1 Noah Webster, *An American Dictionary of the English Language* (1828) ("Webster's Dictionary") (def. 1: "Legal power, or a right to command or to act[.]"); 1 John Ash, *The New and Complete Dictionary of the English Language* (2d ed. 1795) ("Ash's Dictionary") ("Power, dominion, legal power, influence, credit, testimony, support, credibility."); Thomas Dyche, *A New General English Dictionary* (17th ed. 1794) ("Dyche's Dictionary") ("power, influence, rule, credit, support, countenance, testimony, credibility").

[15] The term "government of the United States" appears several times in the Constitution, each time referring specifically to the federal government as a whole. *See, e.g.*, U.S. Const. art. I, § 8, cl. 17 (referring to the capital district as "the Seat of the Government of the United States"); *id.* art. I, § 8, cl. 18 (vesting Congress with the authority to make necessary and proper laws for the execution of "all other Powers vested by this Constitu-

President with the power to "appoint Ambassadors, [and] other public Ministers and Consuls," U.S. Const. art. II, § 2, cl. 2, and to "receive Ambassadors and other public Ministers," *id.* art. II, § 3. The first Congress charged the Department of State (originally the "Department of Foreign Affairs") with the responsibility for directing the diplomatic correspondence of the United States and "such other matters respecting foreign affairs, as the President" may assign to the Department. Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29. As then-Secretary of State Jefferson advised French Minister Edmond Charles Genet, the President is "the only channel of communication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation, and whatever he communicates as such they have a right and are bound to consider as the expression of the nation." To Edmond Charles Genet (Nov. 22, 1793), *in* 27 *The Papers of Thomas Jefferson* 414, 414 (John Catanzariti ed., 1997).

Jefferson's sentiment was repeated on multiple occasions during the early Republic. Shortly before adoption of the Logan Act, Attorney General Charles Lee opined that "[a] foreign minister here is to correspond with the Secretary of State on matters which interest his nation, and ought not to be permitted to do it through the press in our country." *Diplomacy*, 1 Op. Att'y Gen. 74, 75 (1797). The foreign minister's "intercourse is to be with the Executive of the United States only, upon matters that concern his mission or trust," and the breach of that principle would be a "contempt of *the government*, for which he is reprehensible by the President." *Id.* (emphasis added). John Marshall recognized the same during his brief stint in Congress. *See* 10 Annals of Cong. 613 (1800) (statement of Rep. Marshall) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."); *accord* S. Comm. on Foreign Relations, 14th Cong., Rep. of Feb. 15, 1816, *reprinted in* S. Doc. No. 56-231, pt. 8, at 24 (1901) ("The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success."). The

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tion in the Government of the United States"); *id.* art. II, § 1, cl. 3 (requiring electors to transmit their sealed votes to "the Seat of the Government of the United States").

Supreme Court confirmed that principle as well. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988) ("The Court also has recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive.'" (quoting *Haig*, 453 U.S. at 293–294)); *see also, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 14, 21 (2015) (affirming the President's "unique role in communicating with foreign governments," whereas "Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation"); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414, 429 (2003) (observing that the executive power includes the "vast share of responsibility for the conduct of our foreign relations" and "independent authority in the areas of foreign policy and national security" (internal quotation marks omitted)); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) (plurality opinion) (acknowledging "the exclusive competence of the Executive Branch in the field of foreign affairs"); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) ("The power to admit new States resides in Congress. The President, on the other hand, is the constitutional representative of the United States in its dealings with foreign nations."); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quoting Rep. Marshall). Accordingly, within the context of the Logan Act, the phrase "authority of the government of the United States" means the authority vested in the Executive Branch.

Were there any doubt, the Logan Act's legislative history would confirm that Congress viewed the phrase in the same way.[16] The House resolution authorizing the drafting of the bill was directed against "all persons, citizens of the United States, who shall usurp *the Executive authority* of this Government." 9 Annals of Cong. at 2489 (emphasis added); *see also id.* at 2494 (statement of Rep. Griswold) ("I think it necessary to guard by law against the interference of individuals in the negotiation of our Executive with the Governments of foreign countries. . . . This power has been delegated by the Constitution to the Presi-

[16] We address the legislative history here and elsewhere in this opinion because some courts find it relevant to construing statutes, and because such history, like dictionaries, may bear upon contemporaneous usage in 1799. But "Congress left the authoritative record of its deliberations in the text of the statute," and it is the plain meaning of that language that governs our interpretation. *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. 158, 174 (2018).

dent[.]"). When the bill came to the floor of the House, the Members of Congress showed a common understanding that the "authority" in question was executive. *See, e.g.*, *id.* at 2588 (statement of Rep. Bayard) ("The object of this law is to prevent these private interferences altogether, since the Constitution has placed the power of negotiation in the hands of the Executive only."); *id.* at 2598 (statement of Rep. Edmond) ("[I]t will be wise and prudent, at this time, to frame a law to prevent individuals from interfering with the Executive authority, in a manner injurious to the community."); *see also supra* Part I.A.

At the time, the Members debated the subordinate question of whether the President could rely upon agents who had not been appointed with the Senate's advice and consent. Members sought to clarify the general reference to "government of the United States" on this point. *See, e.g.*, 9 Annals of Cong. at 2584 (statement of Rep. Sewall) (proposing insertion of "empowered or employed by the President of the United States, or other lawful authority," in order to confirm that the President could send emissaries to foreign countries without the Senate's advice and consent); *id.* (statement of Rep. Nicholas) (asserting that the President lacks authority to name diplomats other than with the Senate's advice and consent); *id.* at 2585 (statement of Rep. Gallatin) (arguing that "[i]f there are any cases, allowed by the Constitution, in which the President may authorize a Minister, without the concurrence of the Senate, he will, in doing so, act under the authority of the Government of the United States, and come within the tenor of this bill").[17] But in the end the phrase remained as first proposed, prohibiting action without "the authority of the government of the United States."

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[17] *See also* 9 Annals of Cong. at 2585–86 (statement of Rep. Bayard) (arguing that "the word 'Government' is here to be understood according to the subject matter," and therefore means "lawful authority," which the President might derive from a statute or the Constitution); *id.* at 2586 (proposed amendment by Rep. Dawson to limit the authority of the President or any officer of the United States to employ persons "except those appointed under the Constitution" to communicate with foreign governments); *id.* (statement of Rep. Pinckney) (calling Dawson's proposed amendment "useless" because "[a]ll power with respect to negotiations with foreign Governments, is placed in the hands of the Executive by the Constitution, and no act of Congress can alter the Constitution," so that "[i]f the President negotiates consistently with the Constitution, he acts under the Constitution, and the act is an act of the Government" and the "House can neither give nor take away power on this subject").

In its current form, the operative phrase prohibits action "without authority of the United States," but this alteration did not change its meaning. In 1875, Congress, in the course of adopting the Revised Statutes, dropped "of the United States," thereby prohibiting acts without "authority of the Government." Rev. Stat. § 5335. During the 1948 recodification of title 18, Congress went back in the other direction, rendering the phrase as "without authority of the United States." Pub. L. No. 80-772, § 953, 62 Stat. at 744. But "[u]nder established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" *Finley v. United States*, 490 U.S. 545, 554 (1989) (quoting *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 199 (1912), and applying the canon to the 1948 recodification of federal law). No such clear statement appears in either the 1875 codification or 1948 recodification. To the contrary, the juxtaposition of the two amendments indicates that Congress viewed "the United States," "the Government," and "the government of the United States" as all referring to one and the same thing.

By longstanding practice, and consistent with ordinary meaning, a person does not require a formal appointment within the Executive Branch to take action with the "authority of the United States." Since the Washington Administration, the President has sent emissaries to foreign governments to conduct missions on the President's behalf, even without an appointment as an ambassador or other officer of the United States.[18] We think that the Executive Branch may similarly take the lesser step of authorizing U.S. citizens to engage in intercourse with foreign powers on diplomatic matters, even without any formal delegation. Such persons do not act "without authority of the United States" under the Logan Act,

[18] *See, e.g.*, *Ambassadors and Other Public Ministers of the United States*, 7 Op. Att'y Gen. 186, 204–06 (1855) (collecting examples of delegations to negotiate treaties without "any authorizing act of Congress, any preparatory specific appropriation, nor even a commission by and with the advice and consent of the Senate"); Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Assigning the Personal Rank of "Ambassador"* at 2 (July 16, 1969) ("As early as October 1789, President Washington requested Gouverneur Morris to proceed to London and to converse with the British Government on certain points. There was no Senatorial advice and consent to this assignment. Since then there has been a large number of instances in which Presidents have assigned persons diplomatic missions without the advice and consent of the Senate." (citation omitted)).

because they have received license to engage in diplomatic activity from the Executive Branch, which in the field of diplomacy exercises the authority of the United States.

The original version of the Logan Act made this conclusion abundantly clear by providing that it did not reach those acting with "the *permission* or authority of the government of the United States." 1 Stat. at 613 (emphasis added). Congress, however, removed the word "permission" in the course of the 1948 recodification. *See* Pub. L. No. 80-772, § 953, 62 Stat. at 744. But as noted above, minor revisions effectuated during a recodification of the laws are presumed to be non-substantive changes, and the Court has specifically applied that canon to the 1948 recodification. *See Finley*, 490 U.S. at 554. Here, there is no indication that Congress, in dropping "permission," narrowed the statute's exception for citizens who engage in foreign communications with the license of the Executive Branch. To the contrary, the House Report described the amendments to the Logan Act as "[m]inor changes of arrangement and in phraseology" unless otherwise specified. H.R. Rep. No. 80-304, at A76. We therefore do not read the recodification to prohibit acts by private citizens done with the permission of the Executive Branch.

This conclusion is supported by Executive Branch practice and precedent. Both before and after the 1948 recodification, the State Department had a practice of authorizing private persons to communicate with foreign governments, so that they might avoid violating the Logan Act. From 1934 through 1960, the State Department maintained regulations for approving requests to represent or assist foreign governments in matters before the Department. *See* 4 Hackworth § 413, at 610; 22 C.F.R. pt. 3 (1958); *see also* Memorandum for Paul A. Sweeney, First Assistant, Office of Legal Counsel, from Nathan Siegel, Office of Legal Counsel, *Re: Letter of Franklin F. Russell to the Department of State Concerning the "Logan Act"* at 2 (Oct. 2, 1958) (memorializing advice concerning the procedures by which the State Department should authorize a U.S. citizen to represent a foreign sovereign in connection with potential disputes with the United States). Even after rescinding these regulations, the State Department has granted ad hoc permissions, including to Members of Congress, to engage in foreign correspondence that otherwise would raise Logan Act concerns. *See, e.g.*, Letter from Robert J. McCloskey, Assistant Secretary of State for Congressional Relations (Sept. 29, 1975)

("McCloskey Letter") ("[T]he executive branch, although it did not in any way encourage the Senators to go to Cuba, was fully informed of the nature and purpose of their visit, and had validated their passports for travel to that country."), *as reprinted in* Eleanor C. McDowell, *Digest of United States Practice in International Law: 1975* ("McDowell") 750, 750 (1976). This Office similarly has recognized that the Executive Branch may authorize a person to conduct diplomacy on behalf of the United States even without an Executive Branch appointment. *See* Memorandum for the Attorney General, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Reply to Congressman Michel* at 1 (June 22, 1961) ("I think the current negotiations [with Cuba] might be of doubtful legality except for the fact that the President has indicated that he has no objection to them.").

There has been no single mode or formality for such authorizations. In some cases, the President, the Secretary of State, or a responsible official has expressly licensed the person's actions. In others, authorization has been implied from an invitation to join an official mission or through the grant of a passport or visa approval for a specific, stated purpose. But the "authority of the United States" must come from the Executive Branch because it is the President and his subordinates who exercise the "authority of the United States" in conducting diplomacy.

In view of the separation of powers, a recurring Logan Act question has been whether and how Members of Congress may engage with foreign governments. In many cases, such communications will not raise any Logan Act concerns because they are made with the consent and support of the Executive Branch, through congressional delegations assisted by the State Department. The Logan Act more broadly does not "appear to restrict members of the Congress from engaging in discussions with foreign officials in pursuance of their legislative duties under the Constitution." McCloskey Letter, *as reprinted in* McDowell at 750. But the permissible scope of such communications is narrow. In the instance addressed by the McCloskey Letter, the State Department had validated the passports of two Senators for travel to Cuba, and one of the Senators confirmed: "I made it clear that I had no authority to negotiate on behalf of the United States—that I had come to listen and learn." *Id.* (quoting Senator George McGovern). When a Member of Congress solicits information necessary to perform a legitimate legislative function, without

more, such requests for information would not involve diplomacy on behalf of the United States—and thus likely would not be made with the intent to influence the foreign government with respect to a dispute or controversy with the United States or to defeat a measure of the United States.

The legislative duties of a Member, however, do not include moving beyond such targeted communications to negotiating with foreign governments. As we have discussed, the Logan Act reflects the constitutional reality "that foreign policy [i]s the province and responsibility of the Executive," *Egan*, 484 U.S. at 529 (quoting *Haig*, 453 U.S. at 293–294), and the statute seeks to prevent "all persons, citizens of the United States, who shall usurp *the Executive authority* of this Government," 9 Annals of Cong. at 2489 (emphasis added).[19] Accordingly, while the Executive Branch, in the interest of comity and to promote the Nation's foreign relations, often authorizes diplomatic activity by Members of Congress, the statute's prohibition on diplomacy "without authority of the United States" requires that activity to be authorized by the "Executive authority" vested in the President.

B.

The second element of the statute requires a citizen to commence or carry on "any correspondence or intercourse with any foreign government

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[19] *See, e.g.*, 9 Annals of Cong. at 2494 (statement of Rep. Griswold) ("I think it necessary to guard by law against the interference of individuals in the negotiation of our Executive with the Governments of foreign countries. . . . This power has been delegated by the Constitution to the President[.]"); *id.* at 2590 (statement of Rep. W. Claiborne) ("Our foreign relations ought doubtless to be managed by the Executive department, and if any other character attempts to interfere in that business, his interference could certainly have no weight[.]"); *id.* at 2677 (statement of Rep. Isaac Parker) ("[T]his bill . . . is founded upon the principle that the people of the United States have given to the Executive Department the power to negotiate with foreign Governments, and to carry on all foreign relations, and that it is therefore an usurpation of that power for an individual to undertake to correspond with any foreign Power on any dispute between the two Governments, or for any State Government, or any other department of the General Government, to do it."); *see also id*. at 2498 (statement of Rep. Gallatin) ("[I]t would be extremely improper for a member of this House to enter into any correspondence with the French Republic, because this country is at present in a peculiar situation; for though, as we are not at war with France, an offence of this kind would not be high treason, yet it would be as criminal an act, as if we were at war[.]"); *supra* note 3 and accompanying text.

or any officer or agent thereof." We read these terms to encompass communications, whether written or spoken, that are directed to a foreign government, officer, or agent, whether in public or in private. They do not extend to the general public advocacy of an idea or a point of view, because such statements do not amount to correspondence or intercourse "with" a foreign interlocutor.[20] The terms "correspondence or intercourse," moreover, connote a reciprocal exchange. Thus, an open letter to a foreign government or a public denunciation of a foreign-government official is not "correspondence or intercourse," unless the circumstances suggest an effort to commence a reciprocal exchange with the speaker.

The words "correspondence" and "intercourse" imply communication directed to a particular recipient. Early dictionaries define "correspondence" as "[i]ntercourse; reciprocal intelligence," 1 Johnson's Dictionary (def. 2), or "an intercourse by letter or otherwise," Dyche's Dictionary.[21] Those dictionaries likewise define "intercourse" as "exchange" or "[c]ommunication: followed by *with*."[22] *See also* Warren Memorandum at 10–11 (collecting definitions of "correspondence" and "intercourse"). A person does not communicate "with" a foreign government simply by publishing an editorial on a foreign policy topic or making a speech expressing an opinion about foreign affairs.[23] To implicate the Logan Act,

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[20] Title 18 of the U.S. Code defines "foreign government" to include "any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States." 18 U.S.C. § 11.

[21] *Accord* 1 Webster's Dictionary (def. 2: "Intercourse between persons at a distance, by means of letters sent and answers received."); *id.* (def. 4: "Friendly intercourse; reciprocal exchange of offices or civilities; connection."); 1 Ash's Dictionary ("intercourse, . . . intercourse by letters").

[22] 1 Johnson's Dictionary (defs. 1, 2); *accord* 1 Webster's Dictionary (def. 1: "Communication; . . . connection by reciprocal dealings between persons or nations, either in common affairs and civilities, in trade, or correspondence by letters."); *id.* (def. 2: "Silent communication or exchange."); 1 Ash's Dictionary ("Communication, commerce, exchange[.]"); Dyche's Dictionary ("exchange, mutual communication").

[23] For this reason, we do not believe that Flournoy's publication of an editorial violated the statute. *See* Warren, *Odd Byways in American History* at 173 ("It is difficult to imagine by what metaphysical ingenuity the United States Attorney, Joseph Hamilton Daveiss, convinced himself that the mere writing of a letter for publication in a newspaper could be construed to constitute the carrying on directly or indirectly of any verbal or written correspondence or intercourse with a foreign government, within the prohibition of that statute."); From Harry Toulmin (Apr. 5, 1803), *in* 4 *The Papers of James Madison:*

the communication must be specifically directed at a foreign government or official (although such an effort may be indirect, as well as direct).

The definitions of "correspondence" and "intercourse" overlap significantly, leading Assistant Attorney General Charles Warren to observe that they are "interchangeable or synonymous." Warren Memorandum at 11; *see also* Letter for Mary G. Kilbreth, from H.M. Daugherty, Attorney General (May 2, 1922) ("Daugherty Letter"), *reprinted in Senator France Given "Benefit of the Doubt": Attorney General Daugherty Declines to Prosecute*, Woman Patriot, May 15, 1922, at 5 (describing "correspondence" and "intercourse" as synonyms in the Logan Act). That conclusion receives further support from Members in the original House debate who employed the terms interchangeably. *See* 9 Annals of Cong. at 2591 (statement of Rep. Bayard) ("In order to establish a crime by this bill, what is to be proved? First, that there are disputes subsisting between the United States and the foreign nation with whom the *correspondence* is said to have taken place; that this *intercourse* has really existed[.]" (emphases added)); *id.* at 2596 (statement of Rep. Gallatin) ("[I]f that is the case, . . . we ought undoubtedly to pass a law to make it criminal to carry on any *correspondence*, without respect to the intention. We are told that it is improper for a man to carry on a written *correspondence* to obtain a restoration of captured property, because under cover of this he may carry on an *intercourse* dangerous to the interests of the country, and that, therefore, he ought to be punished for carrying on a harmless *correspondence*, because it might possibly be criminal." (emphases added)).

Alternatively, we might read "correspondence" and "intercourse" to refer respectively to written and oral communication. Such an interpretation would avoid superfluity, and dictionaries do suggest this potential distinction—that correspondence means communication by letter and

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Secretary of State Series 478, 479 (Mary A. Hackett et al. eds., 1998) (calling the indictment "a flagrant perversion of the meaning of an act of congress big with mischief & even more inauspicious to the freedom of the press, than the odious and far famed sedition law"). Further, such an interpretation would raise serious First Amendment concerns because it would suggest that the Logan Act did seek "to suppress ideas or opinions in the form of 'pure political speech,'" and that individuals could not "say anything they wish on any topic." *Humanitarian Law Project*, 561 U.S. at 25–26; *see infra* Part III.C. We think though that the words of the statute readily exclude such a constitutionally difficult interpretation.

intercourse means oral communication.[24] But it ultimately does not matter whether there is any material difference between the terms, because the statute certainly covers both written and oral communications. *See, e.g.*, To Charles Pinckney, *in* 6 *The Papers of James Madison* at 440 (describing the Logan Act as "forbidding communications of any sort with foreign Governments or Agents on subjects to which their own Government is a party"). Indeed, the original text of the Logan Act was explicit on this point, including the phrase "verbal or written" to qualify "correspondence or intercourse," 1 Stat. at 613, although that phrase was later removed in the 1948 recodification, Pub. L. No. 80-772, § 953, 62 Stat. at 744, without any apparent substantive intention. Therefore, we think that the Logan Act prohibits written and oral communications with foreign governments or officials that otherwise satisfy the statute, no matter the means of communication.

We do not think, however, that the statute requires that the communications involve a mutual exchange of views. In a publicly released letter, Attorney General Daugherty suggested that "correspondence or intercourse" may require more than just a unilateral communication. The Attorney General was responding to a complaint brought against Senator Joseph France, who had sent cables to the British, German, and Russian leaders, among others, proposing that they urge the United States to reverse its decision not to participate in a diplomatic conference in Genoa, Italy. *See Usurpation of Executive Authority: The Case Against Senator France*, Woman Patriot, May 1, 1922, at 1; *Seeks Prosecution of Senator France*, N.Y. Times, Apr. 15, 1922, at 1. In the letter, Attorney General Daugherty stated that "[i]t is not clear" that the Senator's actions "constitute either a commencing or a carrying on of a correspondence or intercourse" because "[t]hey invite merely a public act by the conference at Genoa requesting this country to participate in its deliberations" and "do not call for or require any reply or future exchange of communication." Daugherty Letter, *reprinted in Senator France Given "Benefit of the*

[24] *See, e.g.*, 1 Webster's Dictionary (def. 1 of *intercourse*: "Communication; . . . connection by reciprocal dealings between persons or nations, either in common affairs and civilities, in trade, or *correspondence by letters*." (emphasis added)); *id.* (def. 2 of *correspondence*: "Intercourse between persons at a distance, by means of letters sent and answers received."); 1 Ash's Dictionary (def. of *correspondence*: "intercourse, . . . intercourse by letters"); Dyche's Dictionary (def. of *correspondence*: "intercourse by letter or otherwise").

Doubt", Woman Patriot, May 15, 1922, at 5. Yet the Logan Act prohibits a citizen from "commenc[ing]" with "any correspondence" with a foreign government, without necessarily requiring the correspondence to continue. Thus, where a U.S. citizen opens a dialogue with a particular foreign official in relation to any disputes or controversies with the United States, such a communication may "commence" a "correspondence" under the statute, whether or not the citizen in fact receives a response. But commencing a correspondence does presuppose at least the future prospect of a reciprocal exchange. The mutuality of the communication thus may bear upon whether the communication was the start of a private diplomatic effort directed to a foreign official or government, rather than an open letter or a statement of opinion.

C.

The Logan Act's third element requires that the communication involve an "intent to influence the measures or conduct of any foreign government . . . in relation to any disputes or controversies with the United States, or to defeat the measures of the United States." Intent may be discerned from the nature of the correspondence or intercourse, including "from the facts, circumstances, and surroundings at the time of the transaction and from the defendant's prior course of dealing." Warren Memorandum at 11.

Attorney General Levi Lincoln advised in 1804 that "the words 'in relation to any disputes or controversies with the US,' are as general and comprehensive as could be used, and from their force extending to all our national controversies, they ought not to be limited, unless the subject matter or the reason of the thing shall require it." From Levi Lincoln, *in* 43 *The Papers of Thomas Jefferson* at 649. If the United States is in a specific dispute or controversy with another country, then any intent to interfere in those negotiations, whether to help or to hinder, would satisfy this intent element. Assistant Attorney General Warren similarly read the phrase to "refer[] to all questions which are at the time the subject of diplomatic or official correspondence or negotiation between the United States and the foreign country." Warren Memorandum at 11; *see* Memorandum for Joseph F. Dolan, Assistant Deputy Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, *Re: "Logan Act" (18 U.S.C. 953)—Application to Release of Cuban Prisoners* at 1 (Dec. 19, 1962) ("Schlei Memorandum") (recognizing that

the Logan Act prohibits "interference of individual citizens in the negotiations of our Executive with foreign governments" (quoting 9 Annals of Cong. at 2489 (statement of Rep. Griswold)). He went on to advise that "[i]t is highly important to the welfare of the country that there shall be no interference with the President's constitutional and statutory functions, and especially no attempt to influence or intermeddle in official foreign negotiations carried on by him, through private negotiations with foreign officials in relation to the same subject matter." Warren Memorandum at 12.

We agree that the statute covers "*any* disputes or controversies" (emphasis added) that are the subject of diplomacy with the United States. Underlying even amicable negotiations, there can be competing interests or claims of right and thus a matter of controversy. It is not sufficient, however, that the matter involve a foreign government and be the subject of general debate, or that it relate to a controversy between a private actor and a foreign government. Thus, this Office advised that private negotiations to free Cubans captured in the failed Bay of Pigs invasion did not violate the Logan Act because there was no "dispute or controversy between the United States and the Government of Cuba with respect to the 'Bay of Pigs' prisoners, or any measures of the Government of Cuba in relation to the United States which would be affected by the proposed exchange, or, indeed, of any negotiations between the two governments on the subject." Schlei Memorandum at 1–2.[25] A different question could

[25] The Department repeated that sentiment in several letters signed by Attorney General Kennedy or then-Assistant Attorney General Katzenbach. *See* Memorandum for Byron R. White, Deputy Attorney General, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: Senate Resolution 152* at 1 (Aug. 10, 1961) (disputing that the Tractors for Freedom Committee negotiations that were conducted "with the full knowledge of the Government" involved the intent covered by the Logan Act); Letter for Robert H. Michel, U.S. House of Representatives, from Robert F. Kennedy, Attorney General (June 22, 1961), *reprinted in* 107 Cong. Rec. 11220 (1961) ("[I]t does not appear that the negotiations now in progress by the Tractors for Freedom Committee involve any interference with negotiations between the Governments of the United States and Cuba, or any intent to influence the measures or conduct of the Cuban government 'in relation to any disputes or controversies with the United States' or to 'defeat the measures of the United States.'"); Katzenbach Memorandum at 1 ("[I]t does not appear that there is any dispute or controversy between the United States and Cuba over Cuba's right to hold these men prisoners, or any intent by the Committee to defeat the measures of the United States."); *see also* Letter for Michael A. Feighan, Acting

arise in a case involving U.S. hostages whose release was the subject of active negotiations with the State Department, but as discussed in the next section, in such cases, the family members of the hostages (or their agents) could communicate with the foreign government based upon the exception for those seeking redress for private injuries.

The Logan Act also prohibits correspondence and intercourse conducted with the intent "to defeat the measures of the United States." In contrast with the "dispute or controversy" provision, this provision requires an intent to "defeat" the U.S. objective, not merely to influence a foreign government "in relation to" a matter in controversy. At the same time, the provision sweeps more broadly than the "dispute or controversy" provision because it applies to any effort to frustrate or obstruct U.S. measures, even in the absence of a dispute or controversy involving the United States. The requirement therefore covers all attempts to interfere with or undermine U.S. policies, positions, laws, treaties, and negotiations. But as with the "dispute or controversy" provision, the "measures" in question must be sufficiently concrete to come within the statute's reach. For instance, in *Waldron v. British Petroleum Co.*, 231 F. Supp. 72, 88 (S.D.N.Y. 1964), a civil antitrust case, the defendant accused the plaintiff of violating the Logan Act in negotiating a contract with the National Iranian Oil Company. The district court found a triable issue over whether "the expressed United States policy with respect to the importation of Iranian oil," the market at issue, was sufficiently "definitive" or "clear" to constitute a "measur[e] of the United States." *Id.* at 88–89.[26] The Logan Act therefore requires that the correspondence or intercourse at issue be intended to influence that foreign government in relation to a matter subject to specific controversy with the United States or be intended to invite that government to act contrary to a policy or action previously undertaken by the United States.

Chairman, Subcommittee No. 1 of the House Committee on the Judiciary, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel (June 11, 1963) (similar, regarding negotiations by James Donovan).

[26] In connection with the United States' decision not to attend the Genoa conference, Attorney General Daugherty also opined: "It is doubtful whether there was any existing dispute or controversy, within the meaning of the statute, or any specific measures of the United States on the subject-matter involved; and the benefit of this doubt must be extended to Senator France[.]" Daugherty Letter, *reprinted in Senator France Given "Benefit of the Doubt"*, Woman Patriot, May 15, 1922, at 6.

D.

The final sentence of the Logan Act contains an exception for the vindication of private rights. It excepts citizens who seek redress from a foreign government for any injury caused by that government, its agents, or its subjects. *See* 18 U.S.C. § 953 ("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 . . . ."). The statute thus does not prohibit citizens (or their agents) from communicating with a foreign government where the purpose of that communication is to obtain redress for "any injury" that the citizen has personally suffered. The exception preserves the injured citizen's right to engage in self-help and petition the foreign government for compensation, including in its courts. It would apply even if the communications might otherwise fall within the scope of the Logan Act's prohibition because, for instance, the State Department was separately working to obtain redress on behalf of U.S. citizens in the matter.

Although the exception has existed since the Logan Act's original passage, there is limited concrete evidence of past practice. In 1950, Secretary of State Dean Acheson advised that this exception allowed Colonial Airlines to participate in a hearing before a Canadian regulator. *See Colonial Airlines Told Logan Act Not Involved in Case Before Canadian Transit Board*, 22 Dep't of State Bulletin No. 548, at 29 (1950). After the airline invoked the Logan Act as a reason not to participate, Secretary Acheson responded that "the Logan Act is no more applicable to this case than to any other judicial or administrative proceeding abroad involving an American citizen and the provisions of an international agreement." *Id.* He noted that if Colonial Airlines had a genuine concern, it could have sought the State Department's permission to appear, and "we certainly would have told them that we had no objection to their appearing to take all necessary steps to protect their rights." *Id.*

In another example, when Senators John Sparkman and George McGovern visited Cuba in 1975, they urged Fidel Castro to return a ransom paid by Southern Airways for a hijacked plane and to let the parents of Luis Tiant, a pitcher for the Boston Red Sox, visit him in the United States. The Department of State advised that these discussions "appear[ed] to fall within the second paragraph of [18 U.S.C. § 953],"

indicating that such communications to seek private redress were consistent with the exception to the Logan Act, presumably on the theory that they were made on behalf of the injured parties.

III.

We now address the Logan Act's constitutionality. The Supreme Court has addressed the statute in dictum several times, without ever suggesting a constitutional infirmity. *See, e.g.*, *Arabian Am. Oil Co.*, 499 U.S. at 258; *Am. Banana Co.*, 213 U.S. at 356; *Skiriotes*, 313 U.S. at 74. Other federal courts have done the same. *See supra* note 9. The one exception came in *Waldron*, the civil antitrust case, in which the district court raised "a doubtful question with regard to the constitutionality" of the Logan Act based on "the statute's use of the vague and indefinite terms, 'defeat' and 'measures.'" 231 F. Supp. at 89. A House committee later cited *Waldron* in expressing similar concerns. *See* H. Comm. on Standards of Off. Conduct, 95th Cong., *Manual of Offenses and Procedures: Korean Influence Investigation* 18–19 (Comm. Print 1977). And in 1978, a Department of Justice task force on revising the criminal code advised that the Logan Act "is quite possibly unconstitutional," with the caveat that it had "undertaken no exhaustive analysis of the constitutional questions since [its] position on repeal of the Act [was] based on policy considerations." Hauptly Letter at 1.

This Office has repeatedly construed and applied the Logan Act without ever suggesting any constitutional difficulty except for once, where we stated in passing that "it is unclear under what enumerated power of Congress the statute was enacted." *See* Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Possible Criminal Charges Against American Citizen Who Was a Member of the al Qaeda Terrorist Organization or the Taliban Militia* at 10 (Dec. 21, 2001). Over the years, some academics have endorsed *Waldron*'s suggestion that the statute is void for vagueness; others have cited desuetude; and still others have concluded that the statute may unconstitutionally restrict speech.[27]

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[27] *See, e.g.*, Kevin M. Kearney, Comment, *Private Citizens in Foreign Affairs: A Constitutional Analysis*, 36 Emory L.J. 285, 339–49 (1987) (vagueness and First Amend-

We have considered each of these questions and believe the statute to be facially constitutional. Because our analysis is limited to a facial challenge, we do not address any as-applied challenge that could alter the constitutional calculus in a particular case.

A.

We consider first potential challenges based upon structural concerns. Despite the contrary dictum in one opinion of this Office, we conclude that the Logan Act is a valid act of Congress pursuant to the Necessary and Proper Clause. Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. By its terms, the Necessary and Proper Clause enables Congress to enact legislation that is "necessary and proper" not only to carry out its own enumerated powers but also to assist in the execution of the powers vested in "*any* Department or Officer" of the government. Although this power does not authorize Congress to interfere with the President's execution of his Article II powers, *see, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 135 (1976) (per curiam), it expressly permits Congress to legislate in aid of that authority. Thus, we think that the Necessary and Proper Clause provides Congress with authority to adopt those measures necessary to protect and make effective the diplomatic power vested in the President.

As discussed above, the Logan Act protects the constitutional authority of the Executive Branch by empowering it to seek criminal penalties, in the words of the original House resolution, on "all persons, citizens of the United States, who shall usurp the Executive authority of this Government" by carrying on unauthorized diplomacy. 9 Annals of Cong. at 2489; *see also United States v. Peace Info. Ctr.*, 97 F. Supp. 255, 261 (D.D.C. 1951) (describing the Logan Act as "within the field of external affairs of

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ment); Curtis C. Simpson III, Comment, *The Logan Act of 1799: May It Rest In Peace*, 10 Cal. W. Int'l L.J. 365, 380–82 (1980) (desuetude, vagueness, and First Amendment); Vagts, 60 Am. J. Int'l L. at 293–300 (vagueness and First Amendment); *see also* Noah Feldman, Opinion, *Logan Act Is Too Vague to Prosecute Flynn. Or Anyone.*, Bloomberg (Feb. 15, 2017), https://www.bloomberg.com/opinion/articles/2017-02-15/logan-act-is-too-vague-to-prosecute-flynn-or-anyone; Steve Vladeck, *The Iran Letter and the Logan Act*, Lawfare (Mar. 10, 2015), https://www.lawfareblog.com/iran-letter-and-logan-act.

this country, and, therefore, within the inherent regulatory power of the Congress"); Letter for Richard S. Schweiker, U.S. Senate, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, at 2 (Apr. 16, 1976) ("Clearly Congress enacted this legislation on the basis of the Federal Government's pervasive involvement in and jurisdiction over foreign relations."). Congress thus had affirmative authority under the Necessary and Proper Clause to pass the Logan Act.[28]

The Logan Act also remains valid notwithstanding its limited history of enforcement. The doctrine of desuetude has been taken, at times, to suggest that laws may be impliedly repealed through sustained disuse, and that subsequent enforcement could violate the Due Process Clause. *See Cent. Nat'l Bank of Mattoon v. U.S. Dep't of Treasury*, 912 F.2d 897, 906 (7th Cir. 1990) ("There have been occasional suggestions . . . that the sudden revival of a long forgotten law carrying harsh penalties . . . might encounter a defense of desuetude. But if there is such a defense it is surely reserved for more extreme cases than this one."); *Jamgotchian v. State Horse Racing Comm'n*, 269 F. Supp. 3d 604, 618 (M.D. Pa. 2017) ("Desuetude is a civil law doctrine rendering a statute abrogated by reason of its long and continued non-use." (quoting *United States v. Elliott*, 266 F. Supp. 318, 325 (S.D.N.Y. 1967))); *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070, 1083 (D. Colo. 1999) ("[T]he civil law doctrine of 'desuetude,' assuming its viability in American jurisprudence, requires a showing of 'long and continued non-use' of a statute that is 'basically obsolete.'" (quoting *Elliott*, 266 F. Supp. at 325–26)).

But federal law does not actually recognize the abrogation of statutes by desuetude. The Supreme Court has stated that "failure of the executive branch to enforce a law does not result in its modification or repeal. The repeal of laws is as much a legislative function as their enactment." *John R. Thompson Co.*, 346 U.S. at 113–14 (citations omitted); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 336 (2012) ("A statute is not repealed by nonuse or desuetude. . . . If 10, 20, 100, or 200 years pass without any known cases applying the

[28] We note that the Logan Act has also been justified under Congress's power to "[t]o define and punish . . . Offences against the Law of Nations," U.S. Const. art. I, § 8, cl. 10. *See* l Francis Wharton, *A Treatise on the Criminal Law* § 274, at 299 (8th ed. 1880). But we do not think it necessary here to consider whether private diplomacy was, or could reasonably have been, viewed by Congress to violate the law of nations.

statute, no matter: The statute is on the books and continues to be enforceable until its repeal." (footnote omitted)). Decisions to exercise prosecutorial discretion and forgo prosecutions in past cases could not repeal the Logan Act by implication. *See Waldron*, 231 F. Supp. at 89 n.30 ("The Court finds no merit in plaintiff's argument that the Logan Act has been abrogated by desuetude."); *cf. Haig*, 453 at 309 n.61 ("The Government is entitled to concentrate its scarce legal resources on cases involving the most serious damage to national security and foreign policy."); *Wayte v. United States*, 470 U.S. 598, 608 (1985) (rejecting constitutional claims based on selective prosecution, and noting that such a claim is judged according to "ordinary equal protection standards").

Nor, in fact, has the Logan Act truly laid dormant. As discussed above, Congress has repeatedly codified, re-codified, and amended it since 1799, including as recently as 1994 when Congress changed the punishment. The statute has arisen repeatedly in congressional debates, been the subject of numerous congressional reports, survived multiple attempts at repeal, and periodically claimed a prominent place in public discourse. And the statute has been both discussed in judicial decisions and relied upon as a basis for Department of State regulations and practices, the expulsion of foreign consular officers, and at least one court-martial decision. Thus the Logan Act remains enforceable.

B.

We next consider whether the Logan Act is void for vagueness. Under the Due Process Clause of the Fifth Amendment, a criminal statute may not be "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015); *see also United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (similar). Statutes must provide "relatively clear guidelines as to prohibited conduct" and "objective criteria" to evaluate potential violations. *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 525–26 (1994).

At the same time, "if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise." *United States v. Harriss*, 347 U.S. 612, 618 (1954); *see Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)

("[A]ll agree that a facial challenge must fail where the statute has a plainly legitimate sweep." (internal quotation marks omitted)). And although a statute with terms that might "interfere[] with the right of free speech or of association" calls for "a more stringent vagueness test," the law does not require "perfect clarity and precise guidance," particularly where a scienter requirement reduces the risks of inadvertent violations. *Humanitarian Law Project*, 561 U.S. at 19, 21 (internal quotation marks omitted). In this context, vagueness concerns arise when statutory terms involve "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Williams*, 553 U.S. at 306. Under these standards, we believe that the Logan Act's reasonably precise elements and its strict scienter requirement refute any claim of vagueness.[29]

In *Waldron*, the court expressed concerns with the Logan Act's "use of the vague and indefinite terms, 'defeat' and 'measures,'" because "[n]either of these words is an abstraction of common certainty or possesses a definite statutory or judicial definition." 231 F. Supp. 72 at 89.

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[29] The question of vagueness was in fact discussed during the House's initial consideration of the measure. *Compare, e.g.*, 9 Annals of Cong. at 2512 (statement of Rep. Gallatin) (calling the resolution "perfectly vague and uncertain"), *id.* at 2595 (statement of Rep. Gallatin) (objecting "on account of the vagueness of" the intent requirement), *id.* at 2637 (statement of Rep. Gallatin) (objecting to the bill "because, under the pretence of punishing certain offences which ought to be punished, it 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"), *id.* at 2638 (statement of Rep. Gallatin) (arguing that some Members of the House were trying to "pass 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; or, in other words, our Government is to become a Government, not of law, but of men!"), *and id.* at 2690 (statement of Rep. Livingston) ("A penal law ought to be so clear to the meanest capacity, that no doubt should exist of its construction . . . . Can gentlemen recur to this law and seriously declare that they have a clear idea of the precise acts upon which it is designed to operate?"), *with id.* at 2499 (statement of Rep. Dana) (contending that opponents of the resolution "did not seem fully to understand the import of the words used"), *id.* at 2647 (statement of Rep. Edmond) (describing the bill as "definite and correct"), *and id.* at 2678 (Rep. Isaac Parker) (expressing that certain ambiguity in the bill could be resolved "[i]f the whole scope of the bill was attended to," but introducing a clarifying amendment anyway). That debate, of course, does not itself resolve the constitutional question.

We disagree, however, that the phrase "defeat the measures of the United States" is constitutionally problematic. The terms in the phrase are susceptible to reasonable definition and appear elsewhere in the federal criminal code. Several criminal laws prohibit acts "to defeat," for instance, the provisions of the bankruptcy code, competitive-service examinations, or the purposes of the Department of Housing and Urban Development.[30] Other criminal provisions are contingent on the relationship between conduct and certain "measures," such as the making of a false statement "to influence the measures or conduct of any foreign government . . . to the injury of the United States." 18 U.S.C. § 954. The Espionage Act of 1917 prohibits disseminating information concerning "any works or measures undertaken for or connected with, or intended for the fortification or defense of any place," 18 U.S.C. § 794(b), and the Genocide Convention Implementation Act of 1987 bars "measures intended to prevent births within" a national, ethnic, racial, or religious group, 18 U.S.C. § 1091(a)(5). We thus do not believe that a prohibition on foreign communications intended "to defeat the measures of the United States" fails to provide fair notice. To the contrary, the statute covers foreign communications with the intent to frustrate or obstruct an objective of the United States. And for the reasons explained above, we view the other operative terms in the Logan Act to be readily understandable. *See supra* Part II.

Although the Logan Act may require greater clarity because it is a statute that regulates speech, the possibility of some uncertain applications does not render the statute void. In *Humanitarian Law Project*, the Court

[30] *See, e.g.*, 18 U.S.C. § 152(5), (7) ("intent to defeat the provision of title 11" in the context of bankruptcy); *id.* § 1012 ("intent to defraud [the] Department [of Housing and Urban Development] or with intent to unlawfully defeat its purposes"); *id.* § 1917 ("willfully and corruptly—(1) defeats, deceives, or obstructs an individual in respect of his right of examination . . . for the administration of the competitive service"); *id.* § 2232(b) ("for the purpose of impairing or defeating the court's continuing in rem jurisdiction"); *cf. also* Act of Feb. 25, 1863, ch. 60, § 1, 12 Stat. at 696 ("if any person . . . shall, without the permission or authority of the Government of the United States, and with the intent to defeat the measures of the said Government, . . . hold or commence, directly or indirectly, any correspondence or intercourse, written or verbal, with the present pretended rebel Government"). In the context of the bankruptcy code, the Sixth Circuit has interpreted the phrase "willfully attempted in any manner to evade *or defeat* such tax," 11 U.S.C. § 523(a)(1)(C) (emphasis added), to "cast a wide net" and include "attempts to thwart payment of taxes." *In re Gardner*, 360 F.3d 551, 557 (6th Cir. 2004).

rejected a vagueness challenge to 18 U.S.C. § 2339B, which prohibits "knowingly provid[ing] material support or resources to a foreign terrorist organization," *id.* § 2339B(a)(1), defined to include "training," "expert advice or assistance," "service," and "personnel," *id.* § 2339A(b)(1). The petitioners there sought to provide "monetary contributions, other tangible aid, legal training, and political advocacy" to two terrorist organizations and claimed that the statute was unconstitutionally vague as applied to them. *See Humanitarian Law Project*, 561 U.S. at 10. The Court recognized that it had previously found unconstitutionally vague statutes "that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent'—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Id.* at 20 (quoting *Williams*, 553 U.S. at 306). By contrast, the material-support statute "does not require similarly untethered, subjective judgments," even if it "may not be clear in every application." *Id.* at 21. Like the material-support statute, the Logan Act contains terms capable of objective application.[31]

In *Humanitarian Law Project*, the Court also recognized that the statute's *mens rea* requirement "further reduces any potential for vagueness." *Id.* The Court in other cases has similarly found "that scienter requirements alleviate vagueness concerns." *Carhart*, 550 U.S. at 149; *see, e.g.*, *id.* at 150 ("The scienter requirements narrow the scope of the Act's prohibition and limit prosecutorial discretion."); *Skilling v. United States*, 561 U.S. 358, 412 (2010) ("[T]he statute's *mens rea* requirement further blunts any notice concern." (citation omitted)); *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982) ("[A] scienter requirement may mitigate a law's vagueness, especially with respect to

[31] The Logan Act similarly bears little resemblance to the recent trio of cases where the Court has held unconstitutionally vague statutes that impose penalties or sanctions based upon whether a generic version of the criminal offense causes a "serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), or "substantial risk that physical force against the person or property of another may be used," *id.* §§ 16(b), 924(c)(3)(B). *See Davis*, 139 S. Ct. at 2325–27; *Dimaya*, 138 S. Ct. at 1213–16; *Johnson*, 576 U.S. at 595–97. Those statutes require a court to evaluate not the riskiness of a particular defendant's actions but the abstract, hypothetical facts of an "ordinary case" under the incorporated criminal provisions. *See, e.g.*, *Johnson*, 576 U.S. at 597–98; *see also Welch v. United States*, 578 U.S. 120, 124 (2016) ("*Johnson* thus cast no doubt on the many laws that require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." (internal quotation marks omitted)).

the adequacy of notice . . . that [the] conduct is proscribed."); *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*."). Here too the Logan Act contains a requirement of intentional conduct that narrows the statute's prohibition and protects against the risk of inadvertent violations.

The Supreme Court reached a similar conclusion in upholding a prohibition in the Espionage Act of 1917 concerning communications with a foreign government. In *Gorin v. United States*, 312 U.S. 19 (1941), the Court rejected a vagueness challenge, in large part because of an intent element similar to that found in the Logan Act.[32] The Court found "no uncertainty in this statute," explaining that "[i]n each of these sections the document or other thing protected is required also to be 'connected with' or 'relating to' the national defense." *Id.* at 26–27. "The obvious delimiting words in the statute," the Court continued, "are those requiring 'intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.'" *Id.* at 27–28. This requisite scienter ensures "those prosecuted . . . have acted in bad faith." *Id.* at 28. Although the Logan Act may not require identical "bad faith" in all circumstances, the scienter requirement ensures that the statute applies only when a defendant intends to interfere with the core foreign-relations prerogatives of the Executive Branch.

Accordingly, we think that any violation of the Logan Act would require proof of objective, incriminating facts: Either the defendant acted

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[32] *See, e.g.*, Espionage Act of 1917, Pub. L. No. 65-24, tit. I, § 2(a), 40 Stat. 217, 218 ("Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to . . . communicate, deliver, or transmit, to any foreign government, . . . or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years[.]") (codified as amended at 18 U.S.C. § 794(a)); *see also id.* tit. I, § 1(a), 40 Stat. at 217 ("[W]hoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation . . . .") (codified as amended at 18 U.S.C. § 793(a)).

with the authority of the United States, or not. Either the defendant engaged in correspondence or intercourse with a foreign government, or not. And when it comes to the subjects of those communications, the statute's scienter requirement blunts concern for any ambiguity that may arise in particular cases concerning, for instance, whether the foreign country is engaged in a dispute or controversy with the United States. Taken together, these statutory elements provide sufficient notice of what the law proscribes, and establish minimum standards to guide enforcement. Even if certain conduct may raise questions on the margins, the Logan Act nonetheless encompasses a "general class of offenses" that fall "plainly within its terms." *Harriss*, 347 U.S. at 618.

C.

Finally, we consider whether the Logan Act is consistent with the Free Speech Clause of the First Amendment. The Supreme Court has repeatedly upheld statutes that regulate the communications of U.S. citizens with foreign actors in an effort to advance the national security and foreign relations of the United States. Although the Logan Act in part regulates expression, Congress has not "sought to suppress ideas or opinions in the form of 'pure political speech.'" *Humanitarian Law Project*, 561 U.S. at 26. U.S. citizens may "say anything they wish on any topic," *id.* at 25, including by engaging in public discussion and independent advocacy on all topics that implicate the foreign policy of the United States. What they may not do is communicate with a foreign government with an intent to influence its conduct with respect to the specifically delineated matters or to defeat U.S. measures. This prohibition surely restrains expression in some instances, which may warrant heightened scrutiny, but we think that Congress may, consistent with the First Amendment, prohibit U.S. citizens from communicating with a foreign government in the manner prohibited by the Logan Act.

As with the issue of vagueness, the Supreme Court's decision in *Humanitarian Law Project* provides helpful guidance. The Court there addressed whether the First Amendment permitted the government to bar the plaintiffs from providing material support to terrorist organizations in the form of speech. The Court treated the provision, as applied to the activities in which the plaintiffs wished to engage, as a content-based regulation of speech because the petitioners "want[ed] to speak" to the

foreign terrorist organizations, "and whether they may do so under § 2339B depends on what they say." *Id.* at 27. As such, the Court subjected the law to rigorous scrutiny based upon the nature of the prohibited expression and the law's fit with the underlying governmental interests. *See id.* at 28; *see also Nat'l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (describing *Humanitarian Law Project* as applying strict scrutiny).

Applying that standard, the Court rejected the constitutional claim. The Court recognized that "the Government's interest in combating terrorism is an urgent objective of the highest order," and that the challenge involved "sensitive and weighty interests of national security and foreign affairs." *Humanitarian Law Project*, 561 U.S. at 28, 33–34. The organizations had "committed terrorist acts against American citizens abroad, and the material-support statute addresses acute foreign policy concerns involving relationships with our Nation's allies." *Id.* at 34. Although the plaintiffs claimed to support only the legitimate, peaceful objectives of those organizations, Congress could reasonably conclude that any assistance "to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization," *id.* at 36, and would "serve[] to legitimize and further their terrorist means," *id.* at 30. The government also had a diplomatic interest in barring material support to avoid "straining the United States' relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks." *Id.* at 32.

At the same time, the Court emphasized that the material-support statute, as applied to the plaintiffs' activities, did not impose any burden upon pure speech. The plaintiffs could "say anything they wish on any topic," "[t]hey may speak and write freely," and they may engage in "independent advocacy or expression of any kind." *Id.* at 25–26 (internal quotation marks omitted).[33] The statute did not regulate "independent speech," even

[33] In an example touching upon foreign diplomatic communications, the Court emphasized that although the plaintiffs were barred from directly instructing the terrorist organizations on how to petition the United Nations for humanitarian relief, *Humanitarian Law Project*, 561 U.S. at 21–22, the statute did not prevent the plaintiffs from "advocat[ing] before the United Nations" themselves, *id.* at 26. We do not read the Court's description of a kind of speech not covered by the material-support statute as expressing the view that Congress could not restrict diplomatic activity before an international organization or a foreign government.

if that speech would benefit a foreign terrorist organization, and it did not prohibit material support to any domestic organization. *Id.* at 39. The statute instead was "carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations." *See id.* at 26. Given the weighty interests underlying the material-support statute, the Court believed that this narrowly drawn prohibition on speech passed constitutional muster.

Humanitarian Law Project is consistent with other cases upholding restrictions on U.S. citizens' speech with, or on behalf of, foreign actors. In a variety of contexts, the Court has recognized constraints on speech in the international sphere to protect the national security and foreign relations interests of the United States, and authorized restrictions even on some domestic speech. Thus, in *Haig*, the Court rejected a First Amendment challenge to the Department of State's revocation of the passport of a former CIA agent who was traveling to foreign countries for the avowed "purpose of obstructing intelligence operations and the recruiting of intelligence personnel." 453 U.S. at 308–09. Agee sought to travel to foreign countries to consult with local diplomatic officials to identify and expose undercover CIA sources.[34] The Court recognized that the State Department had revoked Agee's passport "in part on the content of his speech," *id.* at 308, but found "no governmental interest" to be "more compelling than the security of the Nation," and the "[p]rotection of the foreign policy of the United States" similarly to be "a governmental interest of great importance," *id.* at 307. Agee remained "as free to criticize the United States Government as he was when he held a passport" (subject to his obligation to protect classified information), *id.* at 309, but the Court rejected the claim that the First Amendment would bar the revocation.

The Supreme Court has similarly sustained the Foreign Agents Registration Act of 1938 ("FARA"), 22 U.S.C. § 611 *et seq.*, which regulates domestic speech when made on behalf of foreign governments or other

[34] As discussed above in Part I.C.3, the D.C. Circuit had voided the State Department's decision over a dissent that found the action justified because Agee's activities violated the Logan Act. *See Agee*, 629 F.2d at 112–13 (MacKinnon, J., dissenting) (indicating that an alleged violation of the Logan Act had been one of the government's initial justifications for revoking the respondent's passport and restraining his speech).

foreign principals. Although FARA does not prohibit domestic speech outright, it requires an agent of a foreign power to register with the Attorney General and publicly disclose that certain speech is made on behalf of a foreign principal, and it imposes criminal penalties based upon a willful failure to do so. *See id.* §§ 612, 614, 618(a); *see also* 18 U.S.C. § 2386 (requiring registration of certain organizations subject to foreign control and engaging in political activity). FARA has repeatedly been upheld. *See Meese v. Keene*, 481 U.S. 465, 477–85 (1987) (rejecting a First Amendment challenge to past FARA provisions regarding political propaganda); *Att'y Gen. v. Irish People, Inc.*, 684 F.2d 928, 935 (D.C. Cir. 1982) ("[I]t is well settled that FARA is constitutional.").[35] As the Court has acknowledged, FARA is intended "to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure" of the activities of foreign governments and other foreign principals. *Meese*, 481 U.S. at 469 (alteration omitted) (quoting Pub. L. No. 77-532, 56 Stat. 248, 248 (1942) (codified at 22 U.S.C. § 611 note)); *see also Viereck v. United States*, 318 U.S. 236, 241 (1943) ("The general purpose of the legislation was to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment.").

Although a disclosure requirement of this kind "neither prohibits nor censors the dissemination of advocacy materials by agents of foreign principals," *Meese*, 481 U.S. at 478, and thus necessarily burdens speech less than an outright prohibition, even such a lesser burden might well be unconstitutional in an entirely domestic context. The Court has had little difficulty striking down similar registration requirements regarding domestic speech. *See, e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002) (holding that a village's registration

[35] *See also, e.g.*, *Att'y Gen. v. Irish People, Inc.*, 595 F. Supp. 114, 120–21 (D.D.C. 1984), *aff'd in part and rev'd in part on other grounds*, 796 F.2d 520 (D.C. Cir. 1986); *Att'y Gen. v. Irish N. Aid Comm.*, 530 F. Supp. 241, 253 (S.D.N.Y. 1981), *aff'd*, 668 F.2d 159 (2d Cir. 1982); *Att'y Gen. v. Irish N. Aid Comm.*, 346 F. Supp. 1384, 1389–91 (S.D.N.Y.), *aff'd mem.*, 465 F.2d 1405 (2d Cir. 1972); *Peace Info. Ctr.*, 97 F. Supp. at 262–64; *cf. United States v. Auhagen*, 39 F. Supp. 590, 591 (D.D.C. 1941). Notably, in *Peace Information Center*, the district court drew an express comparison to the Logan Act in upholding FARA against First Amendment and vagueness challenges. 97 F. Supp. at 263–64.

requirement for door-to-door canvassers violated the First Amendment); *Thomas v. Collins*, 323 U.S. 516 (1945) (striking down a statute requiring labor union organizers to register with the state). These decisions demonstrate that the government's national-security and foreign-affairs interests in regulating foreign actors may permit restrictions on the domestic speech of U.S. citizens that would not be tolerated absent such a foreign connection.[36]

Finally, we note that Congress has prohibited the disclosure of certain categories of national-security information with the intent or belief that it will be used to injure the United States or to the advantage of any foreign nation. *See* Espionage Act of 1917, 18 U.S.C. § 793; *see also id.* § 798(a) (prohibiting the disclosure of certain forms of classified information when done "in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States"). These statutes have routinely been upheld against First Amendment challenges. *See, e.g.*, *United States v. Morison*, 844 F.2d 1057, 1070 (4th Cir. 1988) ("Sections 793(d) and (e) unquestionably criminalize [the transfer of national defense information] by a delinquent governmental employee and, when applied to a defendant in the position of the defendant here, there is no First Amendment right implicated."); *United States v. Kim*, 808 F. Supp. 2d 44, 56 (D.D.C. 2011) ("Because § 793(d) makes it unlawful to communicate national defense information to those not entitled to receive it, courts have held that the First Amendment affords no protection for this type of conduct even though it clearly involves speech."); *see also Haig*, 453 U.S. at 308 ("[R]epeated disclosures of intelligence operations and names of intelligence personnel . . . [that] have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel . . . are clearly not protected by the Constitution."); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per

[36] The Supreme Court has similarly recognized a First Amendment right to receive "communist political propaganda" from a foreign government free from a requirement that the recipient expressly request that the correspondence be delivered. *See Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965). We do not think, however, that *Lamont* speaks to the constitutionality of the Logan Act insofar as the government's interest in regulating a citizen's private diplomatic correspondence with a foreign government implicates far weightier issues than the government's interest in regulating the information that a citizen seeks to receive from a foreign government.

curiam) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) ("No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."). Once again, they demonstrate that Congress may regulate and prohibit speech to further vital national security interests.

Against the backdrop of this precedent, we believe that the Logan Act is consistent with the First Amendment. The Logan Act was enacted for the avowed purpose of protecting the Executive Branch's authority in managing our Nation's foreign relations. *See supra* Part II.A. And the Supreme Court has repeatedly confirmed the President's "unique role in communicating with foreign governments," *Zivotofsky*, 576 U.S. at 21, and "that foreign policy [i]s the province and responsibility of the Executive," *Egan*, 484 U.S. at 529 (quoting *Haig*, 453 U.S. at 293–94); *see also Louisiana*, 363 U.S. at 35 ("The President . . . is the constitutional representative of the United States in its dealings with foreign nations."); *Curtiss-Wright*, 299 U.S. at 319 ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." (quoting 10 Annals of Cong. at 613 (statement of Rep. Marshall))).[37] Like the foreign travel restrictions at issue in *Haig*, the Logan

[37] *See also, e.g.*, *Prohibition of Spending for Engagement of the Office of Science and Technology Policy with China*, 35 Op. O.L.C. 116, 120 (2011) ("The President's exclusive prerogatives in conducting the Nation's diplomatic relations are grounded in both the Constitution's system for the formulation of foreign policy, including the presidential powers set forth in Article II of the Constitution, and in the President's acknowledged preeminent role in the realm of foreign relations throughout the Nation's history." (footnote omitted)); *Legislation Prohibiting Spending for Delegations to U.N. Agencies Chaired by Countries That Support International Terrorism*, 33 Op. O.L.C. 221, 230 (2009) (The President alone can decide "whether, how, when, and through whom to engage in foreign diplomacy."); *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 267 (1996) ("It is . . . well settled that the Constitution vests the President with the exclusive authority to conduct the Nation's diplomatic relations with other States."); *Issues Raised by Foreign Relations Authorizations Bill*, 14 Op. O.L.C. 37, 39 (1990) ("[T]he courts, the Executive, and Congress have all concurred that the President's constitutional authority specifically includes the exclusive authority to represent

Act is justified by "a governmental interest of great importance" since it also involves the "[p]rotection of the foreign policy of the United States." 453 U.S. at 307.

At the same time, the Logan Act does not unduly restrict the freedom of U.S. citizens to speak on issues of foreign policy. The statute regulates only efforts to communicate with foreign governments with the intent to influence their conduct as it relates to specific disputes or controversies involving the United States or to defeat the measures of the United States. It does not bar criticism of the President's foreign policy generally or the manner in which he has carried on relations with foreign governments. It does not prevent anyone from expressing his views concerning the diplomatic efforts that the United States or a foreign government should pursue, so long as those views are not expressed through correspondence or intercourse with foreign officials. And the Logan Act does not regulate "independent speech" by persons or any communications with "domestic organizations." *Humanitarian Law Project*, 561 U.S. at 39. Although private speakers who disclaim a connection to the U.S. government might argue that their diplomatic efforts do not interfere with the right of the United States to conduct foreign policy with one voice, "the considered judgment of Congress and the Executive" stands to the contrary. *Id.* at 36. The statute is narrowly drawn to restrict the kind of speech that Congress has determined threatens to usurp the authority of the Executive Branch to conduct the diplomatic relations of the United States. We therefore believe that the Logan Act is facially consistent with the First Amendment.[38]

IV.

Congress enacted the Logan Act to protect the President's foreign affairs power from interference. The statute was constitutional when enacted, and unless or until repealed by Congress, remains valid and enforceable by the Department.

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the United States abroad."); *Authority to Participate in International Negotiations*, 2 Op. O.L.C. 227, 228 (1978) ("Negotiation is a necessary part of the process by which foreign relations are conducted, and the power to conduct foreign relations is given to the President by the Constitution.").

[38] We thus think that the Logan Act would withstand a facial challenge in which a court applied strict scrutiny. It follows that the statute would survive if a court determined that a lower standard of review were appropriate.

Please let us know if we may be of any further assistance.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel