Comment

THE LOGAN ACT OF 1799: MAY IT REST IN PEACE

The Logan Act, drafted in 1799, has had paradoxical legal significance throughout United States history. The Logan Act's authors intended to protect exclusive Executive authority over foreign relations from the detrimental interference of private citizens, by imposing criminal penalties for such interference.[1] Yet, there have been no convictions under the Logan Act in 180 years despite numerous invocations in a variety of situations, many of which have been accompanied by substantial evidence of a violation.[2] The Logan Act 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 any 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 not more than $5,000 or imprisoned not more than three years, or both.
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> This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government of the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.[3]

The Logan Act has been criticized for containing constitutional defects, including extraterritoriality and infringements of free speech, due process, and equal protection.[4] In addition, the

1. 1797-1799 *e.g.*, 3 ANNALS OF CONG. 2494 (1798). The proposition advanced is that the government "speaks with one voice" when involved with foreign nations and critical international affairs. Senator Fulbright applied Justice Frankfurter's quote from United States v. Pink, 315 U.S. 203, 242 (1942), to the Logan Act in 106 CONG. REC. 8625 (1960). *See* Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 AM. J. INT'L L. 268, 269 (1966).

2. 4 J. MOORE, DIGEST OF INTERNATIONAL LAW 449 (1906).

3. 18 U.S.C. § 953 (1976).

4. *See* text accompanying notes 122-50 *infra*.

Act has suffered debilitation from desuetude,[5] and has therefore become ineffective as a deterrent.[6] The Act has never been subjected to direct judicial scrutiny, however, and therefore it continues to be valid law.

The early American legislators were well aware of the inherent weaknesses in the bill which later became enacted as the Logan Act.[7] The majority believed nonetheless that the need for the protection offered by the bill sufficiently outweighed its deficiencies.[8] Although the Act has been invoked on numerous occasions since its enactment, the absence of prosecutions indicates that the Executive does not value the Act as a practical or necessary means of guarding against the "usurpation of Executive authority"[9] to manage American international relations.

Despite its questionable value, the Logan Act has not been completely ignored. In May 1977, Senators Edward Kennedy and John McClellan introduced a Senate bill which proposed a new and revised federal criminal code.[10] The proposed criminal code would have had the effect, if enacted, of repealing the Logan Act.[11] However, the bill failed to pass in the House of Representatives. It was redrafted and again sponsored by Senators Kennedy and McClellan in 1978. An important part of the 1978 bill was the rein-

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5. "[D]iscontinuance of use . . . . Applied to obsolete statutes. BLACK'S LAW DICTIONARY 404 (5th rev. ed. 1979).

6. *See* notes 118-20 *infra*.

7. Mr. Gallatin objected to this bill, because, under the pretense of punishing certain offenses which ought to be punished, it is expressed in so general a manner as to include a number of acts that ought not to be punished; because it was drawn in the loosest possible manner; and [because it] wants that precision and correctness which ought always to characterize a penal law.

3 ANNALS OF CONG. 2637 (1799).

8. *See* text accompanying note 37 *infra*.

9. *Id.*

10. The sweeping bill (S.1, 94th Cong., 1st Sess. (1975)) was intended to "modify or eliminate provisions [of the federal criminal code] that ha[d] been attacked as threats to civil liberties [and to] make punishment predictable by devising uniform standards for sentencing." N.Y. Times, May 2, 1977, § 1, at 1, col. 1.

S.1 passed in the Senate, but was unsuccessful in the House. The following year, the revised criminal code was reintroduced as S. 1437 (95th Cong., 1st Sess. (1977)). *2 Senators Ask Criminal Code Bill*, N.Y. Times, July 14, 1978, § 1, at 14, col. 5 [hereinafter cited as *2 Senators*]. S. 1437 also failed to pass in the House. On September 7, 1979, S. 1722 (96th Cong., 1st Sess. (1979)) was introduced by Senators Kennedy, Thurmond, Hatch, DeConcini, and Simpson. S. 1722 is a modified version of S. 1437. The Senate is expected to vote on S. 1722 in November 1980. Newsletter from Esther Herst, National Committee Against Repressive Legislation (Oct. 4, 1979) (copy on file with the *California Western International Law Journal*) [hereinafter cited as Herst Newsletter].

11. *2 Senators*, *supra* note 10.

troduction of the Logan Act.[12] Senator Allen, Democrat from Alabama, had argued strongly for retaining the Act because of its deterrent value.[13] His "mini filibuster" convinced Senator Kennedy to retain the Act in the criminal code.[14] The 1978 bill again met with failure in the House. The Logan Act was one of several sections of the bill that the House did not favor.[15] The House Judiciary Subcommittee on Criminal Justice "wanted nothing to do with [the Logan Act]."[16] Refusing to surrender, Senator Kennedy modified and reintroduced the bill in 1979. That version did not include the Logan Act.[17] Therefore, at the present time, as legislators consider passage of the 1979 bill, they also consider, in effect, the repeal of the Logan Act.

This Comment examines the historical development of the Logan Act and considers contemporary episodes involving the Act. These episodes have included public and political personalities and American corporations making questionable payments abroad. They are examined to illustrate the confusion and hesitancy over implementing the Logan Act. The constitutional shortcomings of the Logan Act — due process, equal protection, vagueness, free speech, and extraterritoriality — are then considered. This Comment then offers arguments in support of the conclusion that the Logan Act should be repealed or amended.

I. Historical Appearances of the Logan Act

A. Early History

The American public of 1789, having recently fought its own successful revolution, was excited by the French "war of all peoples against all kings."[18] American enthusiasm cooled, however, as the ruthless bloodshed and chaos of the revolution intensified.[19] By 1792, France's revolution had developed into war with Great Britain and Spain.[20] When France began attacking British sea commerce, Great Britain retaliated against American ships trading

12. 124 Cong. Rec. S767 (daily ed. Jan. 30, 1978) (remarks of Sen. Allen).
13. *Id.*
14. *Id.*
15. *See* Cong. Q., May 20, 1978, at 1284; Cong. Q., July 1, 1978, at 1701.
16. *Id.*
17. Herst Newsletter, *supra* note 10.
18. S. Morrison, The Oxford History of The American People 336 (1965).
19. R. Current, T. Williams & F. Friedel, American History — A Survey 149 (2d ed. 1967).
20. *See* O. Handlin, America — A History 251-52 (1970).

with the French in the West Indies, bringing the United States into the conflict.[21] President Washington sent John Jay to Great Britain to reconcile the differences between the United States and Great Britain.[22] The reconciliation was successful, and in 1794 the Jay Treaty[23] was signed, but the problems between the United States and the warring nations remained unsettled. The French, opposed to the treaty, began attacking American trade vessels. During 1797, President Adams' diplomatic efforts to ease the tensions with France were unsuccessful.[24]

In the spring of 1798, a pro-British, Federalist Congress was in power. George Logan and many Americans feared their country was on the threshold of war with France. Logan, a peace-loving Quaker, was a doctor, farmer, pamphleteer, and a resolute Republican.[25] Having learned of President Adams' diplomatic failures, Logan decided to make a personal effort for peace.[26] He obtained a letter of introduction, necessary for European travel, from his friend, Vice-President Thomas Jefferson.[27] Logan did not explain his mission to Jefferson nor anyone else in the Adams administration. Therefore, he received no authority from the United States government for his undertaking.[28] Logan travelled to Europe and met with the Executive Directory (the French government in exile) in Luxembourg.[29] French Foreign Minister Talleyrand showed no interest in Logan,[30] but another member of the Directory, Merlin Douai, liked Logan's ideas and presented them to the Directory.[31] The Directory was receptive to Logan's appeal for peace and agreed that there were French advantages in respecting United States neutrality. Logan returned to the United States with copies of decrees which indicated France's desire to negotiate a termina-

21. *Id.*

22. *Id.*

23. 1 LAWS OF THE UNITED STATES 202-06 (1815).

24. HANDLIN, *supra* note 20, at 251-52. President Adams' envoy was confronted with bribes, requests, resistance, and noncooperation from the French in a mission labeled the "*XYZ* Affair." Federalists were enraged, and Republicans were discredited for their sympathetic posture toward France. Alexander Hamilton was actively advocating war with France at the time. *Id.*

25. *See* F. TOLLES, GEORGE LOGAN OF PHILADELPHIA at viii (1953).

26. *Id.*

27. For a complete description of Logan's trip and his meeting with French officials, *see generally id.* at 153-85.

28. *Id.* at 155.

29. *Id.* at 168.

30. *Id.* at 163.

31. *Id.* at 164.

tion of its trade embargo against the United States and to free all captured American seamen.[32] Logan's apparent diplomatic success was not, however, appreciated by the Adams administration.[33]

On December 12, 1798, President Adams addressed the United States Senate. He referred to Logan's mission as a temerarious and impertinent interference with public affairs.[34] The President went even further to invite an inquiry into the mission and to ask that corrective measures be taken.[35] Responding to the President's request, Representative Griswold introduced a resolution in December 1798 to guard against the "usurpation of Executive authority."[36] After much debate, the resolution resulted in the passage of the Logan Act,[37] which was signed into law on January 30, 1799.[38]

Since its enactment, the Logan Act has often been invoked and displayed in a threatening manner. Yet, from the beginning, the United States government has refused to prosecute under the Act, even when there has appeared to be sufficient evidence to obtain a conviction.[39]

B. Recent History

Violations of the Logan Act are most likely to occur during times of war. The Civil War, the First and Second World Wars, the Korean War, the Vietnam conflict, and the conflicts in the Middle East have produced many Logan Act episodes involving prominent

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32. *Id.* at 166.

33. Secretary of State Pickering and General George Washington were especially angered by Logan's mission. *See id.* at 176-77.

34. Although 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, whether by their secret correspondence or otherwise, and intended to impose upon the people, and separate them from their Government, ought not to be inquired into and corrected.

3 ANNALS OF CONG. 2193 (1799).

35. *Id.*

36. 3 ANNALS OF CONG. 2583 (1799).

37. 18 U.S.C. § 953 (1976).

38. *See* 3 ANNALS OF CONG. 2639, 2691-92 (1799).

39. For example, in 1802, the Jefferson administration was confronted with the findings of a Senate committee that five American attorneys had violated the Act by corresponding with the government of Spain while that country was engaged in a controversy with the United States. The committee also found that the lawyers possessed the requisite intent to influence the government of Spain and defeat the measures of the United States. The Attorney General was given the evidence, but no efforts were made to prosecute. *See* Vagts, *supra* note 1, at 271-72.

figures, including Henry Ford,[40] Senator Warren Harding,[41] Ex-President Taft,[42] Harold Stassen,[43] Senator Joseph McCarthy,[44] financier Cyrus Eaton,[45] actress Jane Fonda,[46] Senator Jacob Javits,[47] United Nations Ambassador Andrew Young,[48] the Reverend Jesse Jackson,[49] and Representative George Hansen.[50] Although the application of the Logan Act was apparently considered by the government, none of these people were prosecuted for their actions.

1. *Confusion over implementing the Logan Act.* There are indications that the Logan Act has produced accusatory smoke without the fire of a conviction because the Executive has been confused on how to implement the Act and who is responsible for wielding its power. In 1922, a complaint to the Justice Department contended that Senator France had violated the Logan Act.[51] Attorney General Daugherty's response was that the Justice Department would take its cues from the State Department in such cases.[52] Then, in 1950, the government reversed its position. When Secretary of State Dean Acheson received word that University of Pennsylvania President Harold Stassen had written a letter to Joseph Stalin in which he urged Stalin to restrain the aggressive rearmament policy of the Soviet Union to insure world peace, Secretary Acheson commented that while the matter was hypothetically within the purview of the Logan Act, it was for the Justice Depart-

40. N.Y. Times, Nov. 27, 1915, § 1, at 2, col. 5. For a detailed discussion of the Logan Act's history through the Korean War, see Vagts, *supra* note 1, at 271-80.

41. *Sharp Letter by Wilson to Harding Brings Reply that He Saw No Agent of French Government on League*, N.Y. Times, Oct. 19, 1920, § 1, at 1, col. 8.

42. *Say Peace Leaguers Violated Logan Act*, N.Y. Times, Oct. 19, 1920, § 1, at 3, col. 4.

43. N.Y. Times, Oct. 12, 1950, § 1, at 38, col. 1.

44. *Eisenhower Official Sees M'Carthy Plan on Ships as Phony*, N.Y. Times, March 30, 1953, § 1, at 1, col. 4.

45. *Cyrus Eaton Tells Khrushchev a Story*, N.Y. Times, May 20, 1960, § 1, at 1, col. 8.

46. *Kleindienst Doubts Action on Clark or Miss Fonda*, N.Y. Times, Aug. 24, 1972, § 1, at 52, col. 3 [hereinafter cited as *Kleindienst Doubts*].

47. *Javits and Pell Fly to Cuba Despite Objections of U.S.*, N.Y. Times, Sept. 28, 1974, § 1, at 1, col. 1.

48. *See* note 81 *infra*, and accompanying text.

49. *See* notes 80-84 *infra*, and accompanying text.

50. *See* notes 85-96 *infra*, and accompanying text.

51. *Seeks Protection of Senator France*, N.Y. Times, Apr. 15, 1922, § 1, at 1, col. 7. The complaint stated that Senator France had contacted "foreign Governments including German Socialists and Russian Bolsheviki, in direct defiance of the measures of the Government . . . ." *Id.*

52. *Id.*

ment to decide, not the State Department.[53]

The confusion surrounding the application of the Logan Act is well illustrated by the reaction of all three branches of government to the alleged 1961 Logan Act violation by the Tractors for Freedom Committee following the unsuccessful invasion of Cuba at the Bay of Pigs.[54] The Committee was formed by private citizens to finance the purchase of 500 bulldozers, which Fidel Castro said he would accept as "indemnification,"[55] in exchange for the release of Cuban expatriates taken prisoner during the invasion.[56]

The formation of the Committee, "sanctioned by the [United States] government,"[57] drew strenuous opposition in Congress. Senator Bridges felt that dealing with "this Communist Dictator" would bring "humiliation" and "disdain" upon the United States.[58] Senator Capehart recognized the issues that would bring the Committee within the purview of the Logan Act. He believed the Committee was "illegal unless authorized directly by the President."[59] The Senator tried to convince his colleagues in the Senate and House of Representatives that the activities of the Committee violated the Logan Act.[60]

There was also opposition to the Committee from the public, which sought judicial enforcement of the Logan Act. A group of citizens sought a writ of *mandamus* to compel the United States Attorney General to take action against the Committee,[61] and a Floridian tried to carry out a citizen's arrest of the Committee members on their way through Miami.[62] Regardless of the promptings from the Senate and the citizen protests against the Committee, the Executive chose not to take action against the Committee under the Logan Act.

Within the Executive, there was disagreement over the relevance of the Logan Act in the situation. President John F. Kennedy and Attorney General Robert Kennedy interpreted the Act's unclarified terms — "disputes, controversies and measures"

53. N.Y. Times, Oct. 12, 1950, § 1, at 38, col. 1.
54. *See generally* H. JOHNSON, THE BAY OF PIGS 229-41 (1964).
55. *Id.* at 233.
56. *Id.* at 234.
57. *Id.* at 232.
58. *Id.*
59. *Id.*
60. 107 CONG. REC. 9073, 9641 (1961).
61. *Four Seek to Bar Tractors for Cuba*, N.Y. Times, June 18, 1961, § 1, at 7, col. 7.
62. *Tractor Experts Return with Castro's New Demands*, N.Y. Times, June 16, 1961, § 1, at 1, col. 2.

— to find that "the Committee was not interfering with governmental negotiations."[63] By taking this position, the President did not have to give the formal, public support of his administration to the Committee, yet he was able to protect the Committee from sanctions under the Logan Act. The State Department echoed the President when it stated that "there was no dispute or controversy as those terms are customarily understood in diplomatic parlance, between the United States and the Cuban governments."[64] The Justice Department, on the other hand, found the Logan Act inapplicable, because the government had knowledge of the Committee's activities, and therefore the Committee was operating with the government's unspoken consent,[65] that is, with governmental authority. The Act only punishes "unauthorized" activity.[66]

2. *Reluctance to implement the Logan Act.* In addition to the confusion over how to implement the Logan Act, the Executive has been reluctant to seek a prosecution under the Act to protect itself from a "usurpation of Executive authority."[67] The most outstanding example in recent years was the reaction to the missions of Ramsey Clark and Jane Fonda to North Vietnam during the Vietnam conflcit. Ex-United States Attorney General Ramsey Clark and actress Jane Fonda, on separate trips, without the authority of the United States government, met with officials of the North Vietnamese government. Their stated purpose was to help bring peace to Vietnam.[68]

On July 14, 1972, Ms. Fonda gave a live broadcast on the Voice of Vietnam radio program, imploring United States service-

63. 107 CONG. REC. 11220 (1961).

64. Memorandum in Support of Motion to Dismiss at 12, Voornees v. Morrison, No. 63-20 (S.D. Fla. 1961), *cited in* Vagts, *supra* note 1, at 279 n.64.

65. *Id.*

66. 18 U.S.C. § 953 (1976). At the time of the Tractors for Freedom episode, the Justice Department apparently considered the Logan Act to be viable, but inapplicable legislation. Since then, the Justice Department has altered its opinion of the Logan Act. During the recent Senate debates on the proposed revised federal criminal code, Senator Edward Kennedy maintained that the Justice Department had "urged" the legislators to "strike" the Logan Act from the criminal code. Kennedy also said: "10 to 12 crimes are repealed [by the proposed revised federal criminal code], archaic provisions such as interfering with a government carrier pigeon, seducing a female passenger aboard a ship, the Logan Act and so forth." 124 CONG. REC. S763 (daily ed. Jan. 30, 1978) (remarks of Sen. Kennedy).

67. 3 ANNALS OF CONG. 2639, 2691-92 (1799).

68. *Jane Fonda Appeal Reported by Hanoi*, N.Y. Times, July 15, 1972, § 1, at 9, col. 2; *Clark Describes Damage to Dikes*, N.Y. Times, Aug. 7, 1972, § 1, at 5, col. 1 [hereinafter cited as *Clark Describes*].

men to discontinue bombing North Vietnam.[69] The State Department rebuked Ms. Fonda but took no further action against her.[70]

On July 29, 1972, Ramsey Clark arrived in Hanoi "as a guest of the North Vietnam Government."[71] Clark was part of an international commission[72] investigating the effects of the United States bombing of North Vietnam. In a taped interview broadcast by the Voice of Vietnam, Clark asserted that "the bombing [of North Vietnam by the United States] should be stopped immediately, should never have been done in the first place and should never be done again."[73] After Clark returned to the United States, he said he had a "letter from Hanoi's Deputy Premier and Minister of Foreign Affairs . . . concerning the release of [United States] prisoners."[74] Clark "believed that as a private citizen he had a right to go to North Vietnam and do what he could to try to bring peace and gain release of the prisoners."[75]

The activities of Clark and Fonda were identical to George Logan's activities, which prompted the enactment of the Logan Act. Both individuals had carried on "intercourse" with "agents" and "officers" of a foreign nation which, at the time, was engaged in a dispute with the United States, with the obvious and declared "intent to defeat the measures of the United States."[76] Notwithstanding this evidence, Secretary of State Rogers merely criticized Clark for his activities in North Vietnam.[77] Attorney General Kleindienst stated, with reference to both Fonda and Clark: "I don't anticipate any Logan Act cases right now. No evidence of any wrongdoing has been presented to the [Justice] Department yet."[78] The matter ended there.[79]

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69. *Id.*

70. *Id.*

71. *Clark Arrives in Hanoi During Air Raid Alerts*, N.Y. Times, July 30, 1972, § 1, at 15, col. 2.

72. *Clark Describes, supra* note 68.

73. *Id.*

74. *Clark Says North Vietnam May Free a Few P.O.W.'s*, N.Y. Times, Aug. 15, 1972, § 1, at 1, col. 6.

75. *Id.*

76. 18 U.S.C. § 953 (1976).

77. *Rogers Asserts Shriver Talks 'Bunk' About War*, N.Y. Times, Aug. 12, 1972, § 1, at 1, col. 2.

78. *Kleindienst Doubts, supra* note 46.

79. Apparently reacting to political pressures, the government chose not to apply the Logan Act to Fonda's and Clark's activities in North Vietnam. However, in September 1972, as criticism of the Nixon administration's leniency with Fonda and Clark continued, the State Department blocked labor leader James Hoffa's planned trip to Hanoi to aid in gaining

Another classic Logan Act episode involved the Reverend Jesse Jackson, a prominent Chicago civil rights leader. On September 29, 1979, Jackson met with Yasser Arafat,[80] leader of the Palestine Liberation Organization (PLO),[81] which is a government in exile just as was the French government George Logan visited in 1798.[82] Jackson's mission was not authorized by the State Department or the Executive. Jackson wished to challenge the United States policy of refusing to negotiate directly with the PLO. He wanted personally, as a private citizen, to begin debate on what he considered to be "immoral and destructive" Israeli policies.[83] This was a "textbook" example of a Logan Act violation, yet no action was taken against Jackson. Senator Allen, in his successful argument to the Senate for retaining the Logan Act in the revised federal criminal code, was contemplating just this type of situation when he said: "[To repeal the Logan Act would] make every man a secretary of state. So I do not believe we need to have millions of secretaries of state running about carrying on foreign negotiations

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the release of American prisoners. Secretary of State William Rogers echoed the Federalist arguments for the Logan Act in commenting that he "does not like private citizens trying to negotiate about prisoners." Yet the State Department did not rely on the Logan Act to stop the trip. *See* N.Y. Times, Sept. 7, 1972, § 1, at 1, col. 1.

80. *Jackson, Arafat Agree to Keep Talking*, L.A. Times, Sept. 30, 1979, pt. I, at 5, col. 1 [hereinafter cited as *Jackson*].

81. In addition to this Logan Act episode involving the Middle East conflict, on June 26, 1979, United Nations Ambassador Andrew Young met with the United Nations observer from the PLO. Mr. Young's meeting was without authority from the State Department and "in apparent violation of long-standing U.S. policy against substantive negotiations with the Palestinian group." L.A. Times, Aug. 16, 1979, pt. I, at 1, col. 5. Secretary of State Vance was angered by Young's unauthorized interference. Concerned over the harm Young may have done to United States relations with Israel, the Secretary of State approached President Carter to ask for Young's resignation. *The Fall of Andy Young*, TIME, Aug. 27, 1979, at 15. Young's unauthorized negotiations arguably violated the Logan Act, yet the Executive chose to protect itself by securing Young's resignation rather than prosecuting him under the Act.

82. For the Jackson incident to come within the purview of the Logan Act, Yasser Arafat would have to be recognized as an "agent" or "officer" of a "foreign government." It has been a standard policy of the United States not to negotiate with or formally recognize the PLO. However, this policy developed from a pledge to Israel that the United States would not recognize the PLO until the PLO recognized Israel's right to exist as a nation. The United States foreign policy-makers have long been aware of the important role the PLO plays in the Middle East conflict. In a news conference on October 29, 1977, President Carter affirmed this recognition of political importance when he stated: "If the PLO would endorse U.N. Resolution 242 . . . we would then begin to meet with and to work with the PLO. . . . It is a group that represents, certainly, a substantial part of the Palestinians." 77 DEP'T STATE BULL. 584-86. Yasser Arafat has been received in the United Nations as a head of government. *See* J. SPANIER, GAMES NATIONS PLAY 259 (2d ed. 1975).

83. *What Drives Jesse Jackson*, L.A. Times, Sept. 29, 1979, pt. I, at 6, col. 1.

with foreign governments."[84] Regardless of the strength of Senator Allen's argument, the Executive has not applied the Logan Act to protect its sole authority to negotiate foreign relations.

The stage was again set for a Logan Act episode when Iranian terrorists seized the United States Embassy in Tehran, Iran, on November 4, 1979, creating a serious diplomatic crisis.[85] Twenty-two days after the embassy seizure, forty-nine Americans were still being held hostage by the militant students.[86] Although the Carter administration strived to present itself to the Iranians as a strong, unified force, which would not tolerate a foreign government holding American citizens against their will,[87] the Iranian terrorists holding the hostages were unimpressed and responded with threats against the hostages and with refusals to negotiate.[88]

United States Representative George Hansen, Republican from Idaho, intruded into this dangerous and delicate situation and began an "unauthorized mercy mission to Tehran" on November 21, 1979.[89] Hansen negotiated with leaders of the Iranian government on the hostage situation and felt that he had made a "significant breakthrough."[90] Hansen's opinion was not widely shared.

> Hansen's colleagues in Congress [were] embarrassed and even frightened at the thought of this untutored man careening through the world's tragedies under the protective banner of the House of Representatives. [House] Speaker Thomas O'Neill called Hansen "out of bounds." Nor, in hindsight, did the Iranians feel kindly about the Hansen mission. Former Minister Sadegh Ghotbzadeh summed it up: "I don't think that was of any good whatsoever."[91]

While in Iran, Hansen criticized the methods of the Carter administration, claiming there had been too much "brinkmanship and too little willingness to negotiate."[92] Hansen's "mercy mission" left confusion in its wake. As one commentator characterized it, "He did little in Iran but get a glimpse of the hostages, confuse

84. 124 CONG. REC. S765 (daily ed. Jan. 30, 1978) (remarks of Sen. Allen).

85. 80 STATE DEP'T BULL. 1 (1980).

86. *Hansen Talks to Hostages, Finds Them Tired, Worried*, L.A. Times, Nov. 26, 1979, pt. I, at 1, col. 3 [hereinafter cited as *Hansen Talks*].

87. 80 DEP'T STATE BULL. 55-56 (1980).

88. *Hansen Talks*, *supra* note 86.

89. *Id.* at 10, col. 1.

90. *Id.* at 1, col. 1.

91. *A New Kind of Crisis Monger*, TIME, Dec. 10, 1979, at 38 [hereinafter cited as *Crisis Monger*].

92. *Hansen Talks*, *supra* note 86, at 10, col. 1.

American purpose by suggesting a congressional hearing on the Shah and make it more difficult for Carter to convince the world of American resolve."[93]

Just as President Adams had complained to the legislature of George Logan's mission to Europe, President Carter protested to Congress of George Hansen's activities in Iran.[94] One reporter of the situation stated: "There is not much that Carter can do about Hansen but fume . . . ."[95] However, Carter could have sought Hansen's prosecution under the Logan Act. Hansen, "without authority," carried on "intercourse" with "officers" and "agents" of a "foreign government . . . with intent to influence the measures or conduct of the foreign government . . . in relation to a dispute or controversy with the United States . . . ."[96]

The holding of American hostages in Iran is a perilous crisis and a serious challenge to the United States. Yet, even in an emergency of this magnitude, the Executive did not enforce the Logan Act to protect its sovereign authority over United States foreign relations. Historically and presently, the Executive has uniformly ignored the Logan Act.

3. *The Logan Act and corporate corruption overseas.* In addition to the "classic" Logan Act episodes inspired by war or conflict, international involvements of United States multinational corporations have caused commentators to suggest the application of the Logan Act to possible violations.[97] The Logan Act received its first judicial examination in *Waldron v. British Petroleum*.[98] Plaintiff Waldron and his associates, citizens of the United States, were attempting to purchase Iranian oil at a time when Great Britain and Iran were involved in a heated dispute over the nationalization of British oil companies in Iran. The United States, at the time, was

93. *Crisis Monger, supra* note 91, at 38.

94. *Id.*

95. *Id.*

96. 18 U.S.C. § 953 (1964).

97. *See, e.g.*, McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215, 221 n.29 (1976); Note, *Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad*, 10 CORNELL INT'L L.J. 231 (1977). For a general description of the problem, see Note, *Control of Multinational Corporations Foreign Activities*, 15 WASHBURN L.J. 435 (1976) [hereinafter cited as *Foreign Activities*]; Comment, *Bribes, Kickbacks, and Political Contributions in Foreign Countries — The Nature and Scope of the Security and Exchange Commission's Power to Regulate and Control American Corporate Behavior*, 1976 WIS. L. REV. 1231.

98. Waldron v. British Petroleum Co., 231 F. Supp. 72 (S.D.N.Y. 1964).

deeply concerned over possible economic and political upheaval in Iran as a result of the nationalization.[99] Waldron contacted Senator Johnson of Colorado for advice on how the State Department would view his project to sell Iranian oil in the United States. The State Department responded to Johnson's inquiry: "[N]on-official entities should refrain from getting involved in the dispute."[100] Waldron ignored the State Department's position and proceeded with his project.

Waldron later sued British Petroleum, contending that the oil company had conspired to prevent him from receiving oil he had purchased in a contract with Iran. British Petroleum answered that the plaintiffs' activities in Iran violated the Logan Act,[101] and were, therefore, not to be protected by contract. While Waldron, in light of the State Department's position, appeared to have violated the Logan Act, he defended himself by arguing that the "United States policy with respect to the importation of Iranian oil was neither definitive nor clear at the time of [his] alleged violation."[102] The court found that there was "an issue of material fact as to the existence and identity of the 'measures of the United States,' " during the period in question,[103] and concluded that there was no violation of the Logan Act.[104]

The application of the Logan Act in *Waldron* opened an area where the Logan Act might have had vitality — "questionable cor-

99. Concern over possible communist complicity was indicated in a letter from Secretary of State Dulles to Congressman Celler. *Hearings before Antitrust Subcommittee on the Judiciary, House of Representatives*, 84th Cong., 1st Sess., pt. 2, at 1556-59 (1955).

100. The State Department viewed the matter as one requiring negotiation between Great Britian and Iran. The United States, having a "vital interest" in the matter, would use its influence to aid in resolving the dispute. Waldron v. British Petroleum Co., 231 F. Supp. 72, 77 (S.D.N.Y. 1964).

101. *Id.* at 88-89.

102. The confusion in the State Department's position was evidenced by this statement of a Department official: "It is my personal opinion that it appears that the State Department would not actually interfere with any transactions on Iran oil which might be consummated." Exhibit *B* for Defendant at 116, *cited in* Waldron v. British Petroleum Co., 231 F. Supp. 72, 77 n.7 (S.D.N.Y 1964).

103. The court was concerned that the vagueness of the statute's terms "defeat" and "measures" could be in violation of the constitution. *See* Waldron v. British Petroleum Co., 231 F. Supp. 72, 89 (S.D.N.Y. 1964).

104. The court's finding was substantiated by a State Department press release, subsequent to the original statement of the Department's position concerning the Anglo-Iranian dispute. On "the question of moving relatively small quantities of oil . . . this Government believes that the decision whether or not such purchases of oil from Iran should be made must be left to such individuals and firms as may be considering them . . . ." 27 DEP'T STATE BULL. 946 (1962).

porate payments abroad"[105] made by American multinational corporations. This has become an area of concern since the Watergate investigations revealed that many United States firms were making questionable foreign payments to facilitate their overseas operations.[106]

Prior to December 19, 1977, and the passage of the Foreign Corrupt Practices Act, there was no federal law specifically prohibiting American corporations from bribing foreign officials or making similar questionable foreign payments.[107] In 1976, Secretary of Commerce Elliot Richardson was appointed Chairman of President Ford's Task Force on Questionable Corporate Payments Abroad, with the responsibility of conducting "a sweeping policy review" of the problem of questionable corporate payments abroad.[108] Richardson concluded that "even the most vigorous enforcement of existing law would not be an adequate solution to the problem."[109] However, several legislators and commentators contended that the Logan Act could aid in the regulation of questionable business activity by threatening criminal prosecution for overseas payments that violated the Act.[110]

Richardson and the Task Force concluded that the questionable foreign payments were frequently extortion payments used to influence decisionmaking in foreign governments, and therefore were primarily a problem of foreign relations.[111] Payments made with the intent to "influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any

105. The term "corporate payments abroad" is a widely used phrase which includes bribes, "grease" or "facilitating" payments, extortion payments, and illegal campaign contributions. *See* McManis, *supra* note 97, at 217.

106. *Foreign and Corporate Bribes: Hearings on S. 3133 Before the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 3 (1976) [hereinafter cited as *Hearings on S. 3133*] (statement of Sen. Proxmire). Over 200 firms have admitted making such payments. *Bill to Bar Corporate Bribery of Officials Abroad is Passed by Senate, Sent to House*, Wall St. J., Sept. 16, 1976, at 7, col. 1. For a discussion of the reasons and controls advanced for finding a solution to this problem, see note 97 *supra*.

107. On December 19, 1977, Congress enacted the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (1979).

108. The Task Force was created on March 31, 1976, to investigate the problem of corporate corruption abroad and to offer suggestions for a national policy to deal with it. *Hearings on S. 3133*, *supra* note 106, at 77.

109. *See* Letter from Elliot Richardson to Senator Proxmire, *reprinted in Prohibiting Bribes to Foreign Officials: Hearings on S. 3133 & S. 418 Before the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 51 (1976) [hereinafter cited as Richardson Letter].

110. *See* McManis, *supra* note 97, at 221.

111. *Hearings on S. 3133, supra* note 106, at 42, 62.

disputes or controversies with the United States [over trade regulation, for example] or to defeat the measures of the United States"[112] would violate the Logan Act. Notwithstanding the apparent applicability of the Act, when Richardson considered the criminal statutes applicable to questionable corporate payments abroad, the Logan Act was not among them.[113] Consequently, the Act has not been so applied. Similarly, the legislative debate that led to the passage of the "1977 Foreign Corrupt Practices Act"[114] did not include any meaningful discussion of the Logan Act as a statutory solution to the problem.[115]

4. *Conclusions.* In view of the Logan Act's history, as reviewed above, the Act's practical utility in preventing the interference of private citizens in foreign affairs is very doubtful. Not only is there confusion on how to implement the Logan Act, but there has been an unwillingness on the part of the Executive to employ the Act to effectuate its purpose of protecting against the "usurpation of Executive authority,"[116] even when such authority has been threatened.[117]

The Logan Act, as a criminal statute, has as one of its major purposes the deterrence of the offense it proscribes.[118] Because it has never been enforced, the Act has doubtful value in that respect. Furthermore, maintaining a criminal statute in the face of visible nonenforcement against arguable violations weakens the overall fabric of criminal law.[119] Senator Kennedy, arguing for the repeal of the Logan Act, summarized the patent flaw of the Act when he said, "I think the most compelling factor for its repeal . . . is that it

112. 18 U.S.C. § 953 (1976).

113. Richardson Letter, *supra* note 109.

114. 15 U.S.C. § 78dd-2 (1979).

115. The Logan Act was alluded to in reference to such activity in a letter from Senator Metcalf, Representatives Benjamin, Rosenthal, Moffet, and Downey, and Messrs. Nader and Green to then United States Attorney General Edward Levi, dated August 22, 1975. *New Justice Unit Sought to Combat Corporate Crime*, N.Y. Times, Aug. 25, 1975, at 19, col. 1. Additionally, as one commentator indicated, it is not entirely accurate to classify all questionable foreign payments as extortion payments and problems of foreign relations. Some such payments are used by American corporations to defeat other American competitors and are therefore bribes, not a problem of foreign relations. *See* McManis, *supra* note 97, at 221.

116. *See* 3 ANNALS OF CONG. 2639, 2691-92 (1799).

117. In the situation explained in note 39 *supra*, it was President Jefferson who sent the allegedly damning correspondence to Congress for investigation. 1 MESSAGES & PAPERS OF THE PRESIDENTS 354 (J. Richardson ed. 1897).

118. Sellin, *The Trial Judge's Dilemma: A Criminologist's View*, in PROBATION AND CRIMINAL JUSTICE 113 (S. Glueck ed. 1933).

119. *Id.* at 113-15.

has been on the books since 1799 and has never been used."[120]

It is also apparent that the Logan Act has no practical part to play in the control of American corporate overseas activities that affect United States foreign policy: the Act has never been applied in cases involving questionable corporate practices overseas; its potential relevance to such practices has been ignored; and Congress has passed the Foreign Corrupt Practices Act, which supersedes the Logan Act in this area.

The Logan Act has slumbered for more than 180 years. The many prods it has received from executive administrations, elected officials, and concerned citizens have failed to rouse it into the active, potent criminal statute the early American legislators intended it to be. Even assuming the Justice Department enforced the Logan Act, however, there is great doubt the Act could withstand constitutional scrutiny.[121]

II. Possible Constitutional Defects of the Logan Act

A. Equal Protection and Due Process Problems

1. *Desuetude*. Presently, if the Executive chose to enforce the Logan Act to protect its sovereignty in the management of international relations, it would be faced with a major constitutional obstacle. The political nature of the Act makes it particularly susceptible to discriminatory manipulations[122] in violation of the equal protection clause of the Fifth Amendment of the United States Constitution.[123] For a defendant in a Logan Act case to seek refuge under the equal protection doctrine, he would allege and

120. 124 Cong. Rec. S765 (daily ed. Jan. 30, 1978) (remarks of Sen. Allen).

121. *See* Waldron v. British Petroleum Co., 231 F. Supp. 72, 88 (S.D.N.Y. 1964). For a supplemental discussion of the elements of the Logan Act and constitutional objections, *see generally* Vagts, *supra* note 1.

122. "The Logan Act revealed its potential as a principle of political behavior, as a debating weapon against the opposition and a threat against those out of power." Vagts, *supra* note 1, at 271.

123. United States v. Elliott, 266 F. Supp. 318, 326 (1967). Desuetudinous statutes can pose equal protection problems when selectively enforced. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886):

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373-74. *See also* Oyler v. Boles, 368 U.S. 448, 456 (1962) (the Court found the rule applies to penal law as well as civil).

prove that the statute was being drawn out of desuetude[124] for the purpose of intentional and unreasonable discrimination against him. Given the variety of international episodes to which the Logan Act has been applicable, and the decisions of numerous administrations not to seek enforcement by the Justice Department, it is arguable that any application of the Logan Act today would be discriminatory and in violation of the equal protection doctrine.

In addition, because the Logan Act is desuetudinous, its enforcement may fail to provide "fair warning" or "fair notice,"[125] which involve violations of the due process clause of the Fifth Amendment.[126] The fair notice element of the due process clause becomes pertinent whenever a statute lapses into desuetude.[127] The clause demands that criminal statutes provide the public with an accurate and reasonable description of what conduct is prohibited.[128] Many of the Logan Act episodes described in this Comment were reported in newspapers read throughout the world. The high visibility of the United States government's nonenforcement, combined with a history of continuous nonenforcement, is unlikely to offer a potential defendant under the Act a clear impression of what conduct is punishable. On the contrary, the consistency of nonenforcement "establish[es] a reasonable public expectation that the conduct involved will no longer be punished."[129]

Fair notice is to be tested by looking to "community usage, common experience, and the provision's actual significance in the body politic."[130] Under this test, the Logan Act is doubly plagued. It fails to provide fair notice because of its desuetude *and* because

124. "Desuetude" is a civil law doctrine rendering a statute abrogated by reason of its long and continued nonuse. Waldron v. British Petroleum Co., 231 F. Supp. 72, 89 n.30 (S.D.N.Y. 1964). The status of desuetude in United States law has not been clarified. While some commentators have found nonuse to be an invalid method of abrogating a statute, others contend it could serve such a purpose. *Compare* 1 J. SUTHERLAND, STATUTORY CONSTRUCTION § 2034 (F. Horach ed. 1943) *with* Rogers, *Desuetude As a Defense*, 52 IOWA L. REV. 1 (1966). The United States Supreme Court has not resolved the question of whether extended nonenforcement of a statute results in its abrogation. *See* District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953); Poe v. Ullman, 367 U.S. 497 (1961).

125. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 413-16 (1964).

126. *See* U.S. CONST. amend. V.

127. *See* Bonfield, *supra* note 125, at 415.

128. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

129. *See* Bonfield, *supra* note 125, at 419.

130. Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77, 82 (1948).

of its vague terms.[131]

2. *Vagueness*. The vagueness test was stated by the Supreme Court in *Lanzetta v. New Jersey*:

> No one may be required at the peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State [really] commands or forbids . . . . [If] men of common intelligence must necessarily guess at its meaning and differ as to its application, [it] violates the first essential of due process of law.[132]

The Logan Act, with its vague language[133] and history of confusion as to its application, arguably qualifies as being "overly-discretion-dispensing."[134] In its present condition, the Logan Act can be seen to inject "into the governmental wheel so much free play that in the practical course of its operation it is likely to function erratically — responsive to whim or discrimination unrelated to any special determination or need by the responsible policy-making organs of society . . . ."[135] The problem with the Logan Act is that without judicial decisions to clarify its vague legislative intent, it tempts the government with overbroad decisionmaking powers, potentially leading to discriminatory and otherwise unfair prosecutions.

B. First Amendment Problems

Because the Logan Act provides for the suppression of certain speech,[136] namely "correspondence . . . with any foreign government," First Amendment questions arise under the United States Constitution. While the Logan Act has not been examined by the Court as to its impact on the freedom of speech, there has been a series of cases since World War II, which reveals the "conflict between the protection of these rights and the reservation to the United States of adequate power to deal with foreign problems."[137]

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131. *See* U.S. CONST. amend. V.

132. 306 U.S. 451, 453 (1939).

133. *See* Waldron v. British Petroleum Co., 231 F. Supp. 72, 89 (S.D.N.Y. 1964).

134. *See* Bonfield, *supra* note 125, at 413.

135. Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 90 (1960).

136. 18 U.S.C. § 953 (1976).

137. Vagts, *supra* note 1, at 294. For an excellent discussion of the evolution of First Amendment rights in general and in regard to foreign affairs, see Comment, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U.L. REV. 462 (1977) [hereinafter cited as *Constitutional Balance*]; Note, *The Constitution and International Agreements or Unilateral Action Curbing "Peace-Imperiling" Propaganda*, 31 L. & CONTEMP.

The general rule is that "suppression of expression"[138] will survive constitutional challenge from the First Amendment when compelling state interests are threatened[139] — that is, where compelling state interests are "gravely threatened and responsible men conclude that the antisocial evil is close at hand — so close that there is little if any time to take correct action other than suppression . . . ."[140]

The compelling governmental interest which the Logan Act arguably protects is government security. As a category, suppression to protect government security is tolerated when it is necessary to protect the government from violent overthrow.[141] This requisite extent and immediacy of the threat has been noticeably absent from the situations in which the Logan Act has been invoked.[142] Even when compelling government interests are exhibited, the Court will "look to the extent of the burden that they place on individual rights"[143] before deciding that suppression is justified.[144]

Besides showing compelling government interest, the government must show that available alternate means to accomplish the same purpose are not available.[145] Given the wide variety of situations where the Logan Act has been invoked but not enforced, and considering that alternate means were employed by the government,[146] it would be difficult for the Executive to enforce the Act and pass the judicial test of "alternate means."[147] Freedom of speech is one of our dearest freedoms. Justifying its suppression under the Logan Act would not be an easy task for the government.[148]

C. Extraterritoriality

While the Logan Act has been objected to because of its extraterritorial effect, this is clearly the weakest objection to it under the

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PROB. 516 (1966) [hereinafter cited as *Propaganda*]. *See* Vagts, *supra* note 1, at 193-99, for a discussion of cases regarding the Logan Act.

138. *Propaganda*, *supra* note 137, at 524.
139. *Id.*
140. *Id.*
141. *Constitutional Balance*, *supra* note 137, at 479.
142. *See* text accompanying notes 40-96 *supra*.
143. *Constitutional Balance*, *supra* note 137, at 493.
144. *Id.*
145. *Id.* at 510.
146. *See*, *e.g.*, note 81 *supra*.
147. *Constitutional Balance*, *supra* note 137, at 510.
148. *Id.* at 496.

United States Constitution.[149] Extraterritorial legislation has been upheld by the Court, and it is doubtful that such a ground would be used to defeat the Act considering the more patent constitutional flaws that exist.[150]

III. CONCLUSION

The underlying principle of the Logan Act, the protection of exclusive Executive authority to negotiate on behalf of the United States in international affairs, is a meritorious one.[151] The difficulties with the Act arise from its nonenforcement and its constitutional defects. Since the Act was drafted, Americans have become accustomed to enjoying the rights provided by the First and Fifth Amendments. The Logan Act has not kept pace with this constitutional evolution. Today, if the Act were enforced, it might be found to violate these rights. If the government values the protection the Logan Act was intended to provide, it would be well-advised to bring the Act into constitutional alignment through amendment. The Act's desuetudinous condition indicates, however, an unspoken policy statement adhered to by every Presidential administration since Thomas Jefferson that the restraints provided by the Logan Act are either not required or inadequate to effectuate its underlying principle.[152] The alternative is to repeal the Logan Act. Allowing it to remain on the statute books is detrimental to the overall purpose of criminal law to deter and to punish. Passage of the revised federal criminal code would repeal the Act. Should the criminal code fail to become law, this Comment recommends that separate legislative action be taken to repeal the Logan Act.*

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149. *See* Vagts, *supra* note 1, at 292-93, for a more detailed examination of the Logan Act in terms of extraterritoriality.

150. *Id.*

151. *Id.* at 269.

152. *See Jackson, supra* note 80. The Hoffa incident illustrates that the government can protect its executive authority in international affairs without invoking the Logan Act.

* *Author's Note*: As this comment goes to print, Senator Robert Dole (R. Kansas), is urging the Justice Department to investigate the unauthorized mission to Tehran of former United States Attorney General Ramsey Clark, where he and nine others attended an "International Conference on Iranian Grievances Against the United States during the first week in June. Clark and the group violated a Presidential ban on travel to Iran. *Clark Defends Trip, Calls For U.S. Apology To Iran*, L.A. Times, June 9, 1980, pt. I, at 1, col. 4.

Senator Dole has urged the Justice Department to prosecute the group under the Logan

Act. On June 10, 1980, President Carter indicated that he was "inclined" to have Clark and the group prosecuted. The President has referred to criminal prosecution under The International Emergency Powers Act of 1977, not the Logan Act. However, the President has said, "I would guess civil penalties would be more appropriate." *Carter Says He's Inclined To Prosecute Ramsey Clark*, L.A. Times, June 11, 1980, pt. I, at 1, col. 3.

Once again the Logan Act has emerged from history during an emotionally charged and politically volatile situation. Clark's unauthorized trip to Tehran is exactly the type of conduct the Act was designed to protect and punish. Perhaps the Logan Act will finally receive the judicial construction it needs. If it does not, it is but another indication that the Executive does not think the cure is worth the remedy when it considers prosecuting under the Logan Act.