

ARTICLE

NONENFORCEMENT BY ACCRETION: THE LOGAN ACT AND THE TAKE CARE CLAUSE

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The Logan Act is a centuries-old law designed to bolster executive power. Yet Presidents have uniformly declined to don the statute's vintage armor. Countless enforcement opportunities have yielded precisely zero prosecutions; the Act has entirely ceased to function as a criminal statute. A recent resurgence in Take Care Clause scholarship has overlooked this unparalleled passivity. Scholars agree that although Presidents may not categorically refuse to enforce

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statutes on policy grounds, exercising prosecutorial discretion on a case-by-case basis is perfectly permissible. The Logan Act's slow demise offers an important caveat: that laws can be nullified through the repeated use of individualized enforcement discretion. I call this previously unexplored phenomenon "nonenforcement by accretion."

This Article contends that the gradual erasure of an entire statute presents a far greater threat to legislative policymaking supremacy than does the advance signaling of cabined enforcement priorities. The Article highlights the problem's magnitude by chronicling Presidents' refusal to remedy even archetypal Logan Act violations in the face of deafening enforcement demands. It then identifies several forces driving the statute's deterioration. The Article also shows that incremental nonenforcement cannot be easily analyzed under conventional Take Care Clause tests. In doing so, it unsettles the assumed distinction between policy-based nonenforcement and that anchored in constitutional objections. Finally, the Article argues that failing to enforce the Logan Act—a law that modern majorities would never enact—has in fact thwarted long-term democratic responsiveness.

I. INTRODUCTION

Days before Donald Trump's inauguration, word broke that Michael Flynn—the incoming National Security Advisor—had placed several calls to Russian Ambassador Sergey Kislyak.¹ Flynn's short tenure was engulfed by the ensuing political firestorm. The public learned that Flynn had secretly advised Kislyak on how to respond to sanctions imposed by the Obama administration in retaliation for Russian interference in the 2016 election.² (It later came to light that Flynn, acting at the direction of "a very senior member of the Presidential Transition Team," had also contacted Kislyak to request that Russia either "vote against or delay" a controversial United Nations Security Council resolution that the United States had conspicuously declined to veto.)³

The fallout was not purely political. Observers began examining Flynn's potential criminal exposure for tampering with intergovernmental concerns. This months-long melodrama involved an unlikely starlet: the Logan Act of 1799,⁴ which forbids certain unauthorized efforts to interfere with American foreign policy.⁵ Obama administration officials debated whether Flynn's con-

¹ See David Ignatius, Opinion, *Why Did Obama Dawdle on Russia's Hacking?*, WASH. POST (Jan. 12, 2017), https://www.washingtonpost.com/opinions/why-did-obama-dawdle-on-russias-hacking/2017/01/12/75f878a0-d90c-11e6-9a36-1d296534b31e_story.html [https://perma.cc/3JBM-5APS].

² Maggie Haberman et al., *Michael Flynn Resigns as National Security Adviser*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/13/us/politics/donald-trump-national-security-adviser-michael-flynn.html> [https://perma.cc/DG7A-KPB6].

³ Statement of the Offense at 4, *United States v. Flynn*, No. 17-cr-232-RC (D.D.C. Dec. 1, 2017) [hereinafter *Statement of the Offense*], <https://www.justice.gov/file/1015126/download> [https://perma.cc/RU6F-EF64].

⁴ 1 Stat. 613 (1799) (codified as amended at 18 U.S.C. § 953 (2012)). For the full text of the Act, see *infra* note 102 and accompanying text.

⁵ See Charlie Savage, *What Is the Logan Act?*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/us/politics/logan-act-flynn.html> [https://perma.cc/4UBK-W95G].

duct satisfied the Logan Act's elements.⁶ Former acting Attorney General Sally Yates suggested as much in reflecting that "[t]here is certainly a criminal statute that was implicated by his conduct."⁷ Don McGahn, Trump's White House Counsel, even personally briefed the new President on Flynn's potential Logan Act liability.⁸

Yet charging Flynn under the Logan Act was never a realistic prospect. Though the Act has never been repealed, more than two centuries of enforcement opportunities have yielded only two indictments⁹—none since 1852—and *not one* fully pursued prosecution. Obama administration officials privately acknowledged that securing a conviction after such a long history of disuse would be "daunting."¹⁰ House Intelligence Committee Chairman Devin Nunes took umbrage at a reporter's mere mention of Logan Act allegations: "So you want to investigate a Logan Act [violation]? You're a Logan Act guy? It's ridiculous. The Logan Act's ridiculous. You guys all know that's ridiculous."¹¹ And with nearly twenty million viewers tuning in to watch former FBI Director James Comey testify before the Senate Intelligence Committee, Senator Roy Blunt intimated that the absence of prior prosecutions means that the Act cannot be violated in the first place.¹²

⁶ See Greg Miller et al., *National Security Adviser Flynn Discussed Sanctions with Russian Ambassador, Despite Denials, Officials Say*, WASH. POST (Feb. 9, 2017), https://www.washingtonpost.com/world/national-security/national-security-adviser-flynn-discussed-sanctions-with-russian-ambassador-despite-denials-officials-say/2017/02/09/f85b29d6-ee11-11e6-b4ff-ac2cf509efe5_story.html [<https://perma.cc/429S-HUD5>].

⁷ *Anderson Cooper 360 Degrees: Exclusive Interview with Former Acting Attorney General Sally Yates*, CNN (May 19, 2017), <http://www.cnn.com/TRANSCRIPTS/170519/acd.03.html> [<https://perma.cc/429S-HUD5>].

⁸ Murray Waas, *White House Counsel Knew in January Flynn Probably Violated the Law*, FOREIGN POL'Y (Dec. 20, 2017, 12:07 PM), <http://foreignpolicy.com/2017/12/20/white-house-counsel-knew-in-january-flynn-probably-violated-the-law> [<http://perma.cc/A8BT-ABQX>].

⁹ A Kentucky farmer named Francis Flournoy was indicted in 1803 for having written a newspaper article proposing that the Western states secede, reassociate as a separate nation, and ally themselves with France. See Detlev F. Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 AM. J. INT'L L. 268, 271 (1966). Until this Article was uploaded in draft form, Flournoy's was universally regarded as "the first and only indictment under the Logan Act." *Id.* But the law was "exhumed and enforced" in 1852 against one Jonas P. Levy, who was "arrested and held to bail" under the Logan Act for having written a letter to the President of Mexico. Letter to the Editor, *The Exhumed Fossil*, N.Y. TIMES, Feb. 5, 1852, at 2; see also *A Scrap of History*, ALEXANDRIA GAZ., Feb. 12, 1852, at 2 (reporting that "Capt. Levy stands indicted" under the Logan Act); NEWARK DAILY ADVERTISER, Feb. 12, 1852, at 2 (announcing that Levy "was arrested" under the Logan Act for having "corresponde[d] with the President of Mexico"). For a detailed reconstruction of the second (and last) Logan Act indictment, see Jeremy Duda, *A Foreign Affair*, HIST. TODAY (June 13, 2017), <http://www.historytoday.com/jeremy-duda/foreign-affair> [<http://perma.cc/QR9X-EUX4>].

¹⁰ Miller et al., *supra* note 6.

¹¹ C-SPAN, *Russian Hacking and U.S. Elections*, at 29:16 (Feb. 27, 2017), <https://www.c-span.org/video/?424617-1/representative-devin-nunes-provides-russia-investigation-update> [<https://perma.cc/HXR5-GL98>].

¹² See *Full Transcript and Video: James Comey's Testimony on Capitol Hill*, N.Y. TIMES (June 8, 2017), <https://www.nytimes.com/2017/06/08/us/politics/senate-hearing-transcript.html> [perma.cc/B2PV-45ZB] ("[A]ny suggestion that . . . General Flynn had violated the Logan Act, I always find pretty incredible. The Logan Act's been on the books for over 200 years. Nobody's ever been prosecuted for violating the Logan Act.").

By and large, the Logan Act is no longer regarded as a duly enacted law of the United States. It was passed in 1799 after a Philadelphia Quaker named George Logan sailed to Paris seeking an end to the Quasi-War with France.¹³ Though crafted as a gloss on the constitutional machinery of American diplomacy,¹⁴ the Act has fallen far short of its promise. Noncompliance with the statute carries absolutely no criminal (and few reputational) consequences. It is hard to envision Congress getting less out of one of its statutes for such a sustained period of time. It is also hard to identify a federal statute less likely to be enforced in the face of an ostensible violation. For that reason, the Logan Act deters only the astonishingly naïve. And because it forms no part of the prosecutor's arsenal, transgressions ought not be a credible source of prosecutorial leverage—not even for the special counsel specifically charged with investigating the Trump campaign's ties to the Russian government.¹⁵ The Act has slowly morphed into a rich source of ridicule.¹⁶

Yet modern observers have failed to see the Logan Act's extinction for what it is: a blatant distortion of our constitutional structure. The Take Care Clause charges the Executive with ensuring that congressional enactments be "faithfully executed."¹⁷ The Logan Act—crafted by our earliest expositors of federal power—has instead been neglected and disdained. Nor has the Act's demise become a *cause célèbre* for separation-of-powers enthusiasts. Although one might assume that constitutional concerns have driven the Logan Act's decline,¹⁸ the reality is much more prosaic. The statute has effectively been annulled because administrations across the centuries have individually refrained from prosecuting apparent offenders. And as I will endeavor to show, likely violations have been legion. Under no plausible conception of the Logan Act's domain can any recent violations be characterized as unprecedented (or even nearly so).¹⁹

¹³ See generally Frederick B. Tolles, *Unofficial Ambassador: George Logan's Mission to France, 1798*, 7 WM. & MARY Q. 1 (1950). According to Logan's wife, he sought to "persuad[e] the rulers of that arrogant government to alter the tone of their conduct towards the United States." DEBORAH NORRIS LOGAN, MEMOIR OF DR. GEORGE LOGAN OF STENTON 54 (Frances A. Logan ed., 1899).

¹⁴ See *infra* notes 125–26 and accompanying text.

¹⁵ As this Article went to print, it was unclear whether the specter of Logan Act liability had induced any member of Trump's orbit to plead guilty.

¹⁶ See *infra* notes 47–64.

¹⁷ U.S. CONST. art. II, § 3.

¹⁸ See Clare Foran, *What Is the Logan Act and What Does It Have to Do with Flynn?*, ATLANTIC (Feb. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/02/logan-act-michael-flynn-trump-russia/516774> [<http://perma.cc/XSH8-TKFS>] (quoting Professor Steve Vladeck's hypothesis that "the intervening development of our modern First and Fifth Amendment jurisprudence" largely accounts for the Act's nonenforcement).

¹⁹ For two contrary contentions, see *Ep. 28: Eric Posner and the Logan Act*, SOUND-CLOUD: CHI. STORIES, at 4:15 (Dec. 22, 2017), <https://soundcloud.com/chicagosmayor/ep-28-eric-posner-and-the> [<https://perma.cc/69BZ-W95Z>] (asserting that "no one's ever seriously violated [the Act] before, with the possible exception of President Nixon"); Ryan Goodman (@rgoodlaw), TWITTER (Dec. 2, 2017, 8:25 AM), <https://twitter.com/rgoodlaw/status/936949463620386816> [perma.cc/BW56-M9DB] (stating that "Trump transition actions appear to be an unprecedented clear violation of the Act").

Why has Logan Act nonenforcement escaped scholarly scrutiny for so long? Very likely because it was accomplished without attention-grabbing announcements. President Obama, for one, prompted a torrent of Take Care Clause scholarship by openly streamlining prosecutorial priorities in the highly complex realms of immigration and controlled substances.²⁰ His administration's transparent, rule-like directives generated well-founded societal expectations and served as a focal point for public debate. In marked contrast, no President has ever committed in advance to withholding action under the Logan Act. Administrations have effectively altered the substantive law not through "an overt policy of nonenforcement,"²¹ but through hundreds of unconnected, episodic reactions. They have achieved the equivalent of system-wide neglect without issuing pronouncements of general applicability. In short, the Executive has negated a federal statute without reconciling that feat with its constitutional role, and without explaining why other validly enacted statutes might not suffer a similar fate.

I call this previously unexplored phenomenon *nonenforcement by accretion*. Scholars of executive power have overlooked the conceptual space between "purposive presidential inaction" and "the exercise of particularized discretion in individual cases."²² This Article demonstrates that entire statutes can be nullified—even if inadvertently—through the *repeated* use of individualized enforcement discretion. That outcome, moreover, presents a far greater long-term threat to legislative policymaking supremacy than does the advance signaling of cabined enforcement priorities. In most cases, "a future president can always decide to start enforcing a law again."²³ But after generations of well-publicized forbearance, the burden of justifying the first Logan Act prosecution has become virtually insurmountable. Such a proceeding would smack of shameless ad hockery; it would also be colossally unfair to the Act's inaugural victim.²⁴ The evidence suggests that several administrations have consciously deferred to this unbroken pattern of nonenforcement, and that any President inclined to shift course would be practically estopped from doing so under current norms.

This Article paints a portrait of unremitting (if unplanned) passivity. It chronicles administrations' unlikely rejection of a statute expressly designed to bolster the President's Article II authority. The State and Justice Departments have each deflected Logan Act inquiries by disclaiming jurisdiction to

²⁰ For the seminal article in this scholarly renaissance, see Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014).

²¹ Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937, 1016 (2017).

²² Daniel E. Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911, 1918–20 (2016).

²³ Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1239 (2014).

²⁴ Cf. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012) (observing that when "an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute").

commence investigations;²⁵ the White House has also wriggled its way out of the Logan Act limelight through artful interpretation.²⁶ At least once, the executive branch even lobbied for the statute's repeal.²⁷ But most of the time, administrations simply maintain stone-faced silence in response to high-level Logan Act entreaties. They have quietly refused to remedy offenses threatening precisely the harms envisioned by the statute's architects.

Even an administration eager to crack down would be exceptionally unlikely to reverse this pattern. As did Professor David Pozen in his seminal study of why leakers go unprosecuted,²⁸ I venture a typology of overlapping nonenforcement imperatives. Four mutually reinforcing explanations vastly overdetermine the statute's spectacular torpor. First, inaction is often the least-worst response to private affronts to presidential power. Prosecutions could backfire, transforming meddlers into martyrs, dignifying the frolics of nonentities, and inviting well-founded accusations of cruelty. It is also difficult to imagine Logan Act prosecutions of presidential candidates, other political luminaries, and worldwide celebrities—perhaps the only figures capable of inflicting the harm that the Act seeks to prevent.²⁹

Second, nonenforcement may well be motivated by raw personal and political self-interest. To prosecute Logan Act offenders would be to solicit examination of top executive-branch officials' own pre-presidential behavior and to limit their ability to advance any number of humanitarian causes in retirement. Conveniently, nonenforcement often benefits Presidents' personal friends and political allies, as well. Third, private citizens are sometimes needed to accomplish what institutions cannot. The scrutiny the Act invites has greatly embarrassed administrations seeking low-visibility, back-channel extrication from sensitive international impasses. Ordinary enforcement of the Logan Act would place a premium on exposing private recruits' precise links with the White House, greatly undermining their usefulness as unofficial-official emissaries. And because administrations uniformly condone unauthorized discussions that serve the national interest, any level of non-zero enforcement would imply that some of America's greatest foreign-policy triumphs were negotiated criminally.

Finally, Presidents have often felt practically inhibited from acting, whether because of evidentiary obstacles or reluctance to depart from two-plus centuries of forbearance. Crucially for Take Care Clause purposes, although the statute may well be vulnerable on First and Fifth Amendment grounds,³⁰ constitutional concerns appear to have been accorded very little

²⁵ See *infra* Part III.A.1.

²⁶ See *infra* Part III.A.3.

²⁷ See *infra* Part III.A.4.

²⁸ See generally David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).

²⁹ See *Mr. Stassen and the Law*, EVENING STAR (D.C.), Oct. 7, 1950, at A-4 (“[T]he embarrassment is apt to increase with the prominence of the citizen.”).

³⁰ See *infra* note 567.

weight in the decisional ledger. No administration has ever publicly justified Logan Act leniency on constitutional grounds. That should come as no surprise: categorical assurances of nonenforcement would strip the Act of any remaining deterrent value. In some respects, Presidents actually want the statute to work; they want their chosen blend of formal diplomacy and geopolitical isolation to be given a chance to succeed.

The discussion below unfolds as follows. Part II profiles the Logan Act's regression into a less-than-lawlike state. It then situates nonenforcement by accretion within a Take Care Clause literature dominated by assumptions of *programmatic* inaction. Part II also highlights several key interpretive questions presented by the Act's elements. The absence of prosecutions entails a corresponding paucity of judicial guidance on the statute's precise scope. One might expect the Executive to adopt unusually aggressive interpretations when its Article II authority is at stake.³¹ It is remarkable that in this respect, Presidents have relied on other institutions to insist that the White House enjoys "a unique role in communicating with foreign governments."³² The mismatch between the Logan Act's titanic potential and its dwindling residuum is therefore a striking example of institutional self-restraint, one that has quietly chipped away at Congress's power, as well.

Part III compiles outward manifestations of Executive discomfort with the Logan Act. Administrations have gone to impressive lengths to escape accountability for individual nonprosecution decisions. They have demurred and equivocated in the face of countless enforcement demands backed by righteous allusions to the Take Care Clause. Part III also catalogues the most salient reasons—known and suspected—for nonenforcement of the Logan Act. This discussion helps explain how perhaps the most pro-presidential statute in American history came to be snubbed by its intended beneficiaries. But the inquiry also serves a broader purpose: it seeks to enable the accountability that Presidents have shirked, on the assumption that nonenforcement may be excused if grounded in a good-faith constitutional objection.³³ Indeed, it is precisely because Presidents have not bothered to justify the Logan Act's nonuse on *any* basis that scholars have overlooked the Act's treatment as a possible Take Care Clause violation.

Part IV closes with two general reflections. This Article is the first to explore whether gradual nonenforcement of a federal statute—a *cumulative* failure of execution—can amount to a failure of constitutional responsibility. I conclude that the Logan Act's effective nullification cannot be squared with the Take Care Clause, even if no single administration is especially

³¹ See Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1119 (2013) ("The President need not adopt the 'best' reading of the statutes in any neutral sense."); see also Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1502 (2010) (explaining that legal analysis from the Office of Legal Counsel "need not carry the pretense of 'true' neutrality").

³² *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015).

³³ See *infra* note 39 and accompanying text.

blameworthy. And more abstractly, because it entails a multiplicity of rationales, incremental nonenforcement eludes easy analysis under conventional Take Care Clause paradigms. It is well established that Presidents may not refuse to enforce a statute merely because they believe it to embody poor policy.³⁴ But when each administration has its own reasons for remaining inert, how can one conclude that the Executive has neglected enforcement because of some particular factor? Surely aggregate nonenforcement is not excused if just one administration articulates constitutional objections; neither should it be considered unconstitutional if only one intimates policy disagreements. Future studies of nonenforcement by accretion should explore how best to synthesize mixed motives in determining conformity with Article II obligations.

Part IV also ponders what can be done to fix a statute in desperate need of reform, but whose repeal is understandably not a top legislative priority (and whose judicial invalidation is by now impracticable). Finding no easy solutions, it questions how a congressional enactment can have been allowed to linger in a vegetative state. The answer: Presidents' utter failure to enforce it. Far from being a "prime engine[] of social change,"³⁵ nonenforcement—especially incremental, episodic nonenforcement—likely stymies democratic progress by removing any incentive to abrogate laws that modern majorities would never enact. Legislators informed enough to push for the Logan Act's repeal, moreover, are easily branded as diplomatic anarchists.³⁶ Presidents' efforts to channel contemporary preferences through responsive enforcement decisions may therefore thwart social and political change rather than accelerate it. Perhaps only unpopular prosecutions—bookended by presidential pardons, as needed—can "pressure . . . Congress to undertake more fundamental, long-term legal change."³⁷

II. THE LOGAN ACT AND THE TAKE CARE CLAUSE

A. *An Overlooked Nonenforcement Crisis*

The legal community remains sharply divided over the lawfulness of President Obama's key nonenforcement initiatives. Yet virtually all Take Care Clause commentators agree on one bedrock principle: Presidents may not entirely refuse to enforce a federal statute because they believe it to embody poor policy. Sure enough, resource constraints and case-specific considerations can undoubtedly justify less than maximal execution.³⁸ Non-

³⁴ See *infra* notes 40–45.

³⁵ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983).

³⁶ See *infra* notes 612–15 and accompanying text.

³⁷ Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RES. L. REV. 1119, 1123 (2015).

³⁸ See Price, *supra* note 20, at 676–77.

enforcement on constitutional grounds is also fairly well accepted, especially when a statute is thought to intrude on the President's Article II authority.³⁹ Yet a complete failure to implement legislative prescriptions on policy grounds is almost universally—and quite properly—viewed as an affront to the separation of powers.

The Supreme Court has pointedly clarified that Presidents' constitutional powers “do[] not extend to the refusal to execute domestic laws.”⁴⁰ As one commentator puts it, the Executive must “make real the promise” of federal statutes.⁴¹ In other words, he may not effectively “nullify laws he does not like by failing to implement them.”⁴² In venturing to criminalize certain behavior, Congress plainly seeks to effectuate a set of policy outcomes. Elevating a contrary vision through wholesale nonenforcement would accord the President a watertight second veto, mangling one of the clearer mechanisms of our constitutional design. Article II simply denies the Executive any “power . . . to take federal laws off the books.”⁴³ Administrations may not “wholly abdicate [their] responsibilities” by “annul[ing] existing laws” through nonenforcement.⁴⁴

The scholarly consensus on this point is staggering,⁴⁵ as is the Logan Act's failure to achieve the minimal potency seemingly required by the Take

³⁹ For recognition of this point, see, for example, David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61, 97–98 (2000); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 621–22 (1994). The Office of Legal Counsel has naturally advanced this position. See Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 47 (1990) (“[T]he Take Care Clause does not compel the President to execute unconstitutional statutes.”).

⁴⁰ *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007). Long ago, the Court underscored that the Take Care Clause forbids the President to “entirely . . . control the legislation of [C]ongress” by “dispensing” with federal statutes. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838); see also *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (suggesting that agencies may not adopt nonenforcement policies “so extreme as to amount to an abdication of [their] statutory responsibilities”).

⁴¹ See Andrias, *supra* note 31, at 1113.

⁴² Price, *supra* note 20, at 689.

⁴³ Love & Garg, *supra* note 23, at 1238.

⁴⁴ Michael Sant'Ambrogio, *The Extra-legislative Veto*, 102 GEO. L.J. 351, 354, 395 (2014).

⁴⁵ See, e.g., Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 282 (2003) (“The [Take Care] [C]lause is an obligation to obey and implement the law, not disregard it or obstruct it.”); Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381, 382 (1986) (“[T]he Executive's power of execution does not include a power to ignore or disobey what Congress has provided.”); Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 398 (1987) (“To ‘execute’ a statute . . . emphatically does not mean to kill it.”); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1314 (2000) (“[T]he Take Care Clause makes clear that the President . . . may not substitute his judgment for that embodied in the law.”); Leigh Ososky, *The Case for Categorical Nonenforcement*, 69 TAX L. REV. 73, 78 (2015) (concluding that “scholars have reached a near consensus that policy-based nonenforcement is impermissible”); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 670 (1985)

Care Clause. In 219 years, Presidents have pursued precisely zero prosecutions to completion; no one has been indicted under the Logan Act since the Fillmore administration.⁴⁶ Scholars have accordingly ridiculed the Act as “a dead letter,”⁴⁷ a “statutory anachronism[],”⁴⁸ a “curious federalist antique,”⁴⁹ the “most moribund” of federal criminal statutes,⁵⁰ and “an eighteenth century relic”⁵¹ that slumbers “in splendid disregard.”⁵² As in other realms, a vast gulf separates the written law and its lived experience.

Journalists have similarly scorned the statute for its complete failure to function as intended. One commented in 1852 that after having “slept unnoticed for fifty years,” the Act was bizarrely “exhumed, like the fossil remains of some creature of the past.”⁵³ Decades later, a columnist pronounced that “[o]f all dead legislation upon our statute books the Logan Law is the deadest, because it has never been alive.”⁵⁴ That “hoary and impossible law”⁵⁵ had gradually “become a museum piece.”⁵⁶ The Logan Act “might as well not exist,”⁵⁷ as it “has never been enforced.”⁵⁸ One commentator ventured that the Act had “expired by default.”⁵⁹

(“[T]he ‘take Care’ clause does not authorize the executive to fail to enforce those laws of which it disapproves.”).

⁴⁶ See *supra* note 9.

⁴⁷ Louis Fisher, *A Constitutional Structure for Foreign Affairs*, 19 GA. ST. U. L. REV. 1059, 1076 (2003); see also Leon Hurwitz, *Judicial Control over Passport Policy*, 20 CLEV. ST. L. REV. 271, 272 (1971) (deeming the Logan Act “a dead-letter provision”); Louis B. Schwartz, *Law Reform*, 1983 DET. C.L. REV. 1419, 1422 (alluding to “the Logan Act, a 200-year-old dead letter”).

⁴⁸ Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681, 681 (1992); see also John H.F. Shattuck & David E. Landau, *Civil Liberties & Criminal Code Reform*, 72 J. CRIM. L. & CRIMINOLOGY 914, 921 (1981) (labeling the Logan Act “an anachronistic statute”).

⁴⁹ Detlev F. Vagts, *United States of America’s Treatment of Foreign Investment*, 17 RUTGERS L. REV. 374, 388 (1963).

⁵⁰ Robert H. Joost, *Simplifying Federal Criminal Laws*, 14 PEPP. L. REV. 1, 24 (1986).

⁵¹ Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941, 1013 (2011).

⁵² *Rarely Used Statute Bars Policy Dealings by Citizens Abroad*, N.Y. TIMES, July 5, 1984, at A11 (quoting Professor Laurence Tribe); see also Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 702 n.206 (2002) (claiming that the Act enjoys “no continuing efficacy”); Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1252 (2000) (noting the statute’s “virtual desuetude”).

⁵³ *The Exhumed Fossil*, *supra* note 9, at 2.

⁵⁴ *The Logan Law*, INDEPENDENT (N.Y.), June 2, 1917, at 398; see also *A Basis for Peace*, VIERECK’S, June 6, 1917, at 6, 18 (“The Logan [A]ct . . . is an antiquated piece of special legislation that has never been applied.”).

⁵⁵ *Nixon Just Doesn’t Belong*, L.A. TIMES, Feb. 27, 1976, at C6.

⁵⁶ Thomas O’Neill, *Eager Doves*, SUN (Balt.), July 6, 1969, at PER4.

⁵⁷ Editorial, *You Be the Judge*, DAILY OKLAHOMAN, July 4, 1984; see also Murrey Marder, *Logan Act, A Law that Was Never Much*, WASH. POST, July 6, 1984, at A3 (describing the Act as “one of the oldest, and least effective, laws on the books”).

⁵⁸ David Lawrence, *Many Americans Daily Violate Law Under Outmoded Logan Act*, ATLANTA CONST., Oct. 27, 1953, at 4.

⁵⁹ Dorothy Thompson, *How to Define Treason These Days*, EVENING STAR (D.C.), June 3, 1958, at A-13.

Congressmen, too, have proclaimed the Act's effective erasure from the U.S. Code. For Senator William Borah, the unbroken pattern of nonenforcement was "not such as to cause one to regard [the law] as very serious."⁶⁰ Representative Charles Porter deemed the prospect of a Logan Act prosecution "preposterous," for "[n]obody has ever been prosecuted under that legislation since it was enacted in 1799."⁶¹ And the leading champions of legislative repeal have pronounced the law "clearly outmoded,"⁶² given that it "has been on the books since 1799 [without] one prosecution under it. Not one."⁶³ Even a staunch defender of the Act—an ever-dwindling species—acknowledged the widespread view that "it has no force and effect."⁶⁴

The Logan Act's absence from recent Take Care Clause debates is an unfortunate omission. Because the Act is a duly enacted statute like any other, the executive branch must enforce it like any other—"at least unless [it] deems the law unconstitutional."⁶⁵ Below, I attempt to disentangle the manifold motivations driving Presidents' targeted refusals to enforce the Logan Act.⁶⁶ Although plenty of applications would likely run afoul of modern First Amendment and due-process doctrine,⁶⁷ no administration has ever expressly claimed as much. For my purposes, what matters is that the Logan Act's present status represents an idealized abomination for Article II aficionados: an unbroken record of nonenforcement spanning forty-five presidencies and over two centuries, notwithstanding innumerable likely violations threatening the very types of injury the statute was designed to counteract. The Act has "disappear[ed] as law in any meaningful sense."⁶⁸

To be sure, the executive branch has sometimes "enforced" the Logan Act, in the sense that perceived violations have served as a basis for expel-

⁶⁰ 84 CONG. REC. 10,417 (1939) (statement of Sen. Borah (R-Idaho)).

⁶¹ 106 CONG. REC. 10,994 (1960) (statement of Rep. Porter (D-Or.)).

⁶² 126 CONG. REC. 10,112 (1980) (statement of Rep. Beilenson (D-Cal.)).

⁶³ 124 CONG. REC. 1369 (1978) (statement of Sen. Kennedy (D-Mass.)); *see also* 153 CONG. REC. 9043 (2007) (statement of Rep. McDermott (D-Wash.)) ("[T]his is a 200-year-old act that no one has ever been prosecuted under . . ."); 130 CONG. REC. 12,212 (1984) (statement of Rep. George Brown, Jr. (D-Cal.)) ("[T]he Logan Act in 185 years has never been applied."); 118 CONG. REC. 33,192 (1972) (statement of Rep. Preyer (D-N.C.)) ("There has never been a successful prosecution under the Logan Act."); 115 CONG. REC. 32,583 (1969) (statement of Rep. Ichord (D-Mo.)) (observing that "not one single prosecution has been initiated under the Logan Act").

⁶⁴ 126 CONG. REC. 7368 (1980) (statement of Sen. Dole (R-Kan.)).

⁶⁵ Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 NOTRE DAME L. REV. 1907, 1911 (2014); *see also* 2 NORMAN J. SINGER & J.D. SHAMBLE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 34.1, at 31–32 (7th ed. 2009) (describing the "basic principle of law . . . that, unless explicitly provided to the contrary, statutes continue in force until abrogated by subsequent action of the legislature").

⁶⁶ *See infra* Part III.D.

⁶⁷ *See infra* note 567.

⁶⁸ Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 391 (1964).

ling foreign diplomats and conditioning or restricting Americans' travel.⁶⁹ But these examples simply show that administrations have lacked the courage of their convictions. Despite having pondered the Act's applicability to private diplomacy—and occasionally invoked it to alter rights and obligations—Presidents have conspicuously declined to wield that tool as Congress intended. Passports have indeed been withheld—but to forestall violations that never would have been prosecuted, and that may never have occurred.⁷⁰ Presidents have also periodically “used” the Logan Act rhetorically as a dissent-chilling device.⁷¹ At least a few scrupulous souls have been dissuaded;⁷² others have modulated their messages after studying the statute.⁷³ But zero criminal consequences have attended frequent transgressions of one of our very oldest federal statutes.

The Executive's empty posturing has only deepened public contempt for the statute as an enforceable law of the United States. One intrepid congressman, for example, declared on the House floor that “I have not hesitated in the past, nor will I in the future, to violate the Logan Act.”⁷⁴ A Yale professor who met with the North Vietnamese Premier implored Americans to “defy the Logan Act” in a similar fashion.⁷⁵ A prominent shipbuilder claimed to be “sorry to hear that [the Secretary of State] isn't going to prosecute me,” for “[i]t would be interesting to be prosecuted under . . . [such]

⁶⁹ Ryan Goodman, Opinion, *Many Think This Law Is Obsolete. It Could Actually Be a Big Problem for Trump.*, WASH. POST (Apr. 5, 2017), https://www.washingtonpost.com/opinions/the-trump-administration-should-worry-about-logan-act-violations/2017/04/05/648de0a2-1573-11e7-9e4f-09aa75d3ec57_story.html [http://perma.cc/8GAD-4PAX].

⁷⁰ See *Warns Americans to Take No Part in Peace Conclave*, N.Y. TIMES, May 24, 1917, at 1 (reporting that Secretary of State Robert Lansing had denied passports to American citizens wishing to attend an overseas gathering described as “a voluntary conference of the citizens of various countries,” “not a conference of Governments”).

⁷¹ See Brad R. Roth, *The First Amendment in the Foreign Affairs Realm: ‘Domesticating’ the Restrictions on Citizen Participation*, 2 TEMP. POL. & CIV. RTS. L. REV. 255, 266 (1993).

⁷² For example, Martin Luther King, Jr. “apparently dropped his plan to [write various] heads of state when it was pointed out that the Logan Act prohibits a private citizen from dealing with a foreign government.” Roy Reed, *Dr. King's Group Scores Ky Junta*, N.Y. TIMES, Apr. 14, 1966, at 1; see also 126 CONG. REC. 7369 (1980) (statement of Sen. Dole (R-Kan.)) (“[S]ome may have stayed here because of the Logan Act.”).

⁷³ See, e.g., *McGovern Reveals Secret Paris Talks*, L.A. TIMES, July 3, 1969, at A1 (“Before he left for Paris, [Senator George] McGovern [D-S.D.] said, he carefully studied the Logan Act . . . [H]e cautioned the Communists that he was forbidden to negotiate with them.”); *Letter from Stassen to Premier Stalin*, N.Y. TIMES, Oct. 5, 1950, at 18 (“I write to you now . . . not to influence your Government in relation to any disputes or controversies with the United States, which are entirely in the hands of our officials.”); Ferdinand Kuhn, Jr., *Scientist's Appeal to Stalin Balked*, WASH. POST, Nov. 25, 1947, at 11 (reporting that “[b]efore sending [a] letter to Stalin,” scientist Leó Szilárd “sent a draft of it to Attorney General Clark for ‘permission and authority of the Government,’ under the Logan Act”).

⁷⁴ 130 CONG. REC. H4350 (daily ed. May 22, 1984) (statement of Rep. George Brown, Jr. (D-Cal.)); see also *id.* at H4353 (“I am not afraid. I can think of nothing I would relish more than to have my Government indict me for violating that act . . .”).

⁷⁵ *Three U.S. Leftist Leaders in Hanoi*, L.A. TIMES, Dec. 28, 1965, at 2 [hereinafter *Leftist Leaders*].

an old one.”⁷⁶ Former President Herbert Hoover “cheerfully state[d] he was guilty” for his nongovernmental ventures.⁷⁷ And after detailing his negotiations with two high-ranking Spanish ministers, Senator Pat McCarran “didn’t seem concerned” about Logan Act liability.⁷⁸

These Loganeers have it right—*no one* need fear prosecution under the Act under any circumstances, and needn’t have for a long time. Though it has eluded systematic analysis, nonenforcement by accretion is nonenforcement all the same. At some point, a burgeoning mass of declined prosecutions can offend the separation of powers every bit as much as a targeted guarantee of prospective, categorical nonenforcement. Indeed, deeply engrained, institutionally entrenched nonenforcement of an entire statute would seem far *worse* from a law-execution standpoint than priority-setting pronouncements closely associated with a single administration.⁷⁹ It is to these and other conceptual differences that this Article now turns.

B. *Situating Nonenforcement by Accretion*

The Take Care Clause literature has failed to account for the Logan Act’s evisceration—a process by which a series of unconnected nonprosecution events have stripped the law of any remaining efficacy. Contrasting this mechanism with six common nonenforcement themes highlights the Logan Act’s distinctiveness.

First, Logan Act nonenforcement has occurred “in many, many small doses”⁸⁰ and in a reactive posture rather than on a “categorical and prospective”⁸¹ basis. The Act’s impairment has not been an agenda item; no President has pursued a program of disregarding plausible violations. Rather, every administration has refrained from prosecuting only after having been presented with colorable evidence of wrongdoing. Whereas programmatic nonenforcement may actually promote political accountability by necessitating a reasoned explanation,⁸² the Logan Act’s slow decay has obscured such responsibility. There is no single culprit, no obvious suspender-in-chief to

⁷⁶ “*Too Bad*” *Braden to Stay—Higgins*, TIMES-PICAYUNE (New Orleans), Nov. 30, 1946, at 4 [hereinafter *Braden to Stay*].

⁷⁷ Ralph McGill, *The Ordeal of Wilson*, ATLANTA CONST., Apr. 29, 1958, at 1.

⁷⁸ Drew Pearson, *Diplomats Displease McCarran*, WASH. POST, May 9, 1954, at B5; see also *Swiss Loses Office for Peace Move*, N.Y. TIMES, June 20, 1917, at 3 (reporting that one attendee of an international socialist conference “was not afraid of prosecution under the Logan [A]ct” and “would welcome such prosecution as a test case”); Joyce Egginton, *Ho Writes to Dr. Spock*, OBSERVER (London), Dec. 12, 1965, at 12 (discerning that Dr. Spock, the celebrated pediatrician, was “not concerned” about Logan Act liability).

⁷⁹ See Osofsky, *supra* note 45, at 78 (“[T]ime-limited nonenforcement may be more permissible than nonenforcement not so limited.”).

⁸⁰ Cheh, *supra* note 45, at 286.

⁸¹ Price, *supra* note 20, at 746.

⁸² See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1929 (2015) (“The public articulation of the administration’s policies ensured that enforcement choices would be more transparent, thereby enhancing political accountability . . .”).

impeach or punish electorally.⁸³ And because administrations seldom illuminate specific nonprosecution choices, significant labor—and a dose of informed speculation—are required to schematize this series of “repeated, but individually isolated, decisions not to undertake enforcement actions.”⁸⁴

Second, Logan Act nonenforcement has very little to do with one of the few widely endorsed justifications for underenforcement—allocating precious governmental resources.⁸⁵ True, since 1799, “untold thousands . . . have been in communication with foreign governments.”⁸⁶ Yet not every such contact will fit the terms of the Act’s elements.⁸⁷ Unlike in the immigration context, the Executive could likely prosecute all known Logan Act offenses—and might be expected to do so in defense of its constitutional prerogatives. The Act is hardly a “multi-faceted and complex code”⁸⁸ rendering pervasive underenforcement inevitable. Unsurprisingly, then, no administration has ever cited budgetary constraints or limited personnel as a reason for declining to enforce the Logan Act.

Third, taken in the aggregate, Logan Act nonenforcement is entirely untethered to traditional notions of prosecutorial discretion—sparing those offenders whose crimes are relatively innocuous or unusually difficult to prove. Prosecutors at all levels strive to serve “individualized justice”⁸⁹ by “screening for those who are worthy of punishment”⁹⁰ in case-specific circumstances. Yet administrations have not sought to remedy only “the most serious”⁹¹ or the most demonstrable Logan Act violations—they have prosecuted *no* Logan Act violations. Indeed, it is often when unofficial diplomacy is the most damaging that prosecutions would be the most difficult to stomach.

Fourth, unlike with many other federal statutes, no entity outside the executive branch can pick up the enforcement slack. Congress often enlists states and localities⁹² and private individuals⁹³ to enforce federal policies

⁸³ In fact, modern Executives are arguably the *least* culpable, insofar as they bear a larger-than-ever burden of justifying the first Logan Act prosecution.

⁸⁴ Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 808 (2010); see also Cheh, *supra* note 45, at 282 (“A decision not to prosecute or not to enforce is taken in the shadows.”).

⁸⁵ See, e.g., Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 847 (2015) (observing that “the President’s obligations under the Take Care Clause must be assessed in light of the resources allocated by Congress and the need to prioritize”).

⁸⁶ *Braden to Stay*, *supra* note 76, at 4.

⁸⁷ See *infra* Part II.C.

⁸⁸ Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 126 (2015).

⁸⁹ Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877, 879 (1989).

⁹⁰ Cox & Rodríguez, *supra* note 88, at 204.

⁹¹ Michael T. Morley, *Reverse Nullification and Executive Discretion*, 17 U. PA. J. CONST. L. 1283, 1332 (2015).

⁹² See Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 474 (2012) (“Today, a variety of civil federal laws confer enforcement authority on the states . . .”).

contemplating civil liability. Yet Congress does not—and likely cannot—similarly outsource violations of the federal criminal code.⁹⁴ Nor could states realistically temper Logan Act nonenforcement by “enforcing materially comparable or identical state laws,”⁹⁵ for the obvious reason that no such laws exist (or could be validly enacted).⁹⁶

Fifth, Logan Act nonenforcement has no distributive implications; Presidents have been equal-opportunity forbearers. In a leading article on nonenforcement of the criminal law, Professor Alexandra Natapoff argues that such restraint is often a pernicious tool of social stratification. Underenforcement driven by lopsided policing priorities may deprive victims of the “social good of lawfulness” along the “familiar categories of race, gender, class, and political powerlessness.”⁹⁷ Strangely, the putative victim of Logan Act violations is the executive branch, which has always declined to don the statute’s vintage armor. Presidents have not used the Logan Act to target the politically unpopular; some administrations have even nixed possible prosecutions to avoid martyring vocal dissidents.

Sixth, and lastly, the Logan Act’s slow, awkward death cannot be adequately explained by shifting societal mores. To the extent that Federalists’ prohibition on private diplomacy had any merit in 1799, it is implausible to contend that “changed attitudes” have rendered their theory of harm wholly “unacceptable to the community.”⁹⁸ As private diplomacy has proliferated in recent decades, so have opportunities for frustrating American foreign policy. Cries of improper interference continue to resound;⁹⁹ foreign sovereigns still “play on American factions by giving the ‘outs’ what [they] will not give the ‘ins.’”¹⁰⁰ To be sure, surrounding constitutional developments may well have rendered the Act’s strictures unenforceable. But the Logan Act—a

⁹³ See Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1232 (2014) (“The U.S. Code is riddled with . . . ‘citizen suit’ provisions . . . purport[ing] to allow any interested citizen to seek judicial relief.”).

⁹⁴ Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1355 (2015).

⁹⁵ Morley, *supra* note 91, at 1284.

⁹⁶ As a matter of federal preemption, it is hard to imagine a clearer domain that “the Federal Government has reserved for itself,” *Arizona v. United States*, 567 U.S. 387, 402 (2012), than that of interactions with foreign sovereigns.

⁹⁷ Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1717 (2006); see also Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 *B.C. L. REV.* 1287, 1289 (2016) (“[U]nderenforcement . . . manifest[s] the state’s implementation of its police power in ways that disadvantage the most vulnerable among us.”).

⁹⁸ Bonfield, *supra* note 68, at 389.

⁹⁹ See, e.g., 130 *CONG. REC.* 9528 (1984) (statement of Rep. Gingrich (R-Ga.)) (“[I]f you end up with hundreds of people . . . doing whatever they want to, and saying ‘Hi, I would like to negotiate for America,’ you are going to lead to absolute chaos.”); see also *infra* Part III.C.

¹⁰⁰ Vagts, *supra* note 9, at 301. In one especially vivid example, North Vietnamese officials hand-picked a lawyer named William Kunstler to discuss the release of American prisoners of war during the Vietnam War—precisely because, as an opponent of the Johnson administration, he represented two prominent antiwar activists. Kunstler’s success sent a stark signal: “deal with anti-war groups if you want any information about your husbands or sons.” *Rips Kunstler for Talking with N. Viets*, *CHI. TRIB.*, Oct. 31, 1969, at A5 (quoting Sen. Gordon Allott (R-Colo.)).

dead letter for other reasons—is not a statute whose policy presuppositions are entirely alien to modern sensibilities, such as New Jersey’s prohibition on slurping soup or California’s ban on peeling oranges in one’s hotel room.¹⁰¹

The Logan Act’s abandonment reflects none of these familiar themes. Though conceptually exotic, nonenforcement by accretion marks a serious threat to legislative policymaking supremacy. It is time that it be recognized and studied as such.

C. *A Note on the Act’s Breadth*

As might be expected from a Federalist-era prohibition that has never been enforced, the Logan Act’s elements are riddled with ambiguity. The proper resolution of such uncertainties—by defining the realm of potential violations—determines the scope of Presidents’ Take Care Clause obligations.

The current version of the 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 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.¹⁰²

Several interpretive difficulties leap to mind. For instance, must a “measure[]” of the United States be a federal statute or self-executing treaty? Or do less formalized policies—say, executive orders, unacted presidential doctrines,¹⁰³ nonrecognition decisions, Olympic boycotts, repudiations of internal secession,¹⁰⁴ U.S.-initiated extradition requests, absten-

¹⁰¹ See ROBERT M. BOHM & BRENDA L. VOGEL, *A PRIMER ON CRIME AND DELINQUENCY THEORY* 9 (3d ed. 2011).

¹⁰² 18 U.S.C. § 953 (2012).

¹⁰³ See Arthur Krock, *Some Bad Counsel with Respect to Mr. Wallace*, N.Y. TIMES, Apr. 15, 1947, at 24 (contending that “the Truman Doctrine is not a ‘measure,’ Congress not yet having put it in operation”).

¹⁰⁴ See *In re Charge to Grand Jury—Treason and Piracy*, 30 F. Cas. 1049, 1050–51 (C.C.D. Mass. 1861) (No. 18,277) (“[A] member of the British parliament declared . . . that he had received many letters from the Northern states of America, urging [P]arliament to acknowledge the independence of the Southern Confederacy.”).

tions from international hostilities,¹⁰⁵ outstanding offers to mediate inter-sovereign conflicts,¹⁰⁶ refusals to attend foreign conferences, and signaled withdrawals from multilateral conventions—also qualify? Are international and supranational organizations “foreign government[s]” whose employees count as “officer[s] or agent[s] thereof”? Are quasi-governmental or government-run economic, educational, and religious entities covered under the Act?¹⁰⁷ What about political groups with which the United States maintains no formal relations,¹⁰⁸ or that seek to topple regimes recognized by the United States?

What of conversations with de facto foreign leaders who have not yet formally been installed or inaugurated,¹⁰⁹ or with heirs apparent to foreign thrones?¹¹⁰ When should foreign governmental personnel be deemed to operate in a private capacity? Do individual foreign legislators qualify as “officer[s] or agent[s]” of their governments? If done with the requisite mental state, can merely propounding a question¹¹¹—or transmitting information from one foreign official to another¹¹²—constitute the “commence[ment]” of “correspondence or intercourse”? Can a tweet or an open letter,¹¹³ even if the intended recipient never learns of it? From whose per-

¹⁰⁵ See Letter from Justice Daniel F. Cohalan to Ambassador Johann von Bernstorff (Apr. 17, 1916), in EARL E. SPERRY, *GERMAN PLOTS AND INTRIGUES IN THE UNITED STATES DURING THE PERIOD OF OUR NEUTRALITY* 54, 54 (1918) (containing a New York Supreme Court Justice’s advice on how Germany could “decide the war,” including by launching “aerial attacks on England” and “cutting off . . . the supply of food for England”).

¹⁰⁶ See Vagts, *supra* note 9, at 274 (recounting Henry Ford’s 1915 “Peace Ship” voyage to Europe, following which he intended to convene an international antiwar conference, despite President Wilson’s “ha[ving] offered the Government’s services as a mediator”).

¹⁰⁷ See 28 CONG. REC. 491 (1896) (statement of Sen. Lodge (R-Mass.)) (“I ask . . . whether the governor of the Bank of England, which is a semiofficial body, having close relations with the Government, is not an officer of that Government?”).

¹⁰⁸ See *Fake Harding Envoy Won Siberian Grant by Recognition Lure*, PHILA. INQUIRER, Oct. 27, 1920, at 1 (inquiring whether the Act applied to dealings with the as-yet-unrecognized Soviet government); *Rea Through with Puppets as of Aug. 1*, CHINA PRESS, Sept. 26, 1935, at 9 (citing an American’s employment by the “Manchukuo” government, a Japanese puppet state in northeast China that the U.S. government refused to recognize).

¹⁰⁹ See 122 CONG. REC. 19,328 (1976) (statement of Rep. McDonald (D-Ga.)) (asserting that several Americans had met with “the future President of Mexico . . . in violation of the Logan Act”); *Davis Raps Invitation to Castro*, ATLANTA CONST., Apr. 14, 1959, at 5 (discussing a speaking invitation extended to Fidel Castro because “he had become the de facto ruler of Cuba,” but before he assumed power).

¹¹⁰ See 28 CONG. REC. 491 (1896) (statement of Sen. Chandler (R-N.H.)) (complaining of a private citizen’s “direct appeal . . . to the heir apparent to the British throne”).

¹¹¹ *Borah Obtains Data from Calles Direct; Senators Resent It*, N.Y. TIMES, Feb. 28, 1927, at 1, 5 (describing a loaded question posed by Senator William Borah (R-Idaho) to the President of Mexico “on a subject . . . of current controversy between the Governments of Mexico and the United States”).

¹¹² See Editorial Comment, *The Recall of Ambassador Dumba*, 9 AM. J. INT’L L. 935, 935–36, 936 n.2 (1915) (recounting an incident in which an American news correspondent named James Archibald carried secret dispatches to Vienna from the Austro-Hungarian Ambassador in Washington, D.C.).

¹¹³ See Leó Szilárd, *Letter to Stalin*, 3 BULL. ATOMIC SCIENTISTS 347, 348–49 (1947) (recommending “a series of interconnected steps which are within your power to take . . . hav[ing] a direct and immediate effect on the foreign policy of the United States”).

spective should the likelihood of responsive communications be assessed?¹¹⁴ Does the Act cover American lawyers who represent foreign governments in suits against the United States?¹¹⁵ And does its “redress” exception encompass unsolicited efforts to secure the release of Americans imprisoned overseas?¹¹⁶

Perhaps most vexingly, who speaks with the “authority of the United States” for statutory purposes? Within the executive branch, who other than the President (if anyone) is empowered to confer such authority on private citizens? (After all, Dr. George Logan—the paradigmatic offender—carried a letter of credence from Vice President Jefferson.¹¹⁷) If one member of the executive branch purports to approve such a trip while another protests, whose wishes control? Is the “authority” enjoyed by executive-branch officials coextensive with their portfolios?¹¹⁸ And can someone not presently serving in the executive branch enjoy the “authority of the United States” when acting purely of her own accord? This last question is especially important for Take Care Clause purposes, because it implicates whether members of presidential transition teams and federal legislators are categorically immune from Logan Act liability.

On the first issue, surely Presidents-elect ought to be permitted to discuss global problems with world leaders in advance of their inaugura-

¹¹⁴ I reject the view that liability should turn on whether the recipient of a communication happens to reciprocate an effort to “commence[] . . . correspondence or intercourse.” *But see* Daniel J. Hemel & Eric A. Posner, *The Logan Act and Its Limits*, LAWFARE (Dec. 7, 2017, 12:07 PM), <https://www.lawfareblog.com/logan-act-and-its-limits> [<https://perma.cc/WR4S-UUMJ>] (arguing that the Act is best read “to cover only two-way communications”).

¹¹⁵ *See* Jeane J. Kirkpatrick, *Nicaragua’s U.S. Lawyers*, WASH. POST, Sept. 30, 1985, at A15 (reporting that Nicaragua had hired a group of American lawyers, including professors Abram Chayes and Michael Glennon, to “oppose[] their own country” in the International Court of Justice).

¹¹⁶ The State Department once suggested as much. *See* Letter from Robert J. McCloskey, Assistant Sec’y of State for Cong. Relations (Sept. 29, 1975), in ELEANOR C. McDOWELL, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 1975, 750, 750 (1977). I am dubious, however. Disputes concerning the fate of American captives have been among the most volatile in the history of American foreign relations. (Think of the Iran Hostage Crisis of 1979–80, or efforts to repatriate pilot Francis Gary Powers from the Soviet Union after his U-2 spy plane was shot down in 1960.) Relying as it does on a boundless conception of “agen[cy],” such a massive carve-out from Logan Act liability—enabling a multitude of private actors to negotiate weighty settlements with foreign governments—would be surprising indeed. In any event, the “redress” exception plainly applies only when the underlying injury was sustained by a U.S. citizen, not whenever the applicant is a U.S. citizen.

¹¹⁷ FREDERICK B. TOLLES, *GEORGE LOGAN OF PHILADELPHIA* 155 (1972).

¹¹⁸ *See* WILLIAM BLUM, *KILLING HOPE: U.S. MILITARY AND CIA INTERVENTIONS SINCE WORLD WAR II* 286 (2003) (describing a meeting between the U.S. Ambassador to the Vatican and Libyan leader Muammar al-Qaddafi, “disavowed by official Washington as being unauthorized”); Don Irwin & Robert Shogan, *Young Forced to Resign*, L.A. TIMES, Aug. 16, 1979, at 1 (reporting that the U.S. Ambassador to the United Nations, Andrew Young, had initiated “unauthorized contact with the Palestinian Liberation Organization . . . in apparent violation of long-standing U.S. policy”); *see also* *Borah Faces Rift with President on Note to Calles*, EVENING STAR (D.C.), Feb. 28, 1927, at 1 (“Even the Secretary of Commerce or the Secretary of the Treasury cannot communicate directly with a foreign government except through the good offices of the Department of State.”).

tions.¹¹⁹ All of them do, and nothing in the Logan Act forbids those preparatory exchanges. But as I have pointed out elsewhere,¹²⁰ the Act criminalizes only an especially harmful subset of communications with foreign governments—ones designed to “defeat” identifiable “measures” of the United States, or to undercut the authority of a sitting President by altering how other countries will resolve pending “disputes or controversies” with the United States. In other words, “the Logan Act’s limited domain ensures that transitional figures won’t be jailed for swapping pleasantries with foreign leaders or even engaging in substantive foreign-policy discussions.”¹²¹ But it would be deeply troubling for dueling “authorities” to exist concerning the types of behaviors criminalized by the Act. It is almost unfathomable that the enacting Congress—one eager to crack down on simulated statecraft—would have tolerated such national self-contradiction.

The same principle explains why members of Congress should not be regarded as enjoying the requisite “authority” merely because of the offices they hold. It is true, as Professor Ryan Scoville has shown, that “international diplomacy by [members of] Congress is longstanding, frequent, and widespread.”¹²² Direct engagement can supply legislators with valuable “information in aid of the legislative function”¹²³—for example, knowledge enabling them to “regulate Commerce with foreign Nations.”¹²⁴ But there is no firmly entrenched norm of using one’s congressional pedestal to communicate with foreign sovereigns in a manner intended to subvert the executive branch’s dealings with foreign sovereigns.

It would be surprising if such practices could be squared with the Logan Act, which was enacted to reinforce the President’s constitutional authority to conduct diplomatic relations. The Act was debated under the heading “Usurpation of Executive Authority”;¹²⁵ congressional supporters also understood the law to safeguard presidential power by thwarting its obstruction.¹²⁶ The enacting Congress evidently believed that the Logan Act

¹¹⁹ See Steve Vladeck, *The President-Elect and the Logan Act*, JUST SECURITY (Jan. 13, 2017), <https://www.justsecurity.org/36263/president-elect-logan-act> [http://perma.cc/Q4XL-ZQ4Y] (“We should generally not be bothered by the idea that part of a presidential transition includes the President and his team setting the stage for the conduct of their foreign policy.”).

¹²⁰ See Daniel Rice, *The Collateral Costs of a Logan Act Prosecution*, JUST SECURITY (Dec. 7, 2017), <https://www.justsecurity.org/48061/collateral-costs-logan-act-prosecution> [http://perma.cc/2RGN-ARNP].

¹²¹ *Id.*

¹²² Ryan M. Scoville, *Legislative Diplomacy*, 112 MICH. L. REV. 331, 333 (2013).

¹²³ *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

¹²⁴ U.S. CONST. art. I, § 8, cl. 3; see also McCloskey, *supra* note 116, at 750 (“Nothing in [the Logan Act] . . . would appear to restrict members of the Congress from engaging in discussions with foreign officials in pursuance of their legislative duties under the Constitution.”).

¹²⁵ 9 ANNALS OF CONG. 2488 (1798).

¹²⁶ See, e.g., *id.* (statement of Rep. Griswold (Fed.-Conn.)) (“Its object is to punish a crime which goes to the destruction of the Executive power of the Government.”); *id.* at 2588 (statement of Rep. Bayard (Fed.-Del.)) (“[T]he Constitution has placed the power of negotiation in the hands of the Executive only.”); *id.* at 2593 (statement of Rep. Pinckney (Fed.-Del.))

would apply to their own behavior¹²⁷—a fair assumption, since the Act’s reference to “[a]ny citizen” does not obviously spare legislators. Many members of Congress have since echoed this sentiment,¹²⁸ at some cost to their own privileges, and countless congressmen have championed executive diplomatic exclusivity in the course of debating Logan Act accusations.¹²⁹ Commentators, too, have concluded that legislators are not categorically immune.¹³⁰ Members of Congress would seem far *more* capable of undercutting a President’s foreign-policy agenda than would private citizens, since legislators’ statements would more often be “mistaken for authoritative pronouncements.”¹³¹

Finally, the Logan Act’s mens rea element ensures that only those who subjectively intend to bring about the requisite ends can be said to violate the statute. Reflecting on this requirement, the legal scholar Charles Warren as-

(insisting that without the Logan Act, “the authority of the Executive of the United States may be usurped with impunity”); *id.* at 2598 (statement of Rep. Edmond (Fed.-Conn.) (understanding the proposed law to “prevent individuals from interfering with the Executive authority”); *id.* at 2677 (statement of Rep. Isaac Parker (Fed.-Mass.) (claiming that because the Executive enjoys “the power to negotiate with foreign Governments,” it is a “usurpation of that power for an individual to undertake to correspond with any foreign Power”).

¹²⁷ See Scoville, *supra* note 122, at 372 (“[L]egislators who addressed the issue uniformly suggested that the Act’s prohibition could apply to them.”).

¹²⁸ See CONG. GLOBE, 42d Cong., 2d Sess. 1235 (1872) (statement of Sen. Edmunds (R-Vt.) (observing that the Logan Act “may or may not have been violated” by a fellow senator, depending on his intent); 111 CONG. REC. 21,763 (1965) (statement of Rep. Celler (D-N.Y.) (“I have no direct contact with representatives from any South American governments. I think the Logan Act would preclude my having any such contact.”); 122 CONG. REC. 4216 (1976) (statement of Sen. Goldwater (R-Ariz.) (stating that under the Act, “neither . . . a Member of the House or Senate” nor a private citizen may “conduct foreign policy discussions”); 124 CONG. REC. 1371 (1978) (statement of Sen. Allen (D-Miss.) (remarking that the Act should deter certain “Senators [from] going abroad”); 130 CONG. REC. 10,547–58 (1984) (statement of Rep. Gingrich (R-Ga.) (opining that “the Logan Act . . . include[s] Congressmen,” for “it focuses on usurping the Executive authority”); 153 CONG. REC. 9042 (2007) (statement of Rep. Burton (R-Ind.) (claiming that Speaker Nancy Pelosi (D-Cal.) “broke the law” by meeting with Syrian President Bashar al-Assad).

¹²⁹ For expressions of this view, see 61 CONG. REC. 4156 (1921) (statement of Sen. Lodge (R-Mass.)); 106 CONG. REC. 8625 (1960) (statement of Sen. Fulbright (D-Ark.)); *id.* at 12,624–25 (statement of Sen. Ervin (D-N.C.)); 107 CONG. REC. 8545 (1961) (statement of Sen. Morse (D-Or.)); *id.* at 8642 (statement of Sen. Capehart (R-Ind.)); 108 CONG. REC. 23,101 (1962) (statement of Rep. Cramer (R-Fla.)); 126 CONG. REC. 6456 (1980) (statement of Sen. Baker (R-Tenn.)); 134 CONG. REC. 6082 (1988) (statement of Rep. Broomfield (R-Mich.)); 153 CONG. REC. 5489 (2007) (statement of Sen. Craig (R-Idaho)).

¹³⁰ See, e.g., Vagts, *supra* note 9, at 290 (concluding that “no Congressman has authority to communicate in a way otherwise forbidden”); James Reston, *The Wisconsin Touch*, N.Y. TIMES, Oct. 20, 1953, at 4 (“The Logan Act . . . makes no exception of Congressmen.”); Frederic William Wile, *Congress Member Seen Close to Unwitting Violation of Law in Telegram to King*, EVENING STAR (D.C.), June 12, 1939, at A-11 (“There is no provision for congressional immunity.”); Michael C. Dorf, *Did Speaker Pelosi Violate the Logan Act?*, DORF ON LAW (Apr. 7, 2007), <http://www.dorfonlaw.org/2007/04/did-speaker-pelosi-violate-logan-act.html> [<https://perma.cc/44TJ-94LP>] (denying that even the Speaker of the House necessarily possesses the “authority of the United States” for Logan Act purposes).

¹³¹ Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 698 (2002); see also 153 CONG. REC. S4589 (daily ed. Apr. 17, 2007) (statement of Sen. Craig (R-Idaho)) (“High ranking Members of Congress, I believe, are seen by foreign governments as carrying an official message of foreign policy . . .”).

serted that “[i]f the natural and probable result of commencing or carrying on the correspondence or intercourse . . . would be the influencing of a foreign Government or its officials . . . then the law presumes that the person so acting intended so to influence.”¹³² That familiar heuristic could help ascertain the presence of intent in the face of a sworn denial. But Warren did not say that intent could be inferred *only* if an act’s natural and probable consequence would be to alter the behavior of a foreign government or its representative. If a defendant of limited stature actually intended to produce the designated result, it would not matter that his insignificance afforded him “nothing to offer a foreign government” at the negotiating table.¹³³ (One wonders why private citizens would bother to contact foreign officials and urge them to take specified actions if not to influence their behavior.)

Reasonable minds could disagree on many of the potential applications sketched out above. But the Logan Act’s lack of total precision is not a sufficient reason to refrain from prosecuting likely offenders, which precludes courts from clarifying the law’s reach. One might expect the executive branch, in particular, to resolve any statutory uncertainty in favor of its own institutional prerogatives. That it has done just the opposite indicates the depth of Presidents’ curious unease with the Logan Act.

III. A HISTORY OF LOGAN ACT NONENFORCEMENT

Administrations have been incessantly implored to preserve their own dignity by prosecuting Logan Act violators. It might seem unfathomable that the Executive would spurn this Founding-era archetype of self-protection, one bestowed as an interbranch courtesy. Yet violators have uniformly suffered no criminal consequences. Ordinary enforcement of the Logan Act would evidently prove inconvenient or embarrassing to the branch constitutionally obliged to execute it. So a duly enacted “law of the United States”¹³⁴ continues its steady slide into futility, with no prospect of legislative reform or executive reinvigoration.

Part III.A catalogues outward manifestations of the executive branch’s discomfort with the Logan Act, and Part III.B chronicles the extraordinarily vast array of public pleas to prosecute (or at least investigate) Logan Act

¹³² CHARLES WARREN, 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 13 (1915).

¹³³ Hemel & Posner, *supra* note 114. Even were I wrong on this point, it would be misguided to consider each little-known citizen’s efforts in isolation. If the natural and probable consequence of a letter-writing campaign would be to alter a foreign government’s perception of American public opinion, thus triggering a change in its “measures” or “conduct,” it is unclear why every author bearing the requisite intent should skirt liability for helping produce the desired effect, simply because none of them could have accomplished it alone.

¹³⁴ 130 CONG. REC. 10,558 (1984) (statement of Rep. Gingrich (R-Ga.)); *see also* 153 CONG. REC. 16,878 (2007) (statement of Rep. King (R-Iowa)) (“[N]o one here has pointed to a law that supersedes the Logan Act.”).

violators. These sober solicitations are almost never heeded, even when suffused with Take Care Clause rhetoric and broadcast throughout the world. Part III.C ponders the very real vexation endured by administrations that opt to indulge the errands of amateur diplomats. The secret recruitment of private citizens makes some intergovernmental discussions possible, but unauthorized contacts have just as often jeopardized sensitive presidential undertakings. Why, then, is the Logan Act seemingly more obnoxious than the conduct it proscribes? Why have administrations so flagrantly “subtract[ed] from what Congress has provided”?¹³⁵ Part III.D attempts to explain—through both administration statements and inferences from surrounding context—why the Executive has invariably declined to wield “the great legal weapon given to the State Department to enable it to prevent encroachments upon its prerogatives.”¹³⁶

Building off of Professor Pozen’s careful analysis of why leakers avoid prosecution,¹³⁷ this Part employs a heavily inductive approach in unscrambling an underenforcement puzzle replete with harm-harm tradeoffs. The magnitude of the evidence marshaled here highlights just how colossally the sediment of individualized nonenforcement choices can accumulate, imposing intolerable costs on any effort to begin rectifying an enduring Take Care Clause failure.

A. *An Unwanted Reinforcement: The Act as an Embarrassment*

1. *Departmental Buck-Passing*

The executive branch’s deep discomfort with enforcing the Logan Act is neatly illustrated by the practice of reciprocal buck-passing—public disclaimers of authority to commence investigations by both the Department of Justice and the Department of State. The frequency of that practice, as well as the immensely awkward dodges described elsewhere in this subpart, suggest that far more than a lack of coordination—i.e., “confus[ion] on how to implement the Act”¹³⁸—plagues Logan Act enforcement.

In 1922, Attorney General Harry Daugherty announced that in confronting possible Logan Act violations, “the Department of Justice acted as a rule only at the instance of the State Department.”¹³⁹ With no independent investigative responsibility, his department “would take no action” on a private citizen’s complaint.¹⁴⁰ (The Assistant Attorney General contradicted his

¹³⁵ Gressman, *supra* note 45, at 382.

¹³⁶ LINDELL T. BATES, UNAUTHORIZED DIPLOMATIC INTERCOURSE BY AMERICAN CITIZENS WITH FOREIGN POWERS AS A CRIMINAL OFFENCE UNDER THE LAWS OF THE UNITED STATES 16 (1915).

¹³⁷ See generally Pozen, *supra* note 28.

¹³⁸ Curtis C. Simpson, III, Comment, *The Logan Act of 1799: May It Rest in Peace*, 10 CAL. W. INT’L L.J. 365, 370 (1980).

¹³⁹ *Cable to Lloyd George from Senator France*, N.Y. TIMES, Apr. 16, 1922, at 2.

¹⁴⁰ *Id.*

boss by advising the activist to “take it to the United States attorney at Boston.”)¹⁴¹ Five decades later, an unnamed spokesman for Attorney General Richard Kleindienst matched Daugherty’s slippery performance: “It’s a foreign affairs matter The State Department would have to ask us to do something. If they thought there was a violation, they would contact us.”¹⁴²

The State Department, however, has emphatically forsworn any responsibility—much less primacy—in enforcing the Logan Act. Secretary of State Dean Acheson remarked in 1950 that any such prosecution “would be a matter for the Department of Justice to consider and not the State Department.”¹⁴³ State Department officials similarly refused to comment on Logan Act mutterings in 1965, “[b]ecause the Logan Act is a criminal statute.”¹⁴⁴ They took the same position in 1970 when asked whether Justice William O. Douglas had violated the Act,¹⁴⁵ in 1976 when former President Nixon visited the People’s Republic of China,¹⁴⁶ and again in 1980 when former Attorney General Ramsey Clark traveled to Iran to defuse the Hostage Crisis.¹⁴⁷ (The White House, too, has deflected Logan Act chatter by ascribing jurisdiction to the Justice Department. Asked in a daily press briefing whether President Obama planned to prosecute the forty-seven Republican senators who signed a letter to Iranian leaders, Press Secretary Josh Earnest responded tepidly: “For a determination like that, I’d refer you to the Department of Justice. It ultimately would be their responsibility to make that kind of determination.”¹⁴⁸)

The State and Justice Departments have even jockeyed for irrelevance in real time. When cries of Logan Act violations surfaced at the 1972 Republican National Convention, both departments “vied for disavowing re-

¹⁴¹ *Evidence of Soviet Plots Against U.S. Lacking, Crim Says*, WASH. POST, Jan. 9, 1924, at 5 (quoting Assistant Attorney General John Crim).

¹⁴² Sanford J. Ungar, *U.S. Won’t Probe Trips of Salinger and Clark*, L.A. TIMES, Aug. 23, 1972, at A24; see also *id.* (reporting that “[t]he Justice Department reacted with some embarrassment” to requests that it investigate two possible violations).

¹⁴³ *Logan Act and Stassen*, N.Y. TIMES, Oct. 12, 1950, at 38.

¹⁴⁴ *Dr. King Plans to Seek Viet Peace Despite Law*, L.A. TIMES, Aug. 14, 1965, at 5.

¹⁴⁵ See Letter from David M. Abshire, Assistant Sec’y of State for Cong. Relations, to Rep. Emanuel Celler (Aug. 12, 1970), in *Associate Justice William O. Douglas: Final Report by the Special Subcomm. on H. Res. 920 of the Comm. on the Judiciary*, 91st Cong., 18 (Comm. Print 1970) [hereinafter *Douglas Report*] (“[E]nforcement of a federal criminal statute falls within the province of the Department of Justice and not the Department of State.”).

¹⁴⁶ See Letter from Robert J. McCloskey, Assistant Sec’y of State for Cong. Relations, to Sen. John V. Tunney (Apr. 26, 1976), in ELEANOR C. McDOWELL, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1976, 75, 76 (1977)* (asserting that “[i]t is the responsibility of the Department of Justice to make determinations of . . . whether individuals should be prosecuted under [the Logan Act]”).

¹⁴⁷ See John M. Goshko, *Action Against Clark Is Up to Justice Dept.*, WASH. POST, June 7, 1980, at A14 (quoting a State Department spokesman’s remark that “[t]he Department of Justice is the main agency, and the decision will come from there”).

¹⁴⁸ *Press Briefing by Press Secretary Josh Earnest*, THE WHITE HOUSE (Mar. 11, 2015, 12:32 PM), <https://www.whitehouse.gov/the-press-office/2015/03/11/press-briefing-press-secretary-josh-earnest-3112015> [https://perma.cc/SB5B-B48S].

sponsibility” to verify the allegations.¹⁴⁹ A DOJ spokesman dampened the spotlight on his bureau: “We don’t deal in foreign affairs Under normal procedures [the State Department] would have to initiate it. It would have to come from them.”¹⁵⁰ The State Department shot back a stiff response: “The responsibility for enforcing belongs to the Justice Department. . . . We are not competent to invoke or to take measures to have another agency invoke the provisions of the Logan Act.”¹⁵¹

In these actors’ defense, because no probe has ever been carried to fruition, the locus of investigative responsibility for Logan Act violations is hardly self-evident. (FBI Director James Comey added to the confusion in 2016 by asserting that Logan Act allegations fall “within our jurisdiction.”¹⁵²) Still, such blatant buck-passing exemplifies the executive branch’s general strategy toward Logan Act incidents: remaining as reticent and invisible as political forces allow.

2. Avoidance Through Silence

Much more often, rather than foist responsibility onto some other entity, executive-branch personnel simply “do nothing and hope nobody notices.”¹⁵³ Administrations have gone to remarkable lengths to avoid explaining their passivity and to ward off any perceived obligation to redress possible Logan Act violations. These awkward evasions were widely broadcast as they occurred. So presidential inaction is not always “less public . . . than decisions that are implemented through action.”¹⁵⁴

Logan Act nonenforcement has sometimes bordered on willful blindness. In the early 1920s, the Harding administration received numerous complaints about unauthorized diplomatic activity.¹⁵⁵ Assistant Attorney General John Crim set one such petitioner straight: the Justice Department had yet to see a “concrete statement of facts . . . to show [a] violation of the Logan [A]ct.”¹⁵⁶ Without “detailed facts as to the conduct of definite individuals”—which Crim was utterly unwilling to ascertain himself—the Department would not move forward.¹⁵⁷ After a Justice Department official

¹⁴⁹ Lewis Gulick, *Buck Is Passed over 1799 Law*, TIMES-PICAYUNE (New Orleans), Aug. 24, 1972, at 102.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* One columnist recapped this bizarre jurisdictional squabbling: “Justice said that State was responsible for recommending any prosecution. State said no—it is actually the Justice Department that must take action.” Sanford J. Ungar, *The Strange Life of the Logan Act*, WASH. POST, Aug. 27, 1972, at B5.

¹⁵² *Oversight of the Federal Bureau of Investigation: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 72 (2016), https://judiciary.house.gov/wp-content/uploads/2016/09/114-91_22125.pdf [<https://perma.cc/S7BT-YCKX>] [hereinafter *FBI Hearing*].

¹⁵³ Corinna Barrett Lain, *Passive-Aggressive Executive Power*, 73 MD. L. REV. 227, 232 (2013).

¹⁵⁴ Love & Garg, *supra* note 23, at 1235.

¹⁵⁵ *Complaints*, TIME, Mar. 31, 1923, at 8.

¹⁵⁶ *Evidence of Soviet Plots*, *supra* note 141.

¹⁵⁷ *Id.*

reaffirmed this demanding threshold for private “tips” in 1971,¹⁵⁸ Congressman John Rarick was “shocked” to hear that “it is incumbent upon the citizens to infiltrate the secret meetings and supply . . . specific information indicating a violation.”¹⁵⁹ And the next year, Attorney General Kleindienst announced that “I don’t anticipate any Logan Act cases right now,” for “[n]o evidence of any wrongdoing has been presented to the department yet.”¹⁶⁰

Executive spokespersons have also exuded extreme discomfort with the Logan Act through a related tactic: revealing as little as possible in response to targeted inquiries about apparent violations. In 1923, for example, a concerned citizen asked whether a trio of congressmen had violated the Logan Act during their recent trip to the Soviet Union. An Assistant Secretary of State curtly replied that “the commission to which you refer was not authorized or appointed by the President.”¹⁶¹ That assertion was almost insultingly nonresponsive; an administration that valued the Logan Act would have vowed to investigate the unauthorized mission, or at least explain why it warranted no further review. For not the last time, a question designed to facilitate faithful execution did nothing of the sort.

In 1941, Under Secretary of State Sumner Welles “declined to express any opinion” on whether former President Hoover had violated the Logan Act in “negotiati[ng] with Germany and Britain” to transport food to Nazi-occupied Europe.¹⁶² Asked in 1946 whether he intended to push for a particular prosecution under the Logan Act, Secretary of State Acheson demurred—he had “given the idea no thought.”¹⁶³ Acheson later viewed the Act’s applicability to a different episode as “theoretical,” and he “hoped it stayed that way.”¹⁶⁴ In 1947, the White House “maintained a strict silence” on demands that former Vice President Henry Wallace be prosecuted under the Logan Act.¹⁶⁵ Attorney General Tom Clark claimed that his department “had not studied the applicability of the Logan Act to the Wallace situation.”¹⁶⁶ Would such a study be commissioned, then? “[N]o comment.”¹⁶⁷

¹⁵⁸ See Letter from Robert C. Mardian, Assistant Att’y Gen., to Rep. John R. Rarick (July 13, 1971) [hereinafter “Mardian Letter”], in 117 CONG. REC. 25,650 (1971) (“[W]e would consider requesting an appropriate investigation in any case in which we might receive a specific allegation or specific information indicating a violation of the Logan Act.”).

¹⁵⁹ 117 CONG. REC. 25,649 (1971) (statement of Rep. Rarick (D-La.)).

¹⁶⁰ *Kleindienst Doubts Action on Clark or Miss Fonda*, N.Y. TIMES, Aug. 24, 1972, at 52.

¹⁶¹ *Status of “Mission” to Russia Defined*, WASH. POST, Oct. 24, 1923, at 22 (quoting Second Assistant Secretary of State Alvey Adee).

¹⁶² *U.S. Aloof in Hoover’s Negotiations, Welles Says*, EVENING STAR (D.C.), Feb. 17, 1941, at 1.

¹⁶³ *Acheson Backs Braden Against Attack from Peron to Higgins*, WASH. POST, Nov. 30, 1946, at 3.

¹⁶⁴ *Logan Act and Stassen*, *supra* note 143, at 38.

¹⁶⁵ Robert C. Albright, *Rep. Thomas Suggests Prosecution for Talks*, WASH. POST, Apr. 15, 1947, at 1.

¹⁶⁶ C.P. Trussell, *Wallace Prosecution Asked as Congress Furor Mounts*, N.Y. TIMES, Apr. 15, 1947, at 1, 12.

¹⁶⁷ *Id.*

The White House Press Secretary, too, refused to engage: “[T]here is no comment . . . in any way, shape or form.”¹⁶⁸ The White House also mustered “no comment” on a letter sent to Soviet Premier Joseph Stalin in 1950 from Harold Stassen, a prominent politician and university president.¹⁶⁹

Nor would Secretary of State John Foster Dulles address whether the Eisenhower administration might prosecute a congressman who had urged the South Korean President to release several thousand prisoners of war. Dulles claimed to have “only seen excerpts” of the congressman’s missive, needing to “see the full text before taking any definite position.”¹⁷⁰ President Eisenhower, too, skirted these Logan Act suggestions.¹⁷¹ (Only after the incident blew over did Dulles reject the idea, deeming the congressman’s apparent violation “remote and technical.”¹⁷²) Several years later, President Kennedy remained “silent” about the pre-inaugural Moscow activities of two top aides;¹⁷³ his Department of Justice later declined to comment on a suit brought to enjoin a potential Logan Act violation.¹⁷⁴ An Assistant White House Press Secretary similarly “ha[d] nothing on that” when asked about three Americans who had met with North Vietnamese leaders in 1965.¹⁷⁵ And Secretary of State William Rogers had “no comment” on comedian Bob Hope’s efforts to negotiate the release of American prisoners of war in 1971¹⁷⁶: “I don’t want to get into the general question.”¹⁷⁷

Speaking before the House Foreign Affairs Committee in 1980, Secretary of State Cyrus Vance refused to answer whether Americans negotiating for the release of hostages in Iran should be prosecuted. Vance was chided for his nonresponsiveness after stating simply that “[t]he Logan Act has never been adhered to, as far as I know.”¹⁷⁸ One beneficiary of nonenforcement, Ramsey Clark, pondered his uncertain fate: “I’ve never heard one way or the other, I don’t know if they’re still investigating or what they are doing.”¹⁷⁹ In a scathing Senate speech, Senator Bob Dole accused President

¹⁶⁸ *Cry for Wallace Scalp Increases*, TIMES-PICAYUNE (New Orleans), Apr. 15, 1947, at 4.

¹⁶⁹ Robert K. Walsh, *Leaders Differ on Stassen’s Bid as He Awaits Reply from Stalin*, EVENING STAR (D.C.), Oct. 5, 1950, at 1, 5.

¹⁷⁰ *Rep. O’Konski Would Serve Time “Gladly” for Urging POW Release*, TIMES-PICAYUNE (New Orleans), Oct. 22, 1953, at 1.

¹⁷¹ *See President By-Passes Comment on O’Konski*, N.Y. TIMES, Oct. 22, 1953, at 3 (professing to have read “only an indirect report on the letter”).

¹⁷² *U.S. Won’t Prosecute O’Konski for Letter, Dulles Declares*, EVENING STAR (D.C.), Nov. 3, 1953, at A-6.

¹⁷³ *JFK: Silent on “Mission to Moscow,”* HUM. EVENTS, Mar. 24, 1961, at 177.

¹⁷⁴ *Sue to Block Tractor Deal with Castro*, CHI. DAILY TRIB., June 18, 1961, at 3.

¹⁷⁵ John Corry, *Private Peace Mission to Hanoi Expected Back in U.S. by Jan. 9*, N.Y. TIMES, Dec. 29, 1965, at 3.

¹⁷⁶ Marilyn Berger, *Comedian Bob Hope Makes a Move to Free American POWs*, WASH. POST, Dec. 24, 1971, at A3.

¹⁷⁷ *Id.*

¹⁷⁸ *Foreign Assistance Legislation for Fiscal Year 1981 (Part 1): Hearings Before the H. Comm. on Foreign Affairs, 96th Cong. 36* (1980) (statement of Secretary of State Cyrus Vance) [hereinafter “Vance Statement”].

¹⁷⁹ Gene Tharpe, *Of Ramsey Clark*, ATLANTA CONST., Sept. 17, 1980, at 5A.

Carter of “hop[ing] the Ramsey Clark issue will be forgotten and blow away.”¹⁸⁰ Much later, when President Obama was petitioned to “[f]ile charges against the 47 U.S. Senators in violation of the Logan Act,” the White House’s official “Response” failed even to reference the Logan Act or the possibility of prosecution.¹⁸¹ And Press Secretary Josh Earnest side-stepped a question about the legality of Donald Trump’s pre-inaugural diplomacy: “I’m not aware of the finer points of the Logan Act, so there may be somebody else that you consult on that one.”¹⁸²

When pressured to crack down on self-appointed diplomats, the Executive rarely does more than “hope[] that the whole brouhaha w[ill] go away.”¹⁸³ Definitively announcing one’s choice would very likely backfire either way; “[c]riticism is likely to be heard whether the administration decides to prosecute . . . or decides against it.”¹⁸⁴ So executive-branch officials feebly obfuscate, straining to avoid the public scrutiny and accountability that accompany taking an actual position.

3. Interpretive Avoidance

On the extremely rare occasions when Presidents feel compelled to articulate a decision, they sometimes decline prosecutions based on dubious—or utterly implausible—readings of the statutory text. Their guiding principle seems to be as follows: when a fair reading of the Logan Act would enable a politically untenable prosecution, and silence is not an acceptable response, the Act should be construed so as to avoid embarrassment to the executive branch, even if plainly contrary to congressional intent. On these occasions, the White House “cover[s] a fundamentally political decision with the veneer of legal obligation.”¹⁸⁵ Such sleights resemble Presidents’ avoidance of difficult choices under the War Powers Resolution—a measure principally designed to *restrain* presidential power.¹⁸⁶

Consider the Kennedy administration’s unconventional effort to extricate the 1200-plus Cuban prisoners who had been captured during the CIA-

¹⁸⁰ 126 CONG. REC. 18,515 (1980) (statement of Sen. Dole (R-Kan.)); *see also id.* (“Now, quietly, there is no action taken—nothing done.”).

¹⁸¹ *See File Charges Against the 47 U.S. Senators in Violation of the Logan Act in Attempting to Undermine a Nuclear Agreement*, THE WHITE HOUSE (Mar. 9, 2015) [hereinafter *File Charges*], <https://petitions.whitehouse.gov/petition/file-charges-against-47-us-senators-violation-logan-act-attempting-undermine-nuclear-agreement> [perma.cc/5M2F-768S].

¹⁸² *Press Briefing by Press Secretary Josh Earnest*, THE WHITE HOUSE (Dec. 5, 2016, 12:28 PM), <https://obamawhitehouse.archives.gov/the-press-office/2016/12/05/press-briefing-press-secretary-josh-earnest-12516> [perma.cc/S42E-MC3V].

¹⁸³ Ungar, *supra* note 151, at B5.

¹⁸⁴ *Law Checked in Lynd Case*, SUN (Balt.), Jan. 24, 1966, at A6.

¹⁸⁵ Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1195 (2006).

¹⁸⁶ *See* Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 986–98 (2016) (explaining and defending the official position of the State Department Legal Adviser’s Office that military action in Libya did not constitute “hostilities” within the meaning of the War Powers Resolution).

sponsored Bay of Pigs invasion. By this point, Kennedy could hardly have conferred directly with his Cuban counterpart.¹⁸⁷ But when Castro bizarrely intimated that he would trade these detainees for five hundred heavy-duty tractors, Kennedy saw an opening.¹⁸⁸ He quietly recruited three prominent citizens to form the “Tractors for Freedom” Committee, which would solicit monetary contributions from the American people on a “nongovernmental, voluntary” basis.¹⁸⁹ After meeting with Castro’s representatives—parolees flown to Washington to negotiate—the Committee pledged to consummate the exchange.¹⁹⁰

Congressional Republicans immediately pounced: was the Committee authorized to negotiate on behalf of the United States? If so, Kennedy was dealing directly with a despised dictator. If not, a clearer violation of the Logan Act could hardly be imagined. To Kennedy’s great chagrin, Congress erupted with bipartisan demands that he clarify the Committee’s legal status to illuminate the issue of Logan Act liability.¹⁹¹ He never did so. Rather, he grasped for other statutory grounds to silence the agitation for transparency. In a public address, Kennedy contended that “the Logan Act is not involved, inasmuch as it covers only negotiations ‘in relation to any disputes or controversies with the [United States], or to defeat the measures of the [United States].’”¹⁹² Attorney General Robert Kennedy echoed that analysis in a letter to an inquiring congressman.¹⁹³ The State Department shed more light on the administration’s shaky rationalization two years later: “There was no dispute between the United States and Cuba in regard to the prisoners since,

¹⁸⁷ See 107 CONG. REC. 8543 (1961) (statement of Sen. Morse (D-Or.)) (“[W]e are not, of course, in a position as a government to negotiate directly with the Castro regime.”).

¹⁸⁸ See PHILLIP J. BIGGER, *NEGOTIATOR: THE LIFE AND CAREER OF JAMES B. DONOVAN* 105 (2006).

¹⁸⁹ John W. Finney, *Castro Will Get Tractor Pledge*, N.Y. TIMES, May 23, 1961, at 1, 2.

¹⁹⁰ See *id.*

¹⁹¹ See, e.g., 107 CONG. REC. 8541 (1961) (statement of Sen. Case (R-S.D.)) (asking whether “the Cuban operation was a U.S. operation and the United States was officially in it”); *id.* at 8543 (statement of Sen. Mundt (R-S.D.)) (“I hope that . . . the matter will be cleared up by a statement issued without delay and with crystal clarity.”); *id.* at 8545 (statement of Sen. Morse (D-Or.)) (“We want to know from our State Department, and soon, its position in regard to this question.”); *id.* at 8642 (statement of Sen. Capehart (R-Ind.)) (“Today I am asking the President of the United States . . . whether or not these people are acting with the advice and consent of our Government”); *id.* at 8711 (statement of Sen. Dodd (D-Conn.)) (“[T]he situation is by now so confused that I feel it is mandatory for the State Department to issue a statement”); *id.* at A3801 (statement of Rep. Alger (R-Tex.)) (“A clear-cut statement from the President is needed.”); *id.* at A3853 (statement of Rep. Chamberlain (R-Mich.)) (asking whether “the private citizens have . . . the full approval of the American Government”).

¹⁹² *Statement by the President on the Tractors-for-Freedom Movement* (May 24, 1961), reprinted in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY, CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF THE PRESIDENT, JANUARY 20 TO DECEMBER 31, 1961, 393, 393 (1962) [hereinafter *Tractors-for-Freedom Statement*].

¹⁹³ See Letter from Robert F. Kennedy, Att’y Gen., to Rep. Robert H. Michel (R-Ill.) (June 22, 1961), in 107 CONG. REC. 11,220 (1961).

although the United States deplored their retention, there were no formal efforts by the United States to obtain their release.”¹⁹⁴

That no “dispute” or “controversy” existed between the two governments at that time is difficult to swallow. The Kennedy administration had a “moral responsibility” to save the men it had enlisted to invade Cuba¹⁹⁵—in the Attorney General’s words, to “do everything possible to keep them from being shot.”¹⁹⁶ Castro uniformly characterized the tractors as an “indemnity” for the Bay of Pigs.¹⁹⁷ In short, “[i]t was clearly our Executive’s wish that the prisoners be released and Castro’s that they not be,” at least without an acceptable bribe.¹⁹⁸ Critics of Kennedy’s strategy accordingly denounced his shrewd circumvention of the Logan Act’s triggering conditions.¹⁹⁹ Moreover, the State Department’s “no formal efforts” test would immunize otherwise-forbidden communications with certain regimes simply because the United States enjoys no direct diplomatic relations with them. Yet the Logan Act was enacted against a backdrop of “diplomatic silence”—undeclared war, even—with France, and Dr. Logan’s private peace mission was the archetypal example of a statutory offense.²⁰⁰

President Reagan, too, twisted the Logan Act’s text in explaining why Jesse Jackson’s Cuban hostage-release efforts did not technically violate the law: “[P]rivate citizens cannot go and literally try to negotiate terms and arrangements with foreign governments. I don’t think there’s been any evidence of that being broken.”²⁰¹ After all, as a State Department spokesman added, “it is certainly our position . . . that he was not in any way authorized to negotiate on behalf of our Government.”²⁰² So in the heat of the 1984 presidential campaign, the Reagan administration spared itself great discomfort by dismantling a straw man rather than seriously grappling with the actual language of the Act’s elements. And it nonsensically cited Jackson’s

¹⁹⁴ *Briefing on Cuban Developments* (Jan. 25, 1963), reprinted in 15 EXECUTIVE SESSIONS OF THE SENATE FOREIGN RELATIONS COMMITTEE 81, 123 (1987).

¹⁹⁵ Charles William Maynes, Opinion, *Clark’s Effort in Diplomacy Echoes Past*, ATLANTA CONST., June 15, 1980, at 1C, 8C.

¹⁹⁶ ARTHUR M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 469 (2d ed. 2002) (quoting Attorney General Kennedy).

¹⁹⁷ *Id.*

¹⁹⁸ Vagts, *supra* note 9, at 287–88.

¹⁹⁹ See 107 CONG. REC. 8539 (1961) (statement of Sen. Capehart (R-Ind.)) (“Can there be any question in the mind of anyone that this is a dispute between Castro and the U.S. Government?”); *Washington Report by Congressman Bruce Alger, Fifth District, Texas* (June 3, 1961), in 107 CONG. REC. 9501 (1961) (“We are in controversy with Communist Castro.”); Roscoe Drummond, *It’s Dangerous Business*, SPARTANBURG HERALD, May 28, 1961, at 4 (“[S]ince Castro has stated he views the tractor ‘gift’ as ‘indemnity’ or reparations for the invasion, there seems to me a very real controversy here.”).

²⁰⁰ Vagts, *supra* note 9, at 287.

²⁰¹ Steven R. Weisman, *President Finds No Evidence Jackson Broke Law in Cuba*, N.Y. TIMES, July 10, 1984, at A16.

²⁰² Hedrick Smith, *Administration and Jackson’s Trip: Limits of Citizen Diplomacy Tested*, N.Y. TIMES, July 7, 1984, at 8.

absence of official authority as one reason why he had *not* committed a crime.

Why, then, do Presidents not talk their way out of the Logan Act lime-light more often? In court, executive representations that certain of the Act's elements had been met might well operate as a binding rule of decision, since they would involve quasi-factual assessments implicating the President's core ability to construct and implement the nation's foreign policy.²⁰³ And in the public sphere, assertions that one or more elements had not been satisfied might just as easily shrink any serious appetite for prosecution.

The likely reason is a familiar one: denying that individual violations have occurred—much like pledging categorical nonenforcement or declaring the Logan Act unconstitutional—would prospectively reduce any remaining deterrence value flowing from the law's formal retention. Presidents want the Logan Act to work sometimes—to curtail much behavior that a fair reading of the statute would proscribe. That is why they and their subordinates *say* they will enforce the Act,²⁰⁴ warn citizens not to violate it,²⁰⁵ and sometimes even induce Logan Act accusations,²⁰⁶ while simultaneously condon-

²⁰³ For a helpful overview of this classic conception of the political-question doctrine, see Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1915–39 (2015). Importantly, this approach applied equally to criminal prosecutions. *Id.* at 1920. Such deference could conceivably extend to several of the Logan Act's elements—namely, whether a defendant acted with the “authority of the United States”; whether the recipient of a communication qualified as a “foreign government” or an “officer or agent thereof”; whether “measures or conduct [of such a government]” and “measures of the United States” had been implicated; and whether an intergovernmental disagreement had ripened into a “dispute[] or controvers[y] with the United States.” 18 U.S.C. § 953 (2012).

²⁰⁴ See *Evidence of Soviet Plots*, *supra* note 141 (quoting Assistant Attorney General John Crim's assertion that “[o]f course the [Logan Act] should be enforced”); *Station Assaults Ghotbzadeh on Question of Hostage Trials*, GLOBE & MAIL (Toronto), June 7, 1980, at 3 (“‘The Administration will uphold the law,’ a [State Department] spokesman said . . .”); Francis X. Clines, *Reagan Contends Jackson's Missions May Violate Law*, N.Y. TIMES, July 5, 1984, at A1 (quoting President Reagan's admonition that “there is a law, the Logan Act . . . that is the law of the land”); see also *FBI Hearing*, *supra* note 152, at 72 (quoting FBI Director Comey's statement that the Bureau “certainly will” conduct “Logan Act investigations . . . in the future”).

²⁰⁵ See David Lawrence, *Gregory Warns of War-End Plots*, EVENING STAR (D.C.), Nov. 9, 1918, at 9 (citing Attorney General Thomas Gregory's warning that Americans who seek “in-fornal participation in the [World War I] peace parleys . . . will be subject to prosecution if they have violated the Logan Act”); Richard V. Oulahan, *Washington Annoyed*, N.Y. TIMES, Dec. 1, 1928, at 2 (reporting that “copies of the Logan [A]ct had been furnished by the State Department to persons reported to be engaged in the practices which the act forbids”); *Trans-ocean Caller of Diplomats Gets Warning from Uncle Sam*, WASH. POST, July 31, 1936, at 1 (recounting a U.S. District Attorney's admonition to a Cleveland industrialist to “stop telephoning and writing foreign diplomats”); Max Hall, *Logan Act and Letters to Joe*, TUSCALOOSA NEWS, Oct. 10, 1950, at 4 (“Every few days the State Department gets a letter [asking] whether it is permissible . . . to explain to Stalin what a mess he's getting the world into. The State Department discourages these earnest people and quotes the Logan Act to them.”); Willard Edwards, *Capehart Hits 2 Way View of Logan Act*, CHI. DAILY TRIB., May 26, 1961, at 15 (“[T]he [S]tate [D]epartment was warning a private citizen . . . that he would be violating the Logan [A]ct if he tried to collect money from Cuba for his brother's death.”).

²⁰⁶ For example, after Senator Barry Goldwater informed 1972 Republican National Convention attendees that Ramsey Clark was “violating the Logan Act,” Ungar, *supra* note 142, at

ing textbook offenses when their posturing fails. Interpretive avoidance therefore appears to be a last resort for executive-branch actors who cannot easily offload their problems onto another department or publicly equivocate any longer.

4. *Lobbying for Repeal*

After decades of deflecting Logan Act entreaties, an exasperated Department of Justice began pushing for its repeal. Congressman Paul Simon wrote to the Attorney General in 1978 to ask whether he wished to see the Logan Act excised in a pending recodification of federal criminal statutes. A DOJ spokesman responded unequivocally that “the Department does support the repeal of the Logan Act.”²⁰⁷ It had in fact “supported” a recent repeal bill, “stated its opposition” to an amendment reinstating the Act, and in public testimony “again stated our belief that the Act should be repealed.”²⁰⁸ Importantly, the Department’s position was “based on policy considerations,” not constitutional misgivings.²⁰⁹ DOJ was perfectly willing to set aside these concerns by “some showing of need for the Act.”²¹⁰ But the Department could detect “no irreparable injury to the United States because of a failure to prosecute” Logan Act violators.²¹¹ (President Carter reinforced this point the next year, when he seemed not to know that the Act existed.²¹²)

DOJ evidently reached out to lobby key senators as well. Denouncing the Logan Act as a useless archaism, Senator Edward Kennedy disclosed that repeal had been “urged upon us by the Justice Department. . . . [T]hey urged us to strike it.”²¹³ Characterizing the Act as “one of the most antiquated provisions in the current code,” the Department had “asked Senator McClellan, Senator Hruska, and the rest of us to take it out.”²¹⁴

A24, Goldwater evidently revealed that his comments were “made at the request and with the approval of President Nixon,” 118 CONG. REC. 30,602 (1972) (statement of Rep. Schmitz (R-Cal.)).

²⁰⁷ Letter from Denis J. Hauptly, Task Force on Criminal Code Revision, to Rep. Paul Simon (D-Ill.) (June 7, 1978), in *Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 96th Cong. 3277, 3277 (1982) [hereinafter Hauptly Letter].

²⁰⁸ *Id.*

²⁰⁹ *Id.* For that reason, “we have undertaken no exhaustive analysis of the constitutional questions.” *Id.*

²¹⁰ *Id.* at 3278.

²¹¹ *Id.*

²¹² See Interview with the President: Remarks and a Question-and-Answer Session with Editors and Broadcasters (Oct. 10, 1979), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER, JUNE 23 TO DECEMBER 31, 1979, 1855, 1861 (1980) (“I don’t have any authority, nor do I want any authority, to interrupt or to interfere with the right of American citizens to travel where they choose and to meet with whom they choose.”).

²¹³ 124 CONG. REC. 1366–67 (1978) (statement of Sen. Kennedy (D-Mass.)).

²¹⁴ *Id.* at 1369.

The repeal effort failed, due to the tenacity of a single U.S. senator.²¹⁵ And so to the present day, administrations stammer out half-responses to unwanted Logan Act inquiries. They cycle through familiar modes of silence and avoidance, artfully dodging any obligations that Article II might impose on them. Unfortunately for the Executive, public demand for enforcement has made this an acutely embarrassing burden.

B. “Enforce It”: Cataloguing Pleas for Prosecution

The Logan Act occupies an unusual role in the ecosystem of faithful execution. It was enacted to safeguard the eminence of an office that has become the focal point of American politics, and that commands the full machinery of the federal criminal law. In the usual course, likely Logan Act violations are rapidly detected and met with great public clamor; observers loudly wonder why the latest interloper suffers no penalty from the Executive for committing what is effectively a crime against the Executive. Non-enforcement of the Logan Act—often perceived as a failure of courage or an abdication of constitutional duty—thus carries significant reputational and dignitary costs to the Act’s “beneficiaries.”

This subpart details the recurring practice, by both members of Congress and the general public, of exhorting Presidents to initiate Logan Act proceedings. The relentless repetition of such comments highlights the distinguishing feature of nonenforcement by accretion: it results not from an avulsive shift in any one administration’s priorities, but from discrete decisions not to prosecute colorable offenses in a multitude of settings.

1. Members of Congress

Lawmakers have been at the forefront of urging Logan Act enforcement. In 1802, five American lawyers provided the Spanish Minister to the United States legal opinions related to pending claims between the two governments.²¹⁶ Two years later, a Senate committee issued a report methodically detailing why those communiqués satisfied each element of the Logan Act. It then urged the Attorney General to study the matter and, if he agreed, to “instruct the proper law officer to commence a prosecution.”²¹⁷ Decades later, Senator Roscoe Conkling declared of one possible violation, “let it be investigated Let there be light”²¹⁸ Senator Joseph West bookended a floor speech on the Logan Act by emphasizing the President’s “responsibility” to “see[] that the laws are faithfully executed.”²¹⁹ And in 1896,

²¹⁵ See *infra* notes 611–15 and accompanying text.

²¹⁶ JOHN BASSETT MOORE, 4 A DIGEST OF INTERNATIONAL LAW 450 (1906).

²¹⁷ 13 ANNALS OF CONG. 315 (1803).

²¹⁸ CONG. GLOBE, 42d Cong., 2d Sess. App. 66 (1872) (statement of Sen. Conkling (R-N.Y.)).

²¹⁹ *Id.* at 1232 (statement of Sen. West (R-La.)).

Senator William Chandler implored the President and the Attorney General to “do their duty” and “prosecute[] according to law” the newspaper magnate Joseph Pulitzer, alleged to have cabled British officials.²²⁰

Congressmen dialed up the pressure throughout the twentieth century. In 1900, Senator John Morgan complained that he had “several times” alerted the State Department to globetrotting busybodies who “deserve the punishment provided for their conduct by the [Logan Act].”²²¹ Senator Henry Cabot Lodge “suggested that [Herbert] Hoover be prosecuted” for lobbying the British government to end its naval embargo at the outset of World War I.²²² And in the interwar period, Representative Hamilton Fish, Jr. made a “request that the Logan [A]ct . . . be enforced” directly to President Coolidge.²²³ Fish clarified that he did not necessarily support the Act as a policy matter. “[B]ut as it is on the books I want it enforced.”²²⁴

On the eve of Franklin Roosevelt’s presidency, Senator Arthur Robinson insisted that Roosevelt confidante William Bullitt be “apprehended and brought to justice, under the Logan Act.”²²⁵ Another congressman later exhorted Roosevelt’s Justice Department to “call the attention of the grand jury” to a supposed violation.²²⁶ Attorney General Francis Biddle was even lobbied directly: given that certain travelers to the Soviet Union had apparently violated the Act, one legislator asked that Biddle “take appropriate action.”²²⁷

The Truman administration endured a “Congress . . . full of voices demanding that [Henry Wallace] be proceeded against” for meeting with European governmental officials to foment opposition to the Truman Doctrine.²²⁸ One of them, Republican Representative J. Parnell Thomas, proclaimed that “[t]he attorney general will have no excuse whatever for failing to prosecute Wallace,” for the Logan Act “covers [him] just as you’d cover a person with a cloak.”²²⁹ His colleague John Rankin recited the Logan Act before urging the Justice Department to “wake up” and “enforce the laws enacted by the Congress.”²³⁰ The White House did no such thing; it instead muddled through with minimal reason-giving.

²²⁰ 28 CONG. REC. 491 (1896) (statement of Sen. Chandler (R-N.H.)). Chandler was concerned not with “the wisdom of the law, but . . . the law as it stands upon the statute books.” *Id.* at 492.

²²¹ 33 CONG. REC. 6026 (1900) (statement of Sen. Morgan (D-Ala.)).

²²² *Hoover Won the Gratitude of Millions for His Relief Work After World War I*, N.Y. TIMES, Oct. 21, 1964, at 41.

²²³ *Fish Would Punish Debt Critics Abroad*, N.Y. TIMES, May 28, 1925, at 20.

²²⁴ *Id.*

²²⁵ 76 CONG. REC. 3146 (1933) (statement of Sen. Arthur Robinson (R-Ind.)).

²²⁶ 84 CONG. REC. 857 (1939) (statement of Rep. Schafer (R-Wis.)).

²²⁷ Letter from Rep. John Lesinski (D-Mich.) to Francis Biddle, Att’y Gen. (May 8, 1944), in 90 CONG. REC. A2315 (1944).

²²⁸ Krock, *supra* note 103, at 24.

²²⁹ William Strand, *Punish Wallace as Foe of U.S., Thomas Insists*, CHI. DAILY TRIB., Apr. 15, 1947, at 13.

²³⁰ 93 CONG. REC. 3351 (1947) (statement of Rep. Rankin (D-Miss.)).

In 1951, Representative Eugene McCarthy alerted the Justice Department to a potential Logan Act violation by the South Texas Association, which had “announced its intention to lobby . . . the Mexican government” on the fraught issue of migrant labor.²³¹ In 1960, Senator Thomas Dodd called DOJ’s attention to an American business leader who had met privately with the Soviet Premier, Nikita Khrushchev. Dodd opined that this magnate had “violated . . . the Logan Act and should be prosecuted.”²³² Dodd emphasized the separation-of-powers stakes, “pointing out to the Attorney General . . . the law of the land” and urging him to “carry out his duty.”²³³ The next year, as the Kennedy administration gracelessly denied its sponsorship of the Tractors-for-Freedom Committee, congressional critics called the President’s bluff. He was exhorted to “courageously enforce[]” the Logan Act against uncredentialed meddlers,²³⁴ who should “face the consequences of the[ir] violation”²³⁵ in a spirit of “strict adherence to laws . . . on the books.”²³⁶ Republican Senator Barry Goldwater separately extolled a lawsuit designed to “test the willingness of Atty. Gen. [Robert] Kennedy to enforce the law.”²³⁷ The last thing the administration needed in May 1961 was Congress—or anyone—“demand[ing] now that [it] . . . enforce the Logan Act.”²³⁸

Congressional cries for Logan Act enforcement continued apace throughout the Vietnam War. In December 1965, three antiwar activists engaged in lengthy discussions with top North Vietnamese officials at a time when the U.S. government refused to deal with them directly.²³⁹ Senator Karl Mundt proposed that they be “tried for violation of [the] law.”²⁴⁰ Representative O.C. Fisher, too, advised that they “be prosecuted” and “made to answer for their crimes.”²⁴¹ Representative Samuel Devine outdid both: he “directed a letter to the Attorney General . . . demanding to know why the Department of Justice . . . has not taken action” under the Logan Act.²⁴² As a general matter, he asked, should not the executive branch “prosecute violations of the Federal statutes”?²⁴³

²³¹ Thomas L. Stokes, *Dead Ashes of Bright Promises*, EVENING STAR (D.C.), Oct. 19, 1953, at A-11.

²³² 106 CONG. REC. 10,661 (1960) (statement of Sen. Dodd (D-Conn.)).

²³³ *Id.* at 10,662.

²³⁴ 107 CONG. REC. 8540 (1961) (statement of Sen. Mundt (R-S.D.)).

²³⁵ *Id.* at 8541 (statement of Sen. Case (R-S.D.)).

²³⁶ *Id.* at A3801 (statement of Rep. Alger (R-Tex.)).

²³⁷ William Anderson, *Goldwater OK’s Suit to Block Tractor Deal*, CHI. DAILY TRIB., June 19, 1961, at 2 (alteration in original).

²³⁸ 107 CONG. REC. A4325 (1961) (statement of Rep. Alger (R-Tex.)).

²³⁹ Peter Grose, *Lynd Says Hanoi Denies Getting a Direct U.S. Bid*, N.Y. TIMES, Jan. 9, 1966, at 1. One of the three had recently urged opponents of the war to “attempt[] to negotiate a settlement of the conflict directly with Viet Cong leadership.” *Leftist Leaders*, *supra* note 75, at 2.

²⁴⁰ Grose, *supra* note 239, at 6.

²⁴¹ 112 CONG. REC. 83–84 (1966) (statement of Rep. Fisher (D-Tex.)).

²⁴² *Id.* at 110 (statement of Rep. Devine (R-Ohio)).

²⁴³ *Id.*

Similar reactions ensued when the chairman of an American nonprofit met with Ho Chi Minh and invited the North Vietnamese leader to an upcoming private peace conference. Representative Durward Hall openly wondered, “why is not the head of the Department of Justice prosecuting him under the Logan Act?”²⁴⁴ A colleague concurred: “[I]t is high time that the Logan Act be explored for possible application in this case.”²⁴⁵ Soon afterward, an American lawyer’s prisoner-release negotiations with North Vietnamese officials triggered a spate of public demands on the executive branch: “[T]he Department of Justice has a responsibility to examine . . . whether or not criminal prosecution should be brought,” maintained Senator Gordon Allott.²⁴⁶ Strom Thurmond²⁴⁷ and Wallace Bennett²⁴⁸ voiced identical sentiments on the Senate floor. Yet again, the administration did and said nothing in response.

Representative William Bray unleashed his frustration after an antiwar student group purported to sign a peace treaty with Hanoi in 1971. Bray “bluntly asked [the State Department] why it is not enforcing the longstanding Logan Act.”²⁴⁹ If violations were repeatedly overlooked, he asked Secretary of State William Rogers, couldn’t “anyone set himself up as a quasi-official spokesman for the United States government, and in doing so make the world’s mightiest nation look like a fool?”²⁵⁰ Bray found “[t]he failure to enforce the Logan Act . . . reprehensible,” for “[t]he law is on the statute books to be enforced.”²⁵¹ Presidential inaction was simply “not the intent of Congress.”²⁵² Another congressman wrote the Attorney General later that year, “specifically ask[ing] what action was contemplated” in response to “my charges of the Logan Act being violated.”²⁵³

The White House also refused to act on appeals from congressmen demanding that Ramsey Clark be prosecuted for having conferred with North Vietnamese officials.²⁵⁴ One dismayed lawmaker questioned why the “Justice Department [has] not already asked for the indictment of Clark.”²⁵⁵ In 1974, Representative Ed Koch “asked the Department of Justice to advise [him] as to what action it [wa]s undertaking” concerning the oil company

²⁴⁴ 113 CONG. REC. 25,997 (1967) (statement of Rep. Hall (R-Mo.)).

²⁴⁵ *Id.* at 13,424 (statement of Rep. Ashbrook (R-Ohio)).

²⁴⁶ 115 CONG. REC. 32,376 (1969) (statement of Sen. Allott (R-Colo.)).

²⁴⁷ *See* 115 CONG. REC. 32,385 (1969) (statement of Sen. Thurmond (R-S.C.)) (“I urge the Attorney General of the United States to look into this matter as quickly as possible.”).

²⁴⁸ *See id.* at 32,391 (statement of Sen. Bennett (R-Utah)) (“[T]he Justice Department should carefully review the conduct of Mr. Kunstler under the provisions of the Logan Act.”).

²⁴⁹ *State Department Asked to Enforce Logan Act*, HUM. EVENTS, Feb. 13, 1971, at 12.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*; *see also id.* (“This situation must not be allowed to continue. It’s time the State Department acted with vigor and determination . . .”).

²⁵³ 117 CONG. REC. 25,649 (1971) (statement of Rep. Rarick (D-La.)).

²⁵⁴ *See Logan Act Prosecutions*, SUN (Balt.), Aug. 24, 1972, at A8 (reporting that “[s]everal Republican congressman have called for the prosecution of . . . Mr. Clark”).

²⁵⁵ 118 CONG. REC. 30,602 (1972) (statement of Rep. Schmitz (R-Cal.)).

Aramco's dealings with the Saudi Arabian government.²⁵⁶ Representative Samuel Devine later beseeched "the Justice Department, if they have the guts to do so, [to] examine [a certain] condition as it relates to the Logan Act."²⁵⁷ And in 1979, fourteen congressmen called for President Carter to prosecute Jesse Jackson for meeting with leaders of the unrecognized Palestine Liberation Organization.²⁵⁸

Ramsey Clark's 1980 trip to Tehran at the height of the hostage crisis sparked a blistering condemnation of Logan Act nonenforcement. Clark and five other Americans met with Iran's President and Foreign Minister in an effort to resolve the stalemate.²⁵⁹ Deeming "active enforcement of the Logan Act" crucial to American wellbeing, Senator Dole (and twenty cosponsors) introduced a resolution imploring the President to "instruct the Attorney General to prosecute . . . any and all persons who are in violation of the Logan Act."²⁶⁰ This resolution would enable the Senate to "go on record in support of . . . just and vigorous prosecution of the law of the land."²⁶¹ Dole stated his case simply: because the Logan Act was still "on the books . . . it should be enforced."²⁶² The only way to maintain congressional primacy in policymaking—to "maintain respect for our laws"—was to "enforce them when they are broken."²⁶³

Other senators enthusiastically endorsed Dole's resolution, which passed by voice vote in slightly modified form.²⁶⁴ Senator Baker explicitly invoked the Take Care Clause. By his lights, it was "the responsibility of the President to insure that the laws of the United States are faithfully executed. This resolution calls on the President to enforce those laws."²⁶⁵ If Carter neglected to prosecute such a "clear"²⁶⁶ violation, Baker argued, he "will have . . . failed in his constitutional responsibility."²⁶⁷ Senator Thurmond

²⁵⁶ 120 CONG. REC. 1405 (1974) (statement of Rep. Koch (D-N.Y.)); *see also id.* ("I believe that Aramco . . . violated among other laws . . . the Logan Act.").

²⁵⁷ 125 CONG. REC. 26,384 (1979) (statement of Rep. Devine (R-Ohio)).

²⁵⁸ Nathan Z. Dershowitz & Abraham S. Goldstein, Opinion, *High Time to Scrap the Anachronistic Logan Act*, N.Y. TIMES, Oct. 11, 1979, at A26.

²⁵⁹ Stuart Auerbach, *Ramsey Clark Leaves Iran, Mission Produces No Results*, WASH. POST, June 9, 1980, at A1, A18.

²⁶⁰ 126 CONG. REC. 6374 (1980).

²⁶¹ *Id.* at 6375 (statement of Sen. Dole (R-Kan.)).

²⁶² *Id.* at 14,449.

²⁶³ *Id.* at 14,450; *see also id.* at 6,374 (urging the President to "carry out his responsibilities with regard to the Logan Act"); *id.* at 7,369 ("[I]f there is a violation . . . there should be a prosecution."); *id.* at 14,092 (opining that "prosecution should be pursued under the Logan Act, which is on the books"); *id.* at 14,154 (pleading the administration to "prosecute to the fullest extent of the law the Logan Act"); *id.* at 14,449 ("[T]he Attorney General should proceed with an investigation under the provisions of the Logan Act.").

²⁶⁴ Senator Robert Byrd's modified resolution "[s]upport[ed] the enforcement of any applicable statutes not excluding the Logan Act . . . violated in the course of private negotiating initiatives." *Id.* at 7371.

²⁶⁵ *Id.* at 6456 (statement of Sen. Baker (R-Tenn.)).

²⁶⁶ *Clark Broke U.S. Law, Sen. Baker Charges*, EVENING STAR (D.C.), June 10, 1980, at A-7.

²⁶⁷ 126 CONG. REC. at 6456 (statement of Sen. Baker (R-Tenn.)).

also “sincere[ly] hope[d] that our Government here will do its duty” and “hold[] [Clark] responsible for his actions.”²⁶⁸ Representative Eldon Rudd introduced an identical measure in the House,²⁶⁹ which was far from the only enforcement plea in the lower chamber.²⁷⁰

Just over a decade later, a group of House Republicans—citing the Logan Act—petitioned Attorney General William Barr to appoint an independent counsel to investigate whether the Clinton campaign had attempted to subvert the ongoing Uruguay Round trade talks.²⁷¹ Louis Farrakhan’s 1996 meetings with African and Middle Eastern leaders elicited similar congressional commentary, including multiple requests for an investigation by the Justice Department.²⁷² “Do our laws,” one congressman wondered, “have any meaning or not?”²⁷³ In 2008, Representative Tom Tancredo “call[ed] on the Justice Department to initiate an investigation into whether or not the Logan Act . . . ha[d] been violated” by Americans who met with Iranian President Mahmoud Ahmadinejad over dinner.²⁷⁴ In the midst of the 2016 Democratic National Convention, Senator Claire McCaskill declared that Republican nominee Donald Trump “should be investigated” for “violat[ing] the Logan Act” by encouraging the Russian government to hack his opponent’s emails.²⁷⁵ And in January 2017, thirty-five members of Congress asked Attorney General Loretta Lynch to appoint a special counsel to investigate Donald Trump’s “flagrant violations of federal law”—actions that “flout[ed] the letter and spirit of the Logan Act.”²⁷⁶ Their

²⁶⁸ *Id.* at 6457 (statement of Sen. Thurmond (R-S.C.)).

²⁶⁹ *See id.* at 13,843 (statement of Rep. Rudd (R-Ariz.)) (claiming that it “would be totally irresponsible for the President to allow [breaches] . . . to go unprosecuted”); *id.* (pressing for “enforcement of the law through passage of this resolution”).

²⁷⁰ *See, e.g., id.* at 13,007 (statement of Rep. Evans (R-Del.)) (insisting that Clark must “be prosecuted to the fullest extent of the law”); *id.* at 2798 (statement of Rep. Applegate (D-Ohio)) (“Mr. Clark must answer for his reprehensible action.”); *id.* at 14,234 (statement of Rep. Holt (R-Md.)) (“[T]he President . . . should go forward with the investigation of Ramsey Clark and others.”).

²⁷¹ John Maggs, *House Republicans Want Probe into Possible Sabotage of Talks*, J. COM. (Nov. 1, 1992, 7:00 PM), http://www.joc.com/maritime-news/house-republicans-want-probe-possible-sabotage-talks_19921101.html [<https://perma.cc/DZX9-TNCP>].

²⁷² *See* Michael Briggs, *Justice Dept. Investigates Farrakhan*, CHI. SUN-TIMES, Feb. 16, 1996, at 1 (noting that Rep. Peter King (R-N.Y.) “ask[ed] the attorney general to investigate” in demanding that Farrakhan “be held fully accountable for [his] actions”); Letter from Rep. Bob Barr (R-Ga.) to Janet Reno, Att’y Gen. (Feb. 14, 1996), in 142 CONG. REC. 1701 (1996) (“It is unconscionable and unacceptable for our government to stand idly by, while federal laws may have been disregarded with impunity . . .”).

²⁷³ 142 CONG. REC. 1701 (1996) (statement of Rep. Barr (R-Ga.)).

²⁷⁴ Press Release, Office of Rep. Tom Tancredo, Tancredo Condemns Ahmadinejad Meeting (Sept. 26, 2008) (on file with author).

²⁷⁵ Alex Griswold, *McCaskill: Donald Trump Likely Violated Logan Act, Should Be Investigated*, MEDIAITE (July 28, 2016, 1:31 PM), <http://www.mediaite.com/tv/mccaskill-donald-trump-likely-violated-logan-act-should-be-investigated> [<https://perma.cc/WLU9-CKZH>].

²⁷⁶ Letter from Thirty-Five Members of Congress to Att’y Gen. Loretta Lynch, at 2 (Jan. 12, 2017), <https://huffman.house.gov/sites/huffman.house.gov/files/01.12.2017%20Letter%20to%20Attorney%20General%20Lynch%20Requesting%20Special%20Counsel%20to%20Investigate%20Trump%20Logan%20Act.pdf> [<https://perma.cc/PP8U-6HJN>].

plea was simple: "Our national interests require that the Logan Act be enforced."²⁷⁷

If pressure from members of Congress produced any actual investigations, not one of them resulted in a prosecution. Enacting the Logan Act and then demanding that it be enforced—in one case, formally resolving as much—have entirely failed to ensure minimal execution.

2. *The General Public*

Lawmakers are hardly the only ones to have pointed out the ever-widening chasm between the Logan Act's formal existence and its chronic nonuse. Members of the general public—often through the print media—have also urged the Executive to commence Logan Act prosecutions.

From 1922 to 1924, for example, a number of women's groups made it their mission to expose Logan Act violators and ensure their prosecution. One spokesperson explained this singular campaign: "If, at some future time, the representatives of the people . . . believe that this law is an unwise one, it is their duty to repeal it; until such time, however, we ask that it be enforced."²⁷⁸ Mary Kilbreth, a leader in the movement, urged President Harding to end the Logan Act's "humiliating impotence."²⁷⁹ After Senator Joseph France cabled several world leaders in an effort to secure America's attendance at an international economic conference, Kilbreth also "ask[ed] that the Attorney General proceed against [him] 'in the same manner and with the same vigor that any less distinguished internationalist would or should be prosecuted.'"²⁸⁰

In 1935, "an attempt was made in some circles" to have an American advisor to China's "Manchukuo" government prosecuted under the Act.²⁸¹ In 1947, the Missouri legislature issued a resolution calling for Henry Wallace's prosecution on account of his overseas activities.²⁸² That same year, a newspaper publisher "[u]rge[d] the Department of Justice to enforce the Logan Act, and to prosecute violators of the act."²⁸³ An op-ed writer wished to know why the Logan Act was "ignored by the national administration"

²⁷⁷ *Id.*

²⁷⁸ Cornelia A. Gibbs, Opinion, SUN (Balt.), Oct. 19, 1923, at 12; *see also id.* (advocating "enforcement of . . . the 'Logan Act'"). Assistant Attorney General John Crim spoke of having received numerous "inquiries as to why the government took no action against violation[s] of the Logan [A]ct." *Evidence of Soviet Plots*, *supra* note 141, at 5.

²⁷⁹ *Wants to Stop Alien Propaganda*, EVENING STAR (D.C.), Apr. 28, 1923, at 3.

²⁸⁰ *Seeks Prosecution of Senator France*, N.Y. TIMES, Apr. 15, 1922, at 1. Likely unbeknownst to Kilbreth, Senator France had also met with Vladimir Lenin and two other high-ranking Soviet officials to negotiate the release of an American prisoner. *See* MARGUERITE E. HARRISON, MAROONED IN MOSCOW: THE STORY OF AN AMERICAN WOMAN IMPRISONED IN RUSSIA 300–01 (1921).

²⁸¹ *Rea Through with Puppets*, *supra* note 108.

²⁸² O'Neill, *supra* note 56; *see also* Krock, *supra* note 103.

²⁸³ *Testimony of Walter S. Steele Regarding Communist Activities in the United States*, in *Hearings Before the H. Comm. on Un-American Activities*, 80th Cong. 172 (1947).

when Wallace wrote an open letter to Stalin the next year.²⁸⁴ And in 1960, another op-ed contributor questioned “why the Justice Department ha[d] not enforced the provisions of the Logan Act” over the years.²⁸⁵

Public cries for Logan Act enforcement manifested in unusual ways during the ill-fated Tractors-for-Freedom saga. Committee representatives were accosted by a real-estate agent named Douglas Vorhees when they landed in Miami after meeting with Castro.²⁸⁶ Vorhees attempted to restrain them by effecting a citizen’s arrest. “You’re in violation of the law,” he told the Committee members as he clutched their coats. “Sheriffs, citizens, help me arrest these men.”²⁸⁷ Around the same time, a quartet of Indiana businessmen calling themselves “Citizens to Block Tractors to Castro” sued to halt the exchange. They sought a writ of mandamus ordering Attorney General Kennedy to prosecute the Committee’s members under the Logan Act.²⁸⁸ Their petition alleged that Kennedy’s “failure to act and perform his public duties” had brought “contempt and embarrassment on the United States and its citizens.”²⁸⁹ Although the group lost its case, their lawyer got his point across: “[I]t is the duty of the United States attorney general to enforce all laws of the United States, including the Logan [A]ct.”²⁹⁰

Writing in 1965, one columnist lamented that “rigid enforcement [of the Act] has been neglected.”²⁹¹ President Truman, too, came to appreciate the Logan Act when it was no longer his to enforce. Now a stalwart defender of the statute, he unleashed a mini-tirade in urging the prosecution of three Americans who had met with North Vietnamese leaders in Hanoi. “They made a trip to get themselves into the penitentiary,” he exclaimed. “They have no business over there . . . What’s the Logan Act for? They haven’t got any sense.”²⁹² One editorialist tersely summed up these frustrations: “The Logan Act was put on the books for enforcement. *Enforce it.*”²⁹³

As the number of unremedied offenses grew, it seemed sensible to ask, “have we or have we not a Logan Act?”²⁹⁴ And “[a]re the citizens of the

²⁸⁴ Charles H. Small, Opinion, *The Logan Act*, CHI. DAILY TRIB., June 1, 1948, at 22.

²⁸⁵ Sheila A. Herrman, Opinion, *To Enforce Logan Act*, N.Y. TIMES, June 3, 1960, at 30.

²⁸⁶ *Tractor Experts Return with Castro’s New Demands*, N.Y. TIMES, June 16, 1961, at 1.

²⁸⁷ *Id.*

²⁸⁸ Anderson, *supra* note 237, at 2; *see also Sue to Block Tractor Deal*, *supra* note 174, at 3 (describing the petition’s purpose as “ask[ing] that Atty. Gen. Robert Kennedy enforce the Logan [A]ct”).

²⁸⁹ *Sue to Block Tractor Deal*, *supra* note 174.

²⁹⁰ *Find Logan Act Little Used in U.S. Diplomacy*, CHI. DAILY TRIB., June 19, 1961, at 2.

²⁹¹ David Lawrence, *The Logan Act Barrier Should Be Used More*, L.A. TIMES, Aug. 19, 1965, at A4; *see also id.* (reiterating that the Act’s “prohibitions should be enforced”).

²⁹² Corry, *supra* note 175, at 3; *see also Truman Suggests U.S. Prosecute Visitors to Viet*, CHI. TRIB., Dec. 29, 1965, at 4 (reporting that Truman “denounced the[ir] illicit visit . . . and suggested they be prosecuted under the Logan [A]ct”).

²⁹³ *Will the Logan Act Be Enforced?*, HUM. EVENTS, Jan. 15, 1966, at 12.

²⁹⁴ Alice Widener, *Are We Protected by the Logan Act?*, HUM. EVENTS, May 13, 1967, at 6.

United States still protected by the Logan Act?”²⁹⁵ A disappointed columnist pronounced it “high time to find out whether the Logan [A]ct really means what it says.”²⁹⁶ Another insisted that the Act “should be applied” to stifle all “pretenders to the authority of the executive branch.”²⁹⁷ Yet a third implored the Attorney General to “bring[] prosecution[s] . . . under the long neglected Logan Act.”²⁹⁸ A California state senator even wrote the Attorney General to ask whether a certain congressman would be prosecuted for having attended a British Labor Party conference.²⁹⁹

The Reagan,³⁰⁰ Bush I,³⁰¹ Clinton,³⁰² Bush II,³⁰³ and Obama³⁰⁴ administrations suffered similar criticism for failing to enforce the Logan Act. Most starkly, an online White House petition calling for the prosecution of forty-seven Republican senators who wrote to Iranian leaders at the height of 2015’s nuclear negotiations gained 322,116 signatures.³⁰⁵ That appeal met the same fate as every other request to enforce the Logan Act lodged since 1799.

As this subpart has illustrated, administrations habitually remain inert amid cries to safeguard executive authority by executing the Logan Act. They quietly absorb any institutional and personal embarrassment that their

²⁹⁵ Irene Traffert, Opinion, *Salinger’s Talks and the Logan Act*, L.A. TIMES, Aug. 24, 1972, at E6.

²⁹⁶ *Hanoi’s Helpers*, CHI. TRIB., Oct. 30, 1969, at 28; see also Alice Widener, *The Funded Four Hundred*, BARRON’S NAT’L BUS. & FIN. WKLY., May 22, 1967, at 1 (deeming it “high time to discover” whether the Logan Act was still good law).

²⁹⁷ *Off-the-Cuff Diplomacy*, CHI. TRIB., July 5, 1969, at N10.

²⁹⁸ Holmes Alexander, *Taking the King’s Orders*, DESERT SUN (Palm Springs, Cal.), Feb. 13, 1974, at C8.

²⁹⁹ *Legality of Brown’s England Talk Queried*, L.A. TIMES, Oct. 29, 1967, at B5.

³⁰⁰ See Bernice Prescott, Opinion, *Laws Should Be Enforced Equally*, DALL. MORNING NEWS, May 18, 1988, at 18A (“The Logan Act should be dusted off and enforced . . .”); Otto J. Dekom, Opinion, *It’s Law: Foreign Policy Not a Toy of Private Interests*, ORLANDO SENTINEL, Apr. 20, 1988, at A11 (“[S]uch action—under the Logan Act—is illegal. Those who break the law . . . should be held accountable.”); Lionel Van Deerlin, Opinion, *President Was in a Snit over Wright*, EVENING TRIB. (San Diego), Nov. 19, 1987, at B15 (“[I]f this is in fact a law-and-order administration, isn’t it time to enforce the Logan Act?”).

³⁰¹ See Lily Dizon, *Iraq Hostage-Visit Issue Captivates 7th-Graders*, L.A. TIMES, Dec. 5, 1990, at 12 (quoting a twelve-year-old student named Jane Chai who concluded, as part of a school assignment, that “the United States is being careless with the lives of its citizens by not enforcing the federal Logan Act”).

³⁰² See Lars-Erik Nelson, *Newt’s Over the Line on Israel*, N.Y. DAILY NEWS, May 29, 1998, at 51 (“Let’s put Newt Gingrich in jail. . . . The government has no choice but to do its sworn duty: Enforce the law.”); Linda Chavez, *Carter’s Meddling Deserves No Medal*, USA TODAY, Dec. 28, 1994, at 9A (arguing that “Jimmy Carter deserves a warrant, not a medal,” for “violat[ing] the Logan Act”).

³⁰³ See Opinion, *Is Nancy Pelosi Guilty of a Felony?*, CALEDONIAN-REC. (St. Johnsburg, Va.), Apr. 12, 2007 (calling for an investigation of Speaker Nancy Pelosi’s “alleged felonious behavior”).

³⁰⁴ See Laura Curtis, *Enforce the Logan Act or Repeal It*, HOT AIR (Nov. 14, 2010, 1:30 PM), <http://hotair.com/archives/2010/11/14/enforce-the-logan-act-or-repeal-it> [<https://perma.cc/G4DA-NYJ3>] (“Either enforce the [Logan Act] or repeal it.”).

³⁰⁵ *File Charges*, *supra* note 181. For the full text of the senators’ letter, see *Letter from Senate Republicans to the Leaders of Iran*, N.Y. TIMES (Mar. 9, 2015), <http://www.nytimes.com/interactive/2015/03/09/world/middleeast/document-the-letter-senate-republicans-addressed-to-the-leaders-of-iran.html> [<https://perma.cc/FZN4-DCEK>].

inaction engenders. What exactly do Presidents lose when the powers of their office appear to be openly wrested from them? What degree of harm have they refused to remedy?

C. *The Costs of Inaction*

This Section explores those questions by recounting a noteworthy subset of potential Logan Act violations—those accompanied by contemporaneous cries of usurpation, expressions of dismay from the Executive, or a candid acknowledgment of interference on the actor’s part.

At the close of the Mexican-American War, Nicholas Trist negotiated the Treaty of Guadalupe Hidalgo (1848) after President Polk recalled him for exceeding his instructions. Polk found Trist’s insubordination “very insulting I have never in my life felt so indignant.”³⁰⁶ Tellingly, the President recorded in his diary that “[i]f there was any legal provision for his punishment he ought to be severely handled.”³⁰⁷ During the Civil War, untold Americans sought to persuade the British Parliament to formally recognize the Confederacy.³⁰⁸ A federal judge noted at the time—with great understatement—that such communications “interfere[d] with the diplomacy and purposes of our government.”³⁰⁹

As President Wilson sailed to the Versailles Conference following World War I, the President of Columbia University cabled European statesmen “to assure [them] that the President did not reflect American sentiment” on how to achieve a lasting peace.³¹⁰ Numerous senators were said to have triggered a “conflict between the executive and legislative branches of our government” by dealing directly with European diplomats in Washington once the Conference ended.³¹¹ And in 1921, four Americans seeking to undermine their government’s punitive stance on postwar reparations negotiated directly with the German cabinet, thereby “overr[i]d[ing] the American diplomatic agents in Berlin.”³¹² The Coolidge administration later

³⁰⁶ WALLACE OHRT, *DEFIANT PEACEMAKER: NICHOLAS TRIST IN THE MEXICAN WAR* 140 (1997). Though virtually never analyzed in Logan Act terms, Trist’s unauthorized treaty-making is, in my view, the clearest Logan Act violation in all of American history. At least one other author has recognized the Act’s applicability. See J.D.B., Jr., Letter to the Editor, *Questions for Prof. McMaster*, NATION, June 2, 1892, at 413 (arguing that the Act “was clearly violated in 1848 by Nicholas P. Trist, who, refusing to recognize his recall by this Government, persisted in negotiating a treaty with Mexico”).

³⁰⁷ OHRT, *supra* note 306, at 142.

³⁰⁸ Vagts, *supra* note 9, at 272–73.

³⁰⁹ *In re Charge to Grand Jury—Treason and Piracy*, 30 F. Cas. 1049, 1051 (C.C.D. Mass. 1861) (No. 18,277) (Sprague, J.).

³¹⁰ *An Able Survey of Our Foreign Policy*, N.Y. TIMES, Jan. 8, 1928, at 66 (reviewing and quoting LOUIS M. SEARS, *A HISTORY OF AMERICAN FOREIGN RELATIONS* (1927)).

³¹¹ David Lawrence, *Unable to Reach President, Europe Turns to Senate*, EVENING STAR (D.C.), Feb. 4, 1920, at 1.

³¹² *Impertinent Meddlers*, N.Y. TIMES, Apr. 29, 1921, at 11.

seethed at unofficial debt-reduction discussions as “doing great harm” and “working hurtfully against its plans.”³¹³

State Department officials were “annoyed” by a cablegram that Representative Frederick Britten sent in 1928 to the British Prime Minister proposing a naval conference; they “regarded it as an attempt to usurp the prerogatives vested in the Executive.”³¹⁴ Senator Borah, too, “stir[red] up a mild sensation” in the State Department when he called upon the British ambassador in Washington.³¹⁵ President Hoover was likewise livid at the efforts of a shipbuilding lobbyist to sabotage a naval-limitations conference.³¹⁶ And just as Hoover’s term was expiring, William Bullitt reportedly portrayed the incoming President to European leaders as willing to cancel or reduce their debts to the United States, “in utter defiance of the Congress and its enactments.”³¹⁷

President Roosevelt also swallowed his displeasure when confronted with potential Logan Act violations. An American munitions manufacturer named John W. Young sold arms to both the governing and rival factions in Cuba; he even allowed his office to be used to engineer a military coup, and “[a]t a moment when this problem was being handled through regular diplomatic channels.”³¹⁸ In 1938, the lawyer John Foster Dulles visited the Chinese leader Chiang Kai-shek to propose a compromise with Japan,³¹⁹ though Dulles’s “views differed from those of our Government.”³²⁰ Later that year, when an American named Peter Hietko undertook a private mission to Czechoslovakia, he was said to have “li[t] matches near a powder barrel” by lobbying Prague authorities at the height of the Sudeten crisis.³²¹ And in 1940, ex-President Hoover tried to persuade the British government to lift its naval blockade for humanitarian reasons, to Roosevelt’s great irritation.³²²

As the Korean War drew to a close, Representative Alvin O’Konski infuriated the Eisenhower administration by exhorting the South Korean President to liberate all remaining prisoners, in violation of the delicate

³¹³ *Fish Would Punish*, *supra* note 223; *see also id.* (citing the “indignation of the Administration”).

³¹⁴ *Britten Bid Vexes State Department*, N.Y. TIMES, NOV. 29, 1928, at 3.

³¹⁵ *Beneficial Faux Pas*, SUN (Balt.), June 23, 1929, at 8.

³¹⁶ *See Carlisle Bargeron, Kansan Is Spokesman of President and Knows Propaganda*, WASH. POST, Sept. 13, 1929, at 1.

³¹⁷ *Requests Stimson to Act on Bullitt*, N.Y. TIMES, Feb. 4, 1933, at 8.

³¹⁸ Robert C. Albright, *U.S. Firm Sold Both Sides Arms in Cuba’s Strife*, WASH. POST, Sept. 19, 1934, at 1 (quoting Sen. Arthur Vandenberg (R-Mich.)).

³¹⁹ Ross Terrill, *John Carter Vincent and the American “Loss” of China*, in CHINA AND OURSELVES: EXPLORATIONS AND REVISIONS BY A NEW GENERATION 153 n.18 (Bruce Douglass & Ross Terrill eds., 1970).

³²⁰ Leonard B. Boudin, Opinion, *Construing the Logan Act*, N.Y. TIMES, May 28, 1960, at 20.

³²¹ *Dangerous Meddling*, EVENING STAR (D.C.), June 5, 1938, at C-2.

³²² *See* George H. Nash, *Editor’s Introduction*, in FREEDOM BETRAYED: HERBERT HOOVER’S SECRET HISTORY OF THE SECOND WORLD WAR AND ITS AFTERMATH xv, xlix (George H. Nash ed., 2011) (citing Roosevelt’s “opposition to Hoover’s crusade” and his wish that “Hoover were not involved in the matter”).

United Nations armistice. A *Washington Post* editorialist fumed that O’Konski could not have acted more harmfully if he “had spent months studying what he could do to embarrass his Government.”³²³ Eisenhower “devoutly feared”³²⁴ that his South Korean counterpart might now “do what the President of the United States had specifically warned him not to do.”³²⁵ To top it off, O’Konski’s letter was seen as “assum[ing] functions specifically assigned to the President by the Constitution.”³²⁶ Senator McCarran also seemed to assume these functions in 1958, when he lobbied Spanish ministers to ensure that German subcontractors would be permitted to help build American bases in Spain. Naturally, the American Ambassador had “specifically taken up . . . th[is] question” with those same officials.³²⁷

In the early 1960s, top administration employees feared that “things were drifting alarmingly out of hand” due to unauthorized diplomatic ventures.³²⁸ State Department officials in particular groused that such activities “ma[d]e a mockery of the[ir] delicate efforts.”³²⁹ One private trip to Vietnam “g[ot] in the way of the Government’s approach” by cornering the White House into admitting that it had reached out directly to North Vietnamese leaders.³³⁰ President Johnson was also “furious” at Stokely Carmichael’s inflammatory overseas rhetoric and “anxious to throw the book at [him].”³³¹ And the director of a nonprofit that coordinated global peace conferences bragged about its latest “attempt by a group of private people, without any government sanction or government backing, to do what governments ought to be doing.”³³² His institute was effectively running “a privately financed . . . and wholly unaccredited foreign service.”³³³

Then-candidate Richard Nixon certainly acted without government sanction when he directed an intermediary to persuade the South Vietnamese President not to attend a scheduled peace summit until after the 1968 election.³³⁴ Johnson was understandably outraged.³³⁵ Nixon learned what it was

³²³ *Buttinsky O’Konski*, Opinion, WASH. POST, Oct. 21, 1953, at 14; *see also id.* (deeming O’Konski’s letter a “malicious interference with the conduct of our foreign policy”).

³²⁴ Vagts, *supra* note 9, at 278.

³²⁵ Reston, *supra* note 130, at 4.

³²⁶ *Id.*

³²⁷ Pearson, *supra* note 78, at B5.

³²⁸ Max Frankel, *Cold War Confusion*, N.Y. TIMES, Oct. 13, 1962, at 8; *see also id.* (“[I]ts highest officials are beginning to wonder who is in charge around here anyway.”).

³²⁹ *Id.*

³³⁰ *Mr. Logan and Mr. Lynd*, WALL ST. J., Jan. 17, 1966, at 14.

³³¹ Nathan Lewin, *Travels with Ramsey*, NEW REPUBLIC, June 28, 1980, at 17. During his visit to North Vietnam, Carmichael met with President Ho Chi Minh and Prime Minister Pham Van Dong. PENIEL E. JOSEPH, *STOKELY: A LIFE* 211 (2014).

³³² Widener, *supra* note 294, at 6.

³³³ *Id.*

³³⁴ ROBERT DALLEK, *NIXON AND KISSINGER: PARTNERS IN POWER* 74 (2007).

³³⁵ *See “This is Treason,”* MILLER CTR., <https://millercenter.org/the-presidency/educational-resources/this-is-treason> [<https://perma.cc/SHC8-AXA2>] (“[Nixon’s] folks . . . are going to the Vietnamese embassy and saying, ‘Please notify the president [Thieu] that if he’ll hold out ‘til November the 2nd, they could get a better deal.’ . . . [T]hey oughtn’t be doing this. This is treason.”).

like to be upstaged the next year, when a leftist lawyer negotiated for the release of American prisoners of war in Vietnam. On one view, this interference with ordinary prisoner exchanges inflicted “immeasurable damage” and “compound[ed] the embarrassment of our government.”³³⁶ The White House also denounced Representative Wilbur Mills’s textile-related negotiations with the Japanese government as “undercut[ting] [its] efforts” in that field.³³⁷

When Senator George McGovern’s personal representative met with North Vietnamese officials in 1972, Nixon’s Press Secretary warned that this rendezvous “could jeopardize . . . talks . . . going on at the highest level.”³³⁸ The Secretary of the Interior agreed: McGovern’s do-it-yourself diplomacy tended to “undercut[] President Nixon’s efforts to end the war” and “destroy[] the integrity of our foreign policy.”³³⁹ Secretary of State William Rogers denounced Ramsey Clark’s freelancing in Hanoi as “shock[ing],” “contemptible,” and “beyond belief.”³⁴⁰ When Representative George Hansen traveled to Tehran in 1979 to push for the release of American hostages, President Carter “fume[d]” to congressional leaders.³⁴¹ And according to Carter, Ramsey Clark’s related mission to Tehran threatened to “exacerbate an already serious situation and cause further damage[] . . . to the hostages.”³⁴²

In 1981, a top State Department official deemed one ex-CIA agent’s dealings with the Libyan dictator Muammar al-Qaddafi “a particularly dramatic abuse” and “a serious national security problem.”³⁴³ An “irked”³⁴⁴ President Reagan opined in 1984 that it would be “very dangerous” if future presidential candidates emulated Jesse Jackson’s recent prisoner-release negotiations.³⁴⁵ An administration official spoke of the White House’s “annoy-

³³⁶ *Hanoi’s Helpers*, *supra* note 296, at 28.

³³⁷ Frank C. Porter, *Mills Tells Role in Shoe Import Curb*, WASH. POST, July 13, 1971, at A1.

³³⁸ Aldo Beckman, *Salinger Trip Could Hurt Viet Peace Talks*, CHI. TRIB., Aug. 18, 1972, at 1. One columnist decried McGovern for “acting as if [he] were a government separate from the administration lawfully charged with responsibility over foreign relations.” *McGovern’s Meddlers*, CHI. TRIB., Aug. 19, 1972, at N8.

³³⁹ Beckman, *supra* note 338, at 1.

³⁴⁰ Bernard Gwertzman, *Rogers Asserts Shriver Talks “Bunk” About War*, N.Y. TIMES, Aug. 12, 1972, at 1. Clark visited as a guest of the North Vietnamese Government and tried to persuade Hanoi’s Minister of Foreign Affairs to release American prisoners. *Clark Arrives in Hanoi During Air Raid Alerts*, N.Y. TIMES, July 30, 1972, at 15; *see also* Wallace Turner, *Clark Says North Vietnam May Free a Few P.O.W.’s*, N.Y. TIMES, Aug. 15, 1972, at 1.

³⁴¹ Hugh Sidey, *A New Kind of Crisismonger*, TIME, Dec. 10, 1979, at 38.

³⁴² Eleanor Randolph & Don Irwin, *Carter Says He’s Inclined to Prosecute Ramsey Clark*, L.A. TIMES, June 11, 1980, at A6, A16. A former State Department official confided that “the average diplomat looks upon these private efforts about as he would an egg stain on his tuxedo shirt.” Maynes, *supra* note 195, at 8C.

³⁴³ Philip Taubman, *Beyond the Wilson Case*, N.Y. TIMES, Sept. 14, 1981, at A1, A20. The agent, Edwin Wilson, was alleged to have sold explosives to the Libyan government. *Id.*

³⁴⁴ Smith, *supra* note 202, at 8.

³⁴⁵ Weisman, *supra* note 201, at A16.

ance and anger” at those incidents; a veteran diplomat fumed that Jackson had “complicate[d] our life.”³⁴⁶

When Democratic House Speaker Jim Wright authored a letter to the leader of Nicaragua’s ruling junta in 1984, Representative Newt Gingrich claimed that the letter “almost reads as though someone had sat down and read the debate in 1799 and decided to write a 20th century version of exactly the kind of communication that the Founding Fathers were arguing about in 1799.”³⁴⁷ Later in the 1980s, the White House grew “seriously concerned” that Speaker Wright’s Central American mediation efforts might undercut Reagan’s own strategy.³⁴⁸ “The speaker shouldn’t be getting into this,” an administration official groaned. Another official accused Wright of “usurp[ing] Reagan’s authority.”³⁴⁹ (The President himself reportedly “made his displeasure known.”)³⁵⁰ And billionaire Ross Perot “infuriated” the administration by holding three days of prisoner-release discussions with Vietnamese officials; former Reagan aides accused him of “bollixing the government’s negotiating position.”³⁵¹

In 1990, former President Carter wrote to U.N. Security Council members in an effort to defeat a U.S.-backed proposal to authorize the use of force in Iraq. President George H.W. Bush’s National Security Advisor later denounced this putative “violation of the Logan Act” as “unbelievable”;³⁵² Bush himself was reportedly “furious” at Carter’s “deliberate attempt to undermine [him].”³⁵³ Republican Representatives Newt Gingrich³⁵⁴ and Curt Weldon³⁵⁵ were both criticized for imperiling President Clinton’s foreign-policy objectives. When Democratic Senator Bill Nelson met with Syrian President Bashar al-Assad in 2006, White House Press Secretary Tony Snow

³⁴⁶ Smith, *supra* note 202, at 8.

³⁴⁷ 130 CONG. REC. 10,561 (1984) (statement of Rep. Gingrich (R-Ga.)).

³⁴⁸ David Johnston, *Monitoring Sandinistas, U.S. Intercepted Lawmakers’ Talk, Ex-Officials Say*, N.Y. TIMES, Sept. 15, 1991, at 32; *see also* Sara Fritz, *Wright’s Latin Role Assailed by Republicans*, L.A. TIMES, Nov. 14, 1987, at OC1 (indicating that “Wright[’s] unusual approach . . . has had the effect of boxing the President into a position of favoring the peace process”).

³⁴⁹ David Hess & Ellen Warren, *Wright Reportedly Told to ‘Butt Out’ of Diplomacy*, PHILA. INQUIRER, Nov. 14, 1987, at A1.

³⁵⁰ Van Deerlin, *supra* note 300, at B15.

³⁵¹ Paul Richter, *Perot: Image of Lone Gun Trouble-Shooter Emerges*, L.A. TIMES, May 15, 1992, at 1.

³⁵² GEORGE H.W. BUSH & BRENT SCOWCROFT, *A WORLD TRANSFORMED* 414 (1999).

³⁵³ *Id.*

³⁵⁴ *See* Pat Holt, *Newt at the Knesset—Pandering or Peacemaking?*, CHRISTIAN SCI. MONITOR, June 4, 1998, at 11 (“Speaker of the House Newt Gingrich . . . has been in Israel encouraging the government there to resist his country’s foreign policy.”); *see also* 144 CONG. REC. 12,498 (1998) (statement of Rep. Obey (D-Wis.)) (“His actions undercut the ability of the Secretary of State to pursue peace in the region.”).

³⁵⁵ *See* Michael Kelly, *Congress Should Understand the Idea of Nationhood, Support War in Kosovo*, SALT LAKE TRIB., May 20, 1999, at A15 (asserting that a Balkan-peace proposal that Weldon helped formulate “undercut the U.S. position”).

accused him of “undermin[ing] the cause of democracy in the region.”³⁵⁶ President Bush viewed Democratic House Speaker Nancy Pelosi’s similar talks with Assad as “counterproductive” and “undermining American efforts” to isolate the Syrian dictator’s regime.³⁵⁷ The second Bush administration also bristled when Jimmy Carter met with Hamas leadership after being implored not to.³⁵⁸

On President Obama’s watch, the forty-seven Republican senators who wrote to Iranian leaders in 2015 drew Secretary of State John Kerry’s ire; he reacted with “utter disbelief,” dismissing their gambit as “irresponsible,” “stunning,” and “profoundly bad.”³⁵⁹ Vice President Biden resented the senators’ effort to “undercut a sitting President in the midst of sensitive international negotiations;”³⁶⁰ a State Department spokesperson also deemed the Iran letter “harmful to America’s national security.”³⁶¹ In 2016, Virginia state senator Richard Black brazenly “contradict[ed] the State Department line” by meeting with President Assad and applauding his continued leadership.³⁶² And Michael Flynn concededly sought to undercut his own government’s position on a controversial U.N. Security Council resolution shortly before President Trump’s inauguration.³⁶³

Some of these characterizations may well have been embellished for maximum political effect. But there can be little doubt that private diplomatic activity often bedevils the delicate task of projecting a coherent, workable foreign policy. Given the immense drawbacks of condoning unauthorized contacts, the actual degree of criminal enforcement—none—is astounding. Some network of incentives and practical dictates must account

³⁵⁶ *Press Briefing by Tony Snow*, THE WHITE HOUSE (Dec. 14, 2006, 12:45 PM), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/12/20061214-6.html> [<https://perma.cc/Q995-6LJY>]. Snow adjudged Nelson’s visit “not helpful” and “not appropriate.” *Id.*

³⁵⁷ *Pelosi Shrugs Off Bush’s Criticism, Meets Assad*, NBC NEWS (Apr. 4, 2007, 9:28 AM) [hereinafter *Pelosi Meets Assad*], http://www.nbcnews.com/id/17920536/ns/world_news-mideast_n_africa/t/pelosi-shrugs-bushs-criticism-meets-assad [<https://perma.cc/U4D3-ZW9V>].

³⁵⁸ See Elise Labott, *White House Urges Carter Not to Meet Hamas Leader*, CNN (Apr. 10, 2008, 3:42 PM), <http://www.cnn.com/2008/POLITICS/04/10/carter.hammas> [<https://perma.cc/VQZ9-4VX2>] (“[A]ssistant Secretary [of State] David Welch urged Carter in a phone call not to take part in the meeting, arguing doing so would be a detriment to U.S. policy in the Middle East.”).

³⁵⁹ Michael McAuliff, *John Kerry Hammers GOP Senators’ ‘Irresponsible’ Letter to Iran*, HUFFINGTON POST (Mar. 12, 2015), http://www.huffingtonpost.com/2015/03/11/john-kerry-iran-letter_n_6848562.html [<http://perma.cc/TLN4-LBPN>].

³⁶⁰ *Statement by the Vice President on the March 9 Letter from Republican Senators to the Islamic Republic of Iran*, THE WHITE HOUSE (Mar. 9, 2015), <https://www.whitehouse.gov/the-press-office/2015/03/09/statement-vice-president-march-9-letter-republican-senators-islamic-repu> [<https://perma.cc/SEM5-8SV6>].

³⁶¹ Jeremy Diamond, *Did 47 Republican Senators Break the Law in Plain Sight?*, CNN (Mar. 11, 2015, 11:21 AM), <http://www.cnn.com/2015/03/10/politics/tom-cotton-iran-letter-logan-act/> [<https://perma.cc/6VBR-SE8T>] (1:01 mark of embedded video).

³⁶² *Va. State Sen. Black Meets with Syrian President Assad*, DAILY PRESS (Apr. 28, 2016, 4:44 PM), <http://www.dailypress.com/news/politics/dp-va-state-senator-black-meets-with-assad-in-syria-20160428-story.html> [<https://perma.cc/SS5R-EA56>].

³⁶³ See Statement of the Offense, *supra* note 3, at 4.

for Presidents' forbearance in the face of constant diplomatic freelancing. It is simply "[im]plausible that the executive would adhere, across decades, to such a tragic enforcement model."³⁶⁴

D. *Explaining Logan Act Nonenforcement*

By its nature, nonenforcement by accretion is devoid of programmatic pronouncements. It is precisely because Presidents have not publicly justified their nonexecution of the Logan Act that its disuse is detectable only as the gestalt of many unrelated (though parallel) historical choices. In such an environment, it is difficult to pinpoint why most prosecutions never materialized.³⁶⁵ Yet a smattering of administration comments, along with compelling inferences from the surrounding climate, reliably anchor the typology of nonenforcement imperatives advanced below. This subpart strives to enable the very accountability that the executive branch has shirked in quietly failing to enforce the Logan Act.

I identify four principal reasons why the Act has remained lifeless as a source of prosecutions. First, even in the face of serious interference, nonenforcement often appears to be the least-worst option; by avoiding blowback, inaction may actually ensure the smallest departure from the assortment of values Presidents wish to maximize. Second, administrations may well decline to prosecute Logan Act violators out of raw personal or political (as opposed to institutional) self-interest. Third, commencing *any* Logan Act prosecutions might indirectly preclude the Executive from recruiting private citizens to accomplish through back channels what intergovernmental negotiations cannot. And fourth, the White House may feel constrained not to act, whether due to constitutional misgivings or case-specific evidentiary obstacles, or out of deference to the customary practice of inertia. These four explanatory categories—expanded on and dissected below—likely reinforce one another, all but guaranteeing the Act's continued idleness.

1. *Inaction as the Least-Worst Option*

a. Reluctance to Martyr Violators. If “[p]rosecutions invite backlash,”³⁶⁶ then prosecutions of prominent dissidents and political foes would virtually ensure it. The President's chief rivals and most vocal irritants are effectively immune from Logan Act liability, for indicting them would amplify their nonconforming viewpoints and risk transforming them into martyrs. Under this logic, the more flagrant a dissident's violation—the more acutely her actions invade presidential prerogatives—the greater her practical entitlement to continued freedom. No principle seems better calculated to

³⁶⁴ Pozen, *supra* note 28, at 543.

³⁶⁵ Calls for clearer explanations of nonenforcement practices naturally assume a deliberate choice not to enforce on a forward-looking basis. *See, e.g.,* Andrias, *supra* note 31, at 1035.

³⁶⁶ Pozen, *supra* note 28, at 594.

sap the Logan Act of any remaining efficacy.³⁶⁷ Presidents' reluctance to see violators' perspectives propagated has trumped any devotion to the Act, thereby forestalling a foreign-policy incarnation of the so-called Streisand Effect.³⁶⁸

Multiple administrations have articulated an anti-martyring rationale for nonenforcement, propelling this explanation beyond the realm of speculation. In 1947, President Truman's advisors decided that "any White House action would only give [Henry] Wallace greater publicity and perhaps greater weight abroad."³⁶⁹ Wallace escaped prosecution again in 1948, there being "no disposition to give [him] the opportunity to pose as a persecuted martyr."³⁷⁰ Asked to comment on a seemingly cut-and-dried violation by three antiwar activists in 1966, an administration spokesman declared that "[t]here is nothing they would like better than to be made martyrs of and we are not going to oblige."³⁷¹ Likewise, in one editorialist's view, prosecuting Jesse Jackson for his unauthorized discussions with the Palestine Liberation Organization in 1979 would have "inflate[d] [his] clumsy pilgrimage into the *cause célèbre* it should not become."³⁷² One congressman captured this thinking perfectly when he advised President Carter to "do nothing" in response to Ramsey Clark's Iran visit. After all, "[Clark] would like to be prosecuted so that he would attract more attention and have a more prominent platform from which to speak."³⁷³ And in the waning days of the Obama administration, officials worried that prosecuting Michael Flynn under the Logan Act would "invite charges of political persecution" following a toxic election season.³⁷⁴

For the same reasons, it is almost inconceivable that a Republican President would prosecute a sitting Democratic Speaker of the House³⁷⁵ (and vice

³⁶⁷ As one columnist put it, "Are laws to remain unenforced because violators may want to be arrested? Is the law to be applied only to people who won't make a fuss?" *Administration "Reluctant" to Enforce Logan Act*, HUM. EVENTS, Jan. 29, 1966, at 67.

³⁶⁸ See generally *What Is the Streisand Effect?*, ECONOMIST (Apr. 15, 2013, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect> [<https://perma.cc/95SS-54W4>] (explaining how attempts to suppress information can ironically ensure its wider distribution).

³⁶⁹ Trussell, *supra* note 166, at 12; see also *We'd Hate to See Wallace in a Martyr's Robe*, SAT. EVENING POST (Phila.), May 10, 1947, at 160 ("[T]he damage [from Wallace's actions] wasn't so great as it might have been if the Government had suppressed Henry.").

³⁷⁰ William Henry Chamberlin, *Stalin Calls a Wrong Number*, WALL ST. J., May 25, 1948, at 6; see also *Henry Wallace and Timothy Pickering*, L.A. TIMES, May 20, 1948, at A4 ("Wallace could be charged . . . but it is best to let him go.").

³⁷¹ Editorial, *Treason as "Dissent,"* CHI. TRIB., Jan. 10, 1966, at 20.

³⁷² Editorial, *Jesse Jackson's Diplomacy*, WASH. STAR, Oct. 12, 1979, at 10.

³⁷³ 126 CONG. REC. 14,925 (1980) (statement of Rep. Danielson (D-Cal.)).

³⁷⁴ Miller et al., *supra* note 6.

³⁷⁵ See *Congressmen Meet Gorbachev*, L.A. TIMES, Apr. 10, 1985, at A2 (describing Speaker Tip O'Neill's nearly four-hour meeting with Soviet leader Mikhail Gorbachev); Fritz, *supra* note 348, at OC1 (Speaker Jim Wright's meetings with Central American political leaders); *Pelosi Meets Assad*, *supra* note 357 and accompanying text (Speaker Nancy Pelosi's meeting with Assad); Dorf, *supra* note 130 ("There is zero chance that Pelosi will actually be prosecuted.").

versa),³⁷⁶ that a Republican President would prosecute the Democratic National Committee chairman,³⁷⁷ or that a Democratic President would prosecute nearly all sitting Republican U.S. senators.³⁷⁸ Logan Act indictments might counterproductively ennoble their victims, whose very visible afflictions would evoke a darker period of American history when political differences were routinely criminalized.³⁷⁹

b. Reluctance to Dignify Private Meddling. Initiating a prosecution conveys an implicit judgment that the defendant has caused significant harm, enough to warrant a lengthy deprivation of liberty. Perhaps some Logan Act violators walk free because Presidents wish to avoid suggesting that they are actually capable of jeopardizing the administration's agenda. This would not be a conventional exercise of prosecutorial discretion (sparing those whose offenses are relatively harmless), but of perception-management—abstaining so as not to imply that someone is important enough to raise the White House's antennae, even if she is (and has).

Take the extraordinary William “Colorado” Jewett, for example. Jewett spent his Civil War years lobbying European monarchs to mediate the American conflict.³⁸⁰ Attorney General Edward Bates dismissed this curious figure as “a crack-brained simpleton” and a “meddlesome blockhead” who “belongs to a lower order of entities.”³⁸¹ Bates threatened to prosecute Jewett under the Logan Act,³⁸² but doing so would have signaled that the White House cared *at all* about this quixotic busybody—not a message that Bates desired to broadcast. The same would have gone for Abe Pickus, an oil exec-

³⁷⁶ See *supra* note 354 and accompanying text (Speaker Newt Gingrich's trip to Israel); Oren Liebermann, *Boehner, Netanyahu Laud “Bonds” in Israel*, CNN (Apr. 1, 2015, 2:43 PM), <http://www.cnn.com/2015/04/01/politics/john-boehner-benjamin-netanyahu-israel> [https://perma.cc/KHE9-2F34] (reporting on Speaker John Boehner's meeting with Israeli Prime Minister Benjamin Netanyahu during the peak of international discussions over Iran's nuclear program); *Ryan Delegation Reaches Jordan and Meets with King Abdullah*, SPEAKER.GOV (Apr. 7, 2016), <http://www.speaker.gov/press-release/ryan-delegation-reaches-jordan> [https://perma.cc/S86K-27UG] (chronicling Speaker Paul Ryan's discussions with top Jordanian officials).

³⁷⁷ See Roger Simon, *The New Dean Political Plan*, POLITICO (Mar. 14, 2007, 4:35 PM), <http://www.politico.com/story/2007/03/the-new-dean-political-plan-003142> [https://perma.cc/2JYB-67U3] (“Howard Dean has been meeting with world leaders to repair ‘the extraordinary damage’ that the Bush administration has done to America's image and to prepare the way for a new Democratic president.”).

³⁷⁸ See *supra* notes 359–61 and accompanying text (open letter from forty-seven Republican senators to Iranian leadership).

³⁷⁹ See 130 CONG. REC. H4350 (daily ed. May 22, 1984) (statement of Rep. George Brown, Jr. (D-Cal.)) (classifying the Logan Act and the reviled Alien and Sedition Acts as kindred “manifestations of the hysteria of the times”); *The Magazines for June*, N.Y. WORLD, May 19, 1873, at 2 (situating the Logan Act within “the boiling fury of party passion in that day”).

³⁸⁰ See generally Clark C. Spence & Robin W. Winks, *William “Colorado” Jewett of the Niagara Falls Conference*, 23 HISTORIAN 23 (1960). Jewett engaged in verbal or written communication with at least eleven heads of state and foreign ministers. *Id.* at 36–37.

³⁸¹ Entry of July 22, 1864, in THE DIARY OF EDWARD BATES, 1859–1866, at 388 (Howard K. Beale ed., 1933).

³⁸² Spence & Winks, *supra* note 380, at 34.

utive who in the 1930s placed many long-distance calls to world leaders in the interest of preserving peace.³⁸³ A typical call went as follows: “Hello, A. Hitler . . . Can you talk to me only a few minutes before hanging up? . . . What would you think of a general election in Spain to settle the war?”³⁸⁴ As one newspaper later put it, “Perhaps such people should be simply ignored.”³⁸⁵

Consider too Samantha Smith, the ten-year-old schoolgirl who penned a moving letter to Soviet leader Yuri Andropov pleading him to “live together in peace” with the United States.³⁸⁶ Although she received a lengthy and well-publicized response, her father remarked that “Reagan has tried to avoid Samantha,” described elsewhere as a mere “pipsqueak who . . . dared infiltrate the adult world of diplomacy.”³⁸⁷ A State Department spokesman also minimized the persuasive force of Americans stationed outside the 1985 Geneva Summit: “They’re individual citizens acting on their own. Why should there be a government response?”³⁸⁸ And in 2014, after Dennis Rodman visited Pyongyang, White House Press Secretary Jay Carney refused to “dignify” Rodman’s defense of the North Korean regime by formally responding to it.³⁸⁹ These examples exemplify a strategy of strength through neglect—nonenforcement (and non-comment) as an implicit assertion of impotence on the part of certain meddlers.

c. Violators’ High Stature. On the other hand, “powerful people are difficult to punish.”³⁹⁰ Perhaps the only Logan Act violators worth pursuing—the only persons capable of inflicting real injury—are celebrities, political or otherwise. Yet their very prominence makes their imprisonment under the Act almost unthinkable. Here, as elsewhere, the public outcry sure to ensue renders inaction the least-worst option, even in the face of truly outrageous interference.

Sitting members of Congress obviously fall into this category, but outside examples are legion. Five American attorneys escaped prosecution in

³⁸³ Pickus dialed the Russian and Japanese Ambassadors to the United States, the British Foreign Secretary, and the Finnish Foreign Minister, as well as “Hitler, Lebrun, Franco, Mussolini, Chamberlain, and Hirohito.” *Transocean Caller of Diplomats*, *supra* note 205, at 1, 3; *Finnish Finish*, LIFE, Nov. 27, 1939, at 24; *Pickus on the Telephone*, NEW YORKER, Dec. 23, 1939, at 12.

³⁸⁴ *Pickus on the Telephone*, *supra* note 383.

³⁸⁵ *Mr. Logan and Mr. Lynd*, *supra* note 330; *see also* Richard Grenier, *Hit Jimmy Carter with the Logan Act*, WASH. TIMES, Sept. 28, 1994, at A19 (“Henry Kissinger would have felt silly pressing for indictment of a literary lady like Mary McCarthy for visiting Hanoi. . . . She was just a warm-hearted sympathizer.”).

³⁸⁶ GALE WARNER & MICHAEL SHUMAN, *CITIZEN DIPLOMATS: PATHFINDERS IN SOVIET-AMERICAN RELATIONS—AND HOW YOU CAN JOIN THEM* 284 (1987).

³⁸⁷ *Id.* at 295–96.

³⁸⁸ Katy Butler, *America’s Unofficial Emissaries at the Summit*, S.F. CHRON., Nov. 18, 1985, at 12.

³⁸⁹ David Jackson, *White House: No Comment on Rodman’s North Korea Trip*, USA TODAY (Jan. 7, 2014, 2:14 PM), <http://www.usatoday.com/story/theoval/2014/01/07/obama-dennis-rodman-north-korea-jay-carney/4357093> [<https://perma.cc/UPM2-3ZWA>].

³⁹⁰ Pozen, *supra* note 28, at 569.

1804—even though a select committee of the Senate³⁹¹ and Secretary of State James Madison³⁹² deemed their conduct criminal—likely because they were “of the highest standing in their profession.”³⁹³ Horace Greeley, the preeminent newspaper editor of his day, also suffered no legal consequences for his relentless pursuit of a brokered peace during the Civil War.³⁹⁴ Nor did another print mogul, Joseph Pulitzer, for having allegedly cabled British officials.³⁹⁵ It is also difficult to imagine a Logan Act prosecution of prominent Ivy League presidents;³⁹⁶ world-famous industrialist Henry Ford;³⁹⁷ Chief Justice Earl Warren;³⁹⁸ actress Jane Fonda;³⁹⁹ pediatrician Dr. Spock;⁴⁰⁰ New York City Mayor Ed Koch;⁴⁰¹ industry captain Ross Perot;⁴⁰² boxing champion Muhammad Ali;⁴⁰³ former New York City Mayor Rudy Giuliani;⁴⁰⁴ actor Kevin Spacey;⁴⁰⁵ or California Governor Jerry Brown.⁴⁰⁶ This is all the more true in an era of social-media sensationalism.

d. Reluctance to Prosecute Presidential Candidates. Unsurprisingly, Presidents have declined to preempt the electoral process by prosecuting active presidential candidates under the Logan Act. President Wilson did inti-

³⁹¹ See *supra* note 217 and accompanying text.

³⁹² Madison concluded that they had “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.” BATES, *supra* note 136, at 6.

³⁹³ *Id.*

³⁹⁴ DAVID HERBERT DONALD, LINCOLN 414 (1995). Secretary of State William Seward threatened Greeley with prosecution under the Logan Act, but he evidently relented. *Id.*

³⁹⁵ See *supra* note 220 and accompanying text.

³⁹⁶ See Walsh, *supra* note 169, at 1 (Harold Stassen of the University of Pennsylvania); *Able Survey*, *supra* note 310, at 66 (Nicholas Murray Butler of Columbia University).

³⁹⁷ See *supra* note 106.

³⁹⁸ Warren frequently engaged in substantive discussions with foreign heads of state while enjoying their hospitality. At least some of these talks were “unofficial” and undertaken as a “private citizen[.]” Theodore M. Vestal, *Public Diplomacy in the U.S. Supreme Court: The Warren Years—Part II*, 34 J. SUP. CT. HIST. 98, 100, 102 (2009).

³⁹⁹ See *Logan Act Prosecutions*, SUN (Balt.), Aug. 24, 1972, at A8 (“Several Republican congressmen have called for the prosecution of Miss Fonda for speaking on Radio Hanoi during a visit to North Vietnam . . .”).

⁴⁰⁰ Dr. Spock cabled the North Vietnamese President in 1965, urging him to “respond favorably to immediate peace talks.” Egginton, *supra* note 78, at 12.

⁴⁰¹ See Smith, *supra* note 202, at 8 (“Mayor Koch tried to persuade Chancellor Helmut Kohl of West Germany to refuse to sell arms to Saudi Arabia.”).

⁴⁰² See *supra* note 351 and accompanying text.

⁴⁰³ In 1990, Ali flew to Iraq and “met with Saddam Hussein in the hope that his presence would promote dialogue and forestall war.” THOMAS HAUSER, MUHAMMAD ALI: HIS LIFE AND TIMES 482 (1991).

⁴⁰⁴ Giuliani claimed to have made over 150 foreign trips since leaving office, “often meeting with heads of state and other government officials.” Mara Gay & Felicia Schwartz, *Rudy Giuliani Lobbies to Be Secretary of State*, WALL ST. J. (Nov. 25, 2016, 2:56 PM), <http://www.wsj.com/articles/rudy-giuliani-lobbies-to-be-secretary-of-state-1480029769> [<https://perma.cc/ZN92-M6WP>].

⁴⁰⁵ See *Kevin Spacey Visits Hugo Chavez*, CBS NEWS (Sept. 26, 2007), <https://www.cbsnews.com/news/kevin-spacey-visits-hugo-chavez> [<https://perma.cc/8ERK-VAG4>] (detailing Spacey’s nearly three-hour meeting with Venezuelan dictator Hugo Chavez).

⁴⁰⁶ See generally David Siders, *Jerry Brown, President of the Independent Republic of California*, POLITICO MAG. (Nov. 11, 2017), <https://www.politico.com/magazine/story/2017/11/11/jerry-brown-california-profile-215812> [<https://perma.cc/WE9P-3F27>].

mate at the height of the 1920 campaign that his Republican rival Warren Harding had violated the Act,⁴⁰⁷ but Wilson opted not to have his eventual successor indicted. President Reagan similarly trotted out the Logan Act against Democratic hopeful Jesse Jackson before swiftly backpedaling.⁴⁰⁸ Nor was the Progressive Party's nominee prosecuted in 1948,⁴⁰⁹ the Republican Party's in 1968,⁴¹⁰ or the Democratic Party's in 1972,⁴¹¹ despite entirely plausible legal bases for doing so. It is inconceivable that the White House would pluck any serious presidential candidate from the electoral arena through the stigma of a bombshell Logan Act prosecution. So regardless of whether then-candidate Donald Trump violated the Act in meeting with Mexican,⁴¹² Egyptian,⁴¹³ and Israeli⁴¹⁴ leaders or encouraging the Russian government to breach the private data of his Democratic opponent,⁴¹⁵ a pre-election prosecution would have been utterly outlandish.

e. The Cruelty of Prosecuting Prototypical Violations. Some Logan Act violators are paragons of human compassion. Americans have brushed up against the Act by nonviolently seeking to avert genocide, feed famished peoples, stave off nuclear war, and liberate captives—and in ways directly designed to achieve those results. These are hardly the optics of worthwhile federal prosecutions.

For example, when George Logan defied his namesake statute to try to prevent a second great conflict between the British and American peoples, few doubted that he was “actuated by that same charity . . . enthrone[d]

⁴⁰⁷ Wilson wrote Harding to ask whether the news reports were true—had he actually spoken with an agent of the French government who implored the United States to “lead the way to a world fraternity”? *President's Letter to Senator Harding*, N.Y. TIMES, Oct. 19, 1920, at 1.

⁴⁰⁸ See Clines, *supra* note 204, at A11 (quoting Reagan's comment that “it isn't a case of what I think . . . [T]he Logan Act . . . is the law of the land”). In the same interview, though, Reagan announced that “we're not going to take legal action.” *Id.* at A1.

⁴⁰⁹ Henry Wallace wrote an open letter to Stalin after his break with the Truman administration. See *Text of Wallace Letter to Stalin Calling for Peace Program*, N.Y. TIMES, May 12, 1948, at 14.

⁴¹⁰ See *supra* notes 334–35 and accompanying text.

⁴¹¹ Former White House Press Secretary Pierre Salinger met with North Vietnamese representatives in Paris on George McGovern's behalf. *Reflections on the Salinger Mission*, SUN (Balt.), Aug. 18, 1972, at A14.

⁴¹² Susan Davis, *Mexican President Says He Told Trump Mexico Would Not Pay for a Wall*, NPR (Aug. 31, 2016, 5:14 PM), <http://www.npr.org/2016/08/31/492132967/in-mexico-trump-reaffirms-u-s-right-to-protect-its-borders> [https://perma.cc/HF7S-SENK].

⁴¹³ *Readout of Donald J. Trump's Meeting with Egyptian President Abdel Fattah El-Sisi*, DONALD J. TRUMP (Sept. 19, 2016), <https://web.archive.org/web/20170429200517/> <https://www.donaldjtrump.com/press-releases/readout-of-donald-j-trumps-meeting-meeting> [https://perma.cc/8F3R-N2RT].

⁴¹⁴ *Readout of Donald J. Trump's Meeting with Israeli Prime Minister Benjamin Netanyahu*, DONALD J. TRUMP (Sept. 25, 2016), <https://web.archive.org/web/20170430212305/> <https://www.donaldjtrump.com/press-releases/readout-of-donald-j-trumps-meeting-with-israeli-prime-minister-benjamin-ne> [https://perma.cc/968M-T2FF].

⁴¹⁵ See Jonathan Alter (@jonathanalter), TWITTER (July 27, 2016, 8:15 PM), <https://twitter.com/jonathanalter/status/758471016758870017> [https://perma.cc/LQA3-FGCZ] (“Breaking: Senior Dem senators tell me they think Trump may have violated the Logan Act . . .”).

above all Christian virtues.”⁴¹⁶ Both before and after his presidency, Herbert Hoover pressured foreign governments to eradicate the twin scourges of “[f]amine and pestilence.”⁴¹⁷ A popular Italian-American New York Supreme Court Justice cabled Mussolini to plead for restraint after the Italian Grand Council issued a series of draconian anti-Jewish edicts in 1938.⁴¹⁸ Former Vice President Henry Wallace famously “regard[ed] anything as proper and desirable if it work[ed] toward peace.”⁴¹⁹ And Representative Alvin O’Konski claimed to have cabled the South Korean President in order to safeguard “the future of civilization and humanity.”⁴²⁰

That familiar pattern continued throughout the 20th century. The industrialist Cyrus Eaton offered a grim rationale for ignoring Logan Act imputations: “[T]he first day of a nuclear war should see the death of 75,000,000 Americans.”⁴²¹ World-renowned pediatrician Dr. Spock did the same, warning that the “fall-out from nuclear explosions [would be] 1,000 times greater than the illnesses and accidents that threaten children.”⁴²² Representative George Hansen cited his “moral responsibility as [a] citizen[] . . . to try to defuse” the Iranian Hostage Crisis.⁴²³ Jesse Jackson, too, invoked a “moral law” superseding technical proscriptions—a “law of conscience under which we shall seek to free political prisoners wherever they exist.”⁴²⁴ Even apart from martyring effects, indicting those who expend their capital to minimize human suffering might be perceived as heartless, a callous perversion of prosecutorial priorities. (The same concern prompted the Obama administration to announce that it would not enforce the material-support laws against anyone paying a ransom to terrorists for the release of family members.)⁴²⁵

⁴¹⁶ CHARLES J. INGERSOLL, 1 RECOLLECTIONS, HISTORICAL, POLITICAL, BIOGRAPHICAL, AND SOCIAL 232 (1861); see also Boudin, *supra* note 320, at 20 (“Again, Dr. Logan went to England in 1810 in an attempt to avert the pending war and was not prosecuted.”).

⁴¹⁷ Herbert Hoover, *Feed Hungry Europe*, COLLIER’S WKLY., Nov. 23, 1940, at 12.

⁴¹⁸ *Cotillo Appeals to Rome*, N.Y. TIMES, Oct. 8, 1938, at 7. Justice Salvatore Cotillo explicitly desired “further channels” of communication beyond the American government’s own limited request for exemption of American citizens from the edicts. *Id.*

⁴¹⁹ *North Atlantic Treaty: Hearings Before the S. Comm. on Foreign Relations*, 81st Cong. 434 (1949) (Testimony of Henry A. Wallace).

⁴²⁰ *O’Konski Would Serve Time*, *supra* note 170, at 1.

⁴²¹ *Eaton Shrugs Off Senator’s Charge*, N.Y. TIMES, May 23, 1960, at 3.

⁴²² Egginton, *supra* note 78, at 12; see also Boudin, *supra* note 320, at 20 (“[O]ne may question the right to stifle men’s voices on an issue as fundamental as world survival.”).

⁴²³ Doyle McManus, *Hansen Talks to Hostages, Finds Them Tired, Worried*, L.A. TIMES, Nov. 26, 1979, at 1.

⁴²⁴ *Jackson’s Remarks on Legality of Trip*, N.Y. TIMES, July 6, 1984, at A9.

⁴²⁵ See *Fact Sheet: U.S. Government Hostage Policy*, THE WHITE HOUSE (June 24, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/06/24/fact-sheet-us-government-hostage-policy> [https://perma.cc/Z7A5-E7AB].

2. *Self-Interest*

a. Reluctance to Invite Scrutiny of Pre-Presidential Behavior. Some presidential candidates understandably regard themselves as “more than . . . private citizen[s].”⁴²⁶ But the Logan Act contains no carve-out for aspiring chief executives, or even incoming administrations.⁴²⁷ A number of Presidents may have violated the Logan Act themselves (or procured violations by surrogates) before occupying the White House. As a result, those with the most responsibility for deploying the Act—Presidents, Attorneys General, and Secretaries of State—often have a personal stake in its not being enforced. Initiating prosecutions would provoke well-founded cries of hypocrisy, or at least invite distracting inquiries into top officials’ own pre-inaugural discussions with foreign leaders. Administrations eager to squelch such insinuations might also expose themselves to blackmail from erstwhile correspondents or interlocutors.

Any Logan Act prosecution by President Harding, for example, would have revived unwelcome (if baseless) pre-election allegations.⁴²⁸ President Hoover would have been in no position to enforce a statute that he had openly scorned⁴²⁹ and perhaps violated again soon before his inauguration.⁴³⁰ President Franklin Roosevelt could not have easily resuscitated the Act; between his election and his inauguration—and on top of the Bullitt affair⁴³¹—he discussed international debts with the British Ambassador⁴³² and was “in direct touch with Prime Minister MacDonald” on subjects of intergovernmental concern.⁴³³ Nor is it surprising that Secretary of State Dulles stayed

⁴²⁶ *Senator Harding’s Reply*, N.Y. TIMES, Oct. 19, 1920, at 1.

⁴²⁷ See David Lawrence, *A Danger in Meeting of Wilson and Kennedy*, L.A. TIMES, Apr. 2, 1963, at A4 (“Such activity carried on by an individual prior to his assumption of office in government would still be covered by the law.”).

⁴²⁸ See *supra* note 407 and accompanying text.

⁴²⁹ See Joan Hoff-Wilson, *Running for Food Dictator*, N.Y. TIMES, Nov. 27, 1988, at BR36 (reviewing 2 GEORGE H. NASH, *THE LIFE OF HERBERT HOOVER: THE HUMANITARIAN, 1914–1917* (1988)) (stating that Hoover’s Commission for Relief in Belgium “became the equivalent of an independent state with its own flag flying over a fleet of 35 ships, contracting with belligerents on both sides”); see also *supra* note 222.

⁴³⁰ Hoover made a goodwill tour of Argentina soon after the Election of 1928. He certainly seemed to be “entering into communication with foreign governments . . . in matters subject to controversy,” even though he was “not a part of the Government—not yet.” *Official, or Unofficial?*, WASH. POST, Nov. 30, 1928, at 6; see also 70 CONG. REC. 105 (1928) (statement of Rep. Huddleston (D-Ala.)) (suggesting that Hoover’s visit be analyzed as a potential Logan Act violation).

⁴³¹ See *supra* notes 225 and 317 and accompanying text.

⁴³² ROBERT DALLEK, *FRANKLIN ROOSEVELT AND AMERICAN FOREIGN POLICY, 1932–1945*, at 31–32 (1979); see also 77 CONG. REC. 2898 (1933) (statement of Rep. McFadden (R-Pa.)) (“[B]efore entering the Presidency he took up the matter of the war debts. He violated the terms of the Logan Act.”).

⁴³³ *Private Citizen Calls Up*, N.Y. TIMES, Feb. 10, 1933, at 16.

mum during Eisenhower's key Logan Act crisis,⁴³⁴ given his unauthorized meeting with Chiang Kai-shek decades before.⁴³⁵

President Kennedy's discomfort during the Tractors-for-Freedom fiasco must have been especially acute—the month before his inauguration, two of his closest advisors flew to Moscow to lay the groundwork for nuclear disarmament and secure the release of captured American airmen.⁴³⁶ Republicans understandably considered that expedition a “flagrant violation of the Logan Act,”⁴³⁷ given Press Secretary Pierre Salinger's assurance that both men acted “as private citizens and were not representing anyone.”⁴³⁸ Historians have concluded that both Richard Nixon and John Mitchell, soon to be Attorney General, were involved in a scheme to scuttle 1968's pre-election peace talks.⁴³⁹ And in the fall of 1980, three senior Reagan-campaign advisors met in Washington with an arms dealer who claimed to speak for Ayatollah Khomeini, desired to discuss U.S.–Iranian relations “in the event Reagan was elected president,” and promised that he “could influence the fate of the hostages.”⁴⁴⁰ The trio terminated the meeting prematurely and surely lacked the requisite intent for Logan Act liability.⁴⁴¹ Yet criminal accusations surfaced, as they so often do.⁴⁴²

Bill Clinton's 1992 campaign dealt with its own Logan Act incident, when a Washingtonian with uncertain connections to Clinton allegedly asked European Community representatives to delay a final GATT accord until after the election.⁴⁴³ Two election cycles later, the Republican Party hosted a delegation from Vladimir Putin's Unity Party at its 2000 National Convention,⁴⁴⁴ suspicious observers naturally assumed the worst.⁴⁴⁵ The pendulum swung back in 2008, when Barack Obama—then the presumptive Demo-

⁴³⁴ See *supra* note 170 and accompanying text.

⁴³⁵ See *supra* notes 319–20 and accompanying text.

⁴³⁶ *JFK: Silent on Mission to Moscow*, HUM. EVENTS, Mar. 24, 1961, at 177.

⁴³⁷ *Id.*

⁴³⁸ *RB-47 Pleas Traced to 25 U.S. Citizens*, N.Y. TIMES, Mar. 14, 1961, at 17.

⁴³⁹ See *supra* notes 334–335 and accompanying text; see also SEYMOUR M. HERSH, *THE PRICE OF POWER: KISSINGER IN THE WHITE HOUSE* 21 (1983). The intermediary herself later recounted that “I was constantly in touch with Mitchell and Nixon.” DALLEK, *supra* note 334, at 76.

⁴⁴⁰ JOINT REPORT OF THE TASK FORCE TO INVESTIGATE CERTAIN ALLEGATIONS CONCERNING THE HOLDINGS OF AMERICAN HOSTAGES BY IRAN IN 1980, H. REP. NO. 102-1102, at 113 (1993).

⁴⁴¹ See *id.* at 114 (quoting one participant's uncontradicted recollection that “[a]s soon as what he had in mind became apparent, [we] completely and decisively cut off the discussion”).

⁴⁴² See Garry Emmons, *Opinion, Judge in North's Appeal Tainted Justice*, N.Y. TIMES, Aug. 24, 1990, at A28 (insisting that Laurence Silberman, one of the three Reagan aides and now a D.C. Circuit judge, “should have known he might have been violating the Logan Act”).

⁴⁴³ Matt Yancey, *Investigation of Clinton Campaign Sought*, FORT WORTH STAR-TELEGRAM, Oct. 31, 1992, at 3.

⁴⁴⁴ See John D. Ball, *Bush and Putin's “Understandings” Might Have Had an Improper Start*, MORNING CALL (Allentown, Pa.), June 25, 2001, at A7.

⁴⁴⁵ *Id.* (wondering “what ‘understandings’ the Bush team and Putin's party arrive[d] at when they met at the Republican convention”).

cratic nominee—was accused of lobbying Iraqi leaders not to finalize a partial-troop-withdrawal agreement with President Bush.⁴⁴⁶ And Obama’s second Secretary of State, John Kerry, admittedly paid little regard to the Logan Act before joining the executive branch.⁴⁴⁷

In a world of ordinary enforcement, the Trump administration would be beset with plausible Logan Act allegations. Attorney General Jeff Sessions, for one, met with Russian Ambassador Sergey Kislyak well before the transition period.⁴⁴⁸ President-elect Trump claimed to have chosen Rex Tillerson to lead the State Department because of his “vast experience at dealing successfully with all types of foreign governments.”⁴⁴⁹ Trump’s son-in-law, Jared Kushner, interacted with several foreign leaders before January 20, 2017.⁴⁵⁰ He also very likely directed Michael Flynn to seek Russian assistance in undermining the Obama administration’s stance on a U.N. Security Council resolution.⁴⁵¹

President Trump’s own pre-inaugural activities—to say nothing of his conduct before Election Day—leave him historically vulnerable to Logan Act allegations. In the weeks after November 8, Trump spoke with Russian President Vladimir Putin about their nations’ “unsatisfactory” relations;⁴⁵² committed a “major . . . breach of diplomatic protocol” in conversing with the Taiwanese President;⁴⁵³ allegedly applauded the Philippine President’s

⁴⁴⁶ Amir Taheri, *Obama Tried to Stall GIs’ Iraq Withdrawal*, N.Y. POST (Sept. 15, 2008, 8:02 AM), <http://nypost.com/2008/09/15/obama-tried-to-stall-gis-iraq-withdrawal> [https://perma.cc/8A43-KU5W].

⁴⁴⁷ In 1971, Kerry candidly acknowledged that his recent peace discussions with North Vietnamese leaders were “on the borderline of private individuals negotiating.” *Legislative Proposals Relating to the War in Southeast Asia: Hearings Before the S. Comm. on Foreign Relations*, 92d Cong. 180, 188 (1971).

⁴⁴⁸ Adam Entous et al., *Sessions Met with Russian Envoy Twice Last Year, Encounters He Later Did Not Disclose*, WASH. POST (Mar. 1, 2017), https://www.washingtonpost.com/world/national-security/sessions-spoke-twice-with-russian-ambassador-during-trumps-presidential-campaign-justice-officialssay/2017/03/01/77205eda-feac-11e6-99b4-9e613afeb09f_story.html [https://perma.cc/5QZP-YXFS].

⁴⁴⁹ Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 13, 2016, 7:44 AM), <https://twitter.com/realdonaldtrump/status/808653723639697408> [https://perma.cc/4NMN-HWDE].

⁴⁵⁰ Peter Nicholas et al., *Special Counsel Mueller Probes Jared Kushner’s Contacts with Foreign Leaders*, WALL ST. J. (Nov. 21, 2017), <https://www.wsj.com/articles/special-counsel-mueller-probes-jared-kushners-contact-with-foreign-leaders-1511306515> [https://perma.cc/VR8B-69SD].

⁴⁵¹ See Tom Winter & Andrea Mitchell, *Michael Flynn Pleads Guilty to Lying to FBI in Mueller Probe*, NBC NEWS (Dec. 4, 2017, 2:32 PM), <https://www.nbcnews.com/politics/politics-news/michael-flynn-former-national-security-adviser-plead-guilty-mueller-probe-n82555> [https://perma.cc/JP43-P7UH] (identifying Kushner as the “very senior member” of Trump’s transition team referred to in Flynn’s Statement of the Offense).

⁴⁵² Jenna Johnson et al., *Trump and Putin Speak by Phone, Say They’ll Work Together to Improve Relations*, WASH. POST (Nov. 15, 2016), https://www.washingtonpost.com/politics/trump-and-putin-speak-by-phone-say-theyll-work-together-to-improve-relations/2016/11/14/242f44c2-aa90-11e6-977a-1030f822fc35_story.html [https://perma.cc/FU73-S8XT].

⁴⁵³ Anne Gearan, *Trump Speaks with Taiwanese President, a Major Break with Decades of U.S. Policy on China*, WASH. POST (Dec. 3, 2016), <https://www.washingtonpost.com/world/national-security/trump-spoke-with-taiwanese-president-a-major-break-with-decades-of-us->

wave of drug-related assassinations in a one-on-one exchange;⁴⁵⁴ goaded China to keep an American underwater drone that it had seized;⁴⁵⁵ privately urged the Egyptian President to withdraw the U.N. Security Council resolution that landed Flynn in hot water;⁴⁵⁶ and encouraged Israel to “[s]tay strong” during the Obama administration’s final days.⁴⁵⁷ In response, Democratic Congressman Jared Huffman introduced the “One President at a Time Act” to clarify that the Logan Act applies to Presidents-elect and their agents.⁴⁵⁸

Whether all or none of these actors actually violated the Logan Act is irrelevant for present purposes. The key point is that by enforcing the Act, administrations would invite public inquests into the minutiae of their own pre-executive communications. Presidents might be compelled to defend their own ostensible criminality, or at least to justify their retention of scoff-laws. The Logan Act’s potentially massive breadth could make defense against such recriminations a politically unwelcome task.

b. Reluctance to Hamstring Post-Administration Activity. Old habits die hard. Presidents and high-ranking officials apparently struggle to surrender one of their chief institutional privileges: charting the course of American diplomacy. Unfortunately for them, the “authority of the United States” vanishes at the end of their terms. Enforcing the Logan Act like any other criminal statute could greatly restrict their own profiles after leaving office, making retirement much less rewarding. This is another way in which non-enforcement may well be motivated by raw self-interest.

President Grant, for one, met with several foreign sovereigns during a post-presidential world tour.⁴⁵⁹ He concluded his trip by mediating a dispute between Japan and China over control of the Ryukyu Islands.⁴⁶⁰ President Taft also continued to engage with global issues after leaving office. After digging through the files of the League to Enforce Peace—chaired by Taft—counsel for a Senate investigative committee issued the following assessment: “[T]his organization has, through its officials, by correspondence and

policy-on-china/2016/12/02/b98d3a22-b8ca-11e6-959c-172c82123976_story.html [https://perma.cc/TY83-5RRL].

⁴⁵⁴ Ivan Watson et al., *Duterte: Trump Says Philippines Tackling Drug Problem in ‘The Right Way,’* CNN (Dec. 3, 2016, 7:05 PM), <http://www.cnn.com/2016/12/03/politics/trump-duterte-phone-call> [https://perma.cc/8AFP-6KSG].

⁴⁵⁵ Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 17, 2016, 7:59 PM), <https://twitter.com/realDonaldTrump/status/810288321880555520> [https://perma.cc/JN3D-7MYJ].

⁴⁵⁶ *Egypt Delays UN Motion on Israel as Trump Intervenes*, BBC NEWS (Dec. 23, 2016), <http://www.bbc.com/news/world-middle-east-38412079> [https://perma.cc/4CYZ-JMW6].

⁴⁵⁷ Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 28, 2016, 9:25 AM), <https://twitter.com/realdonaldtrump/status/814114980983427073> [http://perma.cc/65YA-8DKN].

⁴⁵⁸ See H.R. 6511, 114th Cong. (2016), <https://www.congress.gov/114/bills/hr6511/BILLS-114hr6511ih.pdf> [https://perma.cc/6KKS-R9T3].

⁴⁵⁹ See RON CHERNOW, GRANT 867, 877–78 (2017) (describing Grant’s interactions with Queen Victoria and Chancellor Otto von Bismarck, among others). “[O]nce a President always a President,” quipped America’s minister to Great Britain. RONALD C. WHITE, AMERICAN ULYSSES: A LIFE OF ULYSSES S. GRANT 593 (2016).

⁴⁶⁰ CHERNOW, *supra* note 459, at 1089.

conferences, talked with various officials of foreign Governments about getting this and other countries into the League of Nations Peace Treaty . . . in violation of the Logan [A]ct.”⁴⁶¹ Hoover the humanitarian reprised his non-governmental feats during World War II,⁴⁶² and Richard Nixon traveled to Beijing to meet with Chinese officials only a year and a half after resigning.⁴⁶³ The latter trip elicited Logan Act outcries from the highest quarters;⁴⁶⁴ Nixon was “treated in Peking as if he still occupied the Oval Office.”⁴⁶⁵

Jimmy Carter has fully embraced the model of ex-President as President—or rather, as tireless moral mediator of international predicaments. By his own admission, Carter considers himself exempt from certain precepts of American foreign policy.⁴⁶⁶ The Carter Center’s website contains ninety-six detailed reports—all written by the former President—on his negotiation-laden international trips from 1997 to 2015.⁴⁶⁷ He makes no pretense of complying with the Logan Act,⁴⁶⁸ a law he was once charged with executing. Bill Clinton, through his namesake Clinton Global Initiative, has “brought together more than 200 sitting and former heads of state” to craft “solutions to the world’s most pressing challenges.”⁴⁶⁹ And Barack Obama sat down with German Chancellor Angela Merkel just hours before she conversed with President Trump at a highly charged NATO summit.⁴⁷⁰ He also met with Chinese President Xi Jinping on the very day that the North Korean government tested an intercontinental ballistic missile.⁴⁷¹

⁴⁶¹ *Say Peace Leaguers Violated Logan Act*, N.Y. TIMES, Oct. 19, 1920, at 3.

⁴⁶² See *supra* note 322 and accompanying text.

⁴⁶³ *Barry Asks a Favor: “Stay in China, Nixon,”* CHI. TRIB., Feb. 26, 1976, at 1.

⁴⁶⁴ See 122 CONG. REC. 4919 (1976) (statement of Sen. Goldwater (R-Ariz.)) (“[T]he [Logan Act] does cover Mr. Nixon’s trip. . . [I]f it has application to any situation it must be this one.”).

⁴⁶⁵ *Nixon’s Embarrassing Road Show*, TIME, Mar. 8, 1976, at 26.

⁴⁶⁶ See Aneesh Raman, *Carter Meets with Hamas Officials in Egypt*, CNN (Apr. 17, 2008, 9:31 PM), <http://www.cnn.com/2008/WORLD/meast/04/17/carter.hammas> [<http://perma.cc/6M5U-HHRM>] (“They have laid down a rule to which I consider myself immune that . . . nobody can talk to Hamas, nobody can talk to Syria.”) (omission in original). In 1989, Vice President Quayle complained that Carter had been “meeting with heads of state we don’t meet with.” Abe Mellinkoff, *Carter’s Gabfest with Daniel Ortega*, S.F. CHRON., Feb. 7, 1989, at A22.

⁴⁶⁷ See generally *Trip Reports by Jimmy Carter*, CARTER CTR., https://www.cartercenter.org/news/trip_reports/index.html [<http://perma.cc/9UXT-B2VZ>].

⁴⁶⁸ See, e.g., Jimmy Carter, *President Carter’s Cuba Trip Report*, CARTER CTR. (May 20, 2002), <https://www.cartercenter.org/news/documents/doc528.html> [<http://perma.cc/VA7Y-M5SM>] (“I wanted to explore with [Fidel Castro] and other Cuban leaders any indication of flexibility in economic or political policy that might help to ease tensions between our two countries.”).

⁴⁶⁹ *About Us: The CGI Mission*, CLINTON GLOB. INITIATIVE, <https://www.clintonfoundation.org/clinton-global-initiative/about-us/cgi-mission> [<https://perma.cc/52W9-KGW8>].

⁴⁷⁰ Stephen Collinson, *1 Day, 2 Presidents: Merkel Meets with Obama, Then Trump*, CNN (May 25, 2017, 9:53 AM), <http://www.cnn.com/2017/05/25/politics/angela-merkel-obama-trump-germany/index.html> [<https://perma.cc/WN9K-HQ36>].

⁴⁷¹ Viola Zhou, *Weeks After Hosting Trump, China’s President Reconnects with Obama*, BUS. INSIDER (Nov. 30, 2017, 6:22 PM), <http://www.businessinsider.com/after-trump-xi-jinping-meets-obama-2017-11> [perma.cc/P4KW-YKYV].

Departing diplomats, too, may struggle to relinquish their earlier roles. In 1808, with Jefferson's Embargo starving American shipyards, former Secretary of State Timothy Pickering struck up a correspondence with a special British envoy named George Rose. Pickering used this contact to urge the British government not to succumb to American economic pressure.⁴⁷² As if drawing up his own Logan Act indictment, Pickering "express[ed] . . . my opinion of the true point of policy to be observed by your government towards the United States"⁴⁷³ in what he later described as a "subject of dispute" between the two nations.⁴⁷⁴ In 1979, Henry Kissinger—another former Secretary of State—met with the Foreign Minister of Chile only days after the Pinochet regime refused President Carter's request to extradite the architect of an assassination that occurred on American soil. Kissinger allegedly praised the decision, encouraged Chile to treat the Carter administration "with brutality," and assured the envoy that America's posture would change after the 1980 presidential election.⁴⁷⁵

More recently (and far more benignly), former U.N. Ambassador Bill Richardson established the Richardson Center for Global Engagement, a nonprofit dedicated to enhancing "citizen diplomacy with countries . . . not usually open to more formal diplomatic channels."⁴⁷⁶ Through the Richardson Center, he continues to "engage directly with foreign leaders, governments and regimes."⁴⁷⁷ Richardson is proud to have acted as "an unofficial envoy with no ties to any government," and to have "mediated international conflicts" in a "non-official" capacity.⁴⁷⁸

Such nongovernmental endeavors are standard fare among ex-White House occupants. But former executive-branch officials are no differently situated under the Logan Act than anyone else who engages in unauthorized activity. Through a centuries-long chain of neglect, Presidents and their top diplomats—those with the greatest stake in stifling unauthorized communications—have left themselves legal room to perpetuate their global influence in retirement.

c. Reluctance to Prosecute Political Allies and Personal Friends. "No Administration likes to prosecute its own Congressmen."⁴⁷⁹ Probabilistically

⁴⁷² FORREST McDONALD, *THE PRESIDENCY OF THOMAS JEFFERSON* 147 (1976).

⁴⁷³ Letter from Sen. Timothy Pickering to George H. Rose (Mar. 13, 1808), in *DOCUMENTS RELATING TO NEW-ENGLAND FEDERALISM, 1800–1815*, 366, 366 (Henry Adams ed., 1877) [hereinafter *DOCUMENTS*].

⁴⁷⁴ Letter from Timothy Pickering to George H. Rose (Apr. 7, 1812), in *DOCUMENTS*, *supra* note 473, at 387, 387; *see also* McDONALD, *supra* note 472, at 147 (characterizing Pickering's double-dealing as a "flagrant violation of the Logan Act").

⁴⁷⁵ Zach Dorfman, *How Henry Kissinger Conspired Against a Sitting President*, *POLITICO MAG.* (Jan. 6, 2017), <https://www.politico.com/magazine/story/2017/01/henry-kissinger-jimmy-carter-chile-214603> [<https://perma.cc/LCB7-XDPG>].

⁴⁷⁶ *About Us*, RICHARDSON CTR., <https://www.richardsondiplomacy.org/about-us/> [<http://perma.cc/8TPW-QEPJ>].

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.*

⁴⁷⁹ Reston, *supra* note 130, at 4.

speaking, a substantial number of Logan Act offenders will be political allies of the administration, in Congress or elsewhere. These affinities—which have nothing to do with whether the Act’s elements have been met—must surely act as a restraining force in deciding whether to condone technical transgressions. After all, indicting the administration’s ideological confrères could well undermine its congressional agenda, deplete the presidential farm team, and damage the party’s brand by amplifying the severity of intramural schisms.

Presidents are just as likely to indulge legally problematic conduct by their personal friends. In 1929, for instance, some terrifically damning correspondence revealed that an American named Herbert Lakin had advised the Cuban government on how public opinion could be manipulated to defeat sugar-tariff legislation in Congress.⁴⁸⁰ Lakin’s associate and personal attorney, Edward Shattuck, dutifully abetted this scheme, but Shattuck’s “very intimate friend[ship]” with President Hoover⁴⁸¹ likely immunized him (and therefore Lakin) from prosecution. One congressman later charged that Attorney General Robert Kennedy’s mentorship of a key Tractors-for-Freedom figure created a “conflict of interest” in the Justice Department’s orientation toward the Logan Act.⁴⁸² Just weeks after golfing with his old companion President Nixon, comedian Bob Hope faced no consequences for his “strictly . . . private” prisoner-release expedition to Vietnam.⁴⁸³ And friendships could have conceivably influenced the enforcement decisions of George H.W. Bush⁴⁸⁴ and Bill Clinton,⁴⁸⁵ as well.

An array of self-regarding incentives thus cripples the Logan Act’s practical utility. Any level of non-zero enforcement would force Presidents to justify their apparent exemption of themselves and those whose prosecutions would be most embarrassing or painful to them.

3. *Leveraging the Absence of Official Authority*

The Logan Act prohibits certain actions taken “without authority of the United States.”⁴⁸⁶ Although its exact coverage is unclear, this enigmatic phrase was codified to help regularize U.S. foreign policy. That goal is best

⁴⁸⁰ *Machado in Letter Held Tariff Fatal*, N.Y. TIMES, Dec. 13, 1929, at 3.

⁴⁸¹ *Century-Old Law to Stop Lobbyists*, ATLANTA CONST., Dec. 13, 1929, at 11.

⁴⁸² 107 CONG. REC. 11,932 (1961) (statement of Rep. Michel (R-Ill.)).

⁴⁸³ Berger, *supra* note 176, at A3 (quoting the White House Deputy Press Secretary).

⁴⁸⁴ Kent Hance, co-chairman of Vice President George H.W. Bush’s presidential campaign in Texas, met in Vienna with OPEC ministers and officials from oil-producing nations to try to stabilize oil prices. Michael Arndt, *Texas Oil Official Takes His Pitch to OPEC*, CHI. TRIB. (Apr. 28, 1988), http://articles.chicagotribune.com/1988-04-28/business/8803120555_1_hance-opec-ministers-oil-prices [https://perma.cc/F9C9-VT3J].

⁴⁸⁵ S. Daniel Abraham, whom Clinton has called a “generous friend,” S. DANIEL ABRAHAM, EVERYTHING IS POSSIBLE 165 (2010), hosted a luncheon for Yemeni President Ali Abdullah Saleh at New York’s Waldorf-Astoria hotel in 2000. Ira Stoll & Seth Lipsky, *Diplomatic Dispatches: Meddler for Hire*, WALL ST. J., EUR., Dec. 8, 2000, at 8.

⁴⁸⁶ 18 U.S.C. § 953 (2012).

achieved by openly communicating conferrals of officialdom, so that foreign nations know who is empowered to make representations on behalf of America's duly constituted government.⁴⁸⁷ Yet some Presidents have secretly recruited private citizens to navigate delicate diplomatic predicaments—to avoid being perceived as carrying on official talks with pariah regimes, and so that undercover envoys could be credibly disavowed if they failed.⁴⁸⁸

There can be little doubt that persons actually deputized to act on behalf of the executive branch enjoy the requisite “authority,” however difficult their status might be to ascertain. But many related practices operate in a legal netherworld. Does an otherwise private figure attain the “authority of the United States” simply because the White House declines to interdict his pending journey—avoiding a drastic and newsworthy remedy—despite having been told what it might entail? What if the State Department also offers a few nuggets of advice designed to mitigate foreseeable damage to ongoing diplomatic efforts? The Logan Act seemingly contemplates no third category of “apparent acceptance” or “grudging toleration.”⁴⁸⁹ But even if it did, levying *any* prosecutions would shatter most attempts at secrecy, because it would place a premium on ascertaining the administration's precise responsibility for unannounced, ostensibly unofficial ventures.

This subpart explains why private citizens are sometimes needed to accomplish what governments cannot. It then highlights the unlikelihood of prosecuting meddlers whose missions yield welcome windfalls. The Logan Act's moral force—and thus the probability of its ever being enforced—is greatly diminished by its undesirability in those triumphal moments. This subpart lastly documents the frequency of Presidents' cooptation of private citizens for diplomatic purposes. It illustrates how a culture of regarding the Logan Act as a genuine criminal statute could weaken Presidents' ability to indirectly “handl[e] the delicate problems of foreign relations,”⁴⁹⁰ even if their formal constitutional power remained unimpaired.

a. The Upside of Private Diplomacy. Diplomatic freelancing has thrown Presidents off message, dashed their displays of strength, and confounded

⁴⁸⁷ Cf. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) (“Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received These assurances cannot be equivocal.”).

⁴⁸⁸ See LEON V. SIGAL, *DISARMING STRANGERS: NUCLEAR DIPLOMACY WITH NORTH KOREA* 152 (1999) (capturing the Clinton administration's view that “if [Jimmy Carter] freelanced, he could always be disowned”); Lior Lehrs, *Private Peace Entrepreneurs in Conflict Resolution Processes*, 21 INT'L NEGOT. 381, 391 (2016) (explaining that decisionmakers sometimes “deny[] any connection to” unofficial emissaries).

⁴⁸⁹ Until 1948, the Act used the phrase “without the permission or authority of the government of the United States” (emphasis added). Compare 1 Stat. 613 (1799) (including the word “permission”), with Act of June 26, 1948, ch. 645, §953, 62 Stat. 683, 744 (codified as amended at 18 U.S.C. § 953 (2012)) (referring only to “authority of the United States”). This textual shift, even if thought to have been inconsequential, cautions against an interpretation of “authority” that encompasses all communications that the executive branch knew would occur.

⁴⁹⁰ *United States v. Pink*, 315 U.S. 203, 229 (1942).

sensitive international negotiations. It has also liberated captives, conciliated brutal dictators, and unclogged impassable channels. An entire literature has sprouted up to canvass the accomplishments of uncredentialed go-betweens.⁴⁹¹ This is because direct diplomacy has proven inadequate to solve some of America's most pressing foreign-policy problems.

Diplomats are cynical creatures; they must presume the worst about adversaries' motives in routine geopolitical interactions. And once governments publicly commit to irreconcilable outcomes—as on North Korea's nuclear program, for instance—direct diplomacy may become impractical.⁴⁹² With entire nations' survival at stake, sometimes private citizens alone—operating outside entrenched and self-reinforcing power structures—can “uncover new avenues for accommodation” to defuse explosive situations.⁴⁹³ As one State Department official reflected, “If Jimmy Carter had not gone to North Korea [in 1994] . . . we would have been damned close to war.”⁴⁹⁴

Prominent dissidents may also be uniquely situated to reason with foreign adversaries inclined to scoff at the incumbent administration's appeals.⁴⁹⁵ For example, after releasing forty-seven American hostages to Jesse Jackson, Iraqi President Saddam Hussein remarked, “This is in your honor. I'm doing this for you—not Bush! I have no respect for Bush.”⁴⁹⁶ Ironically, George Logan's 1798 mission to Paris—which preceded 1800's Treaty of Mortefontaine—seems to fit that very pattern.⁴⁹⁷

Perhaps Clémenceau's famous epigram⁴⁹⁸ deserves a corollary—that “[p]eace is too important to be left to the President and the Department of State.”⁴⁹⁹ In this vein, the Logan Act has been openly scorned as an impedi-

⁴⁹¹ See, e.g., LOUISE DIAMOND & JOHN McDONALD, *MULTI-TRACK DIPLOMACY: A SYSTEMS APPROACH TO PEACE* (3d ed. 1996); *SECOND TRACK / CITIZENS' DIPLOMACY: CONCEPTS AND TECHNIQUES FOR CONFLICT TRANSFORMATION* (John Davies & Edward Kaufman eds., 2002); WARNER & SHUMAN, *supra* note 386; Lehrs, *supra* note 488.

⁴⁹² See, e.g., Maynes, *supra* note 195, at 8C (observing that the U.S. government often “cannot take even minimal steps toward a compromise with a hostile government”).

⁴⁹³ *Id.* at 6; see also *Iranian Asset Settlement: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 97th Cong. 45 (1981) (“[W]here there was no real authority at the other end of the line, and no American presence [in Tehran], we had to employ responsible people that we felt would be useful.”).

⁴⁹⁴ SIGAL, *supra* note 488, at 132.

⁴⁹⁵ Lehrs, *supra* note 488, at 399.

⁴⁹⁶ KARIN L. STANFORD, *BEYOND THE BOUNDARIES: REVEREND JESSE JACKSON IN INTERNATIONAL AFFAIRS* 2 (1997).

⁴⁹⁷ See Tolles, *supra* note 13, at 25.

⁴⁹⁸ See PETER CHARLES HOFFER, *THE HISTORIANS' PARADOX: THE STUDY OF HISTORY IN OUR TIME* 203 (2010) (“War is too important to be left to the generals.”).

⁴⁹⁹ 106 CONG. REC. 10,994 (1960) (statement of Rep. Porter (D-Or.)); see also Coretta Scott King, *We Need to Foster Efforts for Worldwide Friendship*, ATLANTA J.-CONST., Dec. 7, 1986, at E5 (“Peace is too important to be left to the diplomats.”); Szilárd, *supra* note 113, at 353 (doubting “that the problem which faces the world today can be solved at the level of foreign policy . . . by the Administration”).

ment to continued human survival.⁵⁰⁰ As the rest of this Part shows, Presidents have glaringly sidestepped the statute in order to “save some lives”⁵⁰¹ or internalize accomplishments that institutional actors failed to achieve on their own.

b. Embracing Windfalls. Administrations have “little enthusiasm for unauthorized diplomacy . . . [u]nless, of course, it succeeds.”⁵⁰² One such triumph came in 1848, when Nicholas Trist’s negotiations in Mexico City secured to the United States 525,000 square miles of new territory via the Treaty of Guadalupe Hidalgo. President Polk had summoned Trist back to Washington for violating his written orders.⁵⁰³ Trist sensed that unless he quickly resumed negotiations, political forces in Mexico would block any peace deal advantageous to the United States.⁵⁰⁴ An American newspaper correspondent pleaded with the unemployed envoy: “Make the Treaty, Sir! It is now in your power to do your country a greater service than any living man can render her. . . . Instructions or no instructions, you are bound to do it.”⁵⁰⁵ Trist made the treaty, correctly calculating that Polk would seize this annoyingly unconventional opportunity for a profitable peace. Once Polk recommended the Treaty’s ratification—a deal that “fulfilled his own directives”⁵⁰⁶—he could hardly prosecute the defiant deliverer of manifest destiny.

Similar patterns have played out repeatedly. In 1971, the White House bristled at Representative Wilbur Mills’s involvement in foreign-trade policy, but it capitalized on his connections after he unilaterally engineered certain restrictions on exports to the United States.⁵⁰⁷ When ex-President Nixon traveled to Beijing in 1976, Secretary of State Henry Kissinger graciously commented that “we welcome any statement that the Chinese make, even if we would have chosen a different forum.”⁵⁰⁸ The Nixon and Reagan administrations applauded a prominent industrialist’s negotiations with Chinese and Soviet officials, the genesis of “important business deals.”⁵⁰⁹ When Jesse Jackson rescued a captured American flyer in Syria after high-level overtures, one columnist declared to “a lead-pipe certainty” that Jackson

⁵⁰⁰ See 130 CONG. REC. 4353 (1984) (statement of Rep. George Brown, Jr. (D-Cal.)) (“[T]he issues at stake in the world today are too enormous to allow restrictions in their full and free discussion across national boundaries.”); Mike Shenefelt, Opinion, *Jackson Abroad: A Legitimate Voice*, N.Y. TIMES, July 15, 1984, at 185 (doubting “whether at this point there would be an earth left” if governments could not avail themselves of “the constant and incalculable activity of private citizens”).

⁵⁰¹ 107 CONG. REC. 8780 (1961) (statement of Sen. Humphrey (D-Minn.)).

⁵⁰² See Tom Raum, *White House Shies Away from Citizen Diplomats*, ASSOCIATED PRESS, Apr. 29, 1998.

⁵⁰³ OHRT, *supra* note 306, at 136.

⁵⁰⁴ *Id.* at 137.

⁵⁰⁵ *Id.* at 140.

⁵⁰⁶ HOWARD JONES, *CRUCIBLE OF POWER: A HISTORY OF AMERICAN FOREIGN RELATIONS TO 1913*, at 161 (2002).

⁵⁰⁷ Frank C. Porter, *Nixon Aide Backs Trip*, WASH. POST, Aug. 6, 1971, at D7.

⁵⁰⁸ “*To Do This Country a Favor*,” L.A. TIMES, Feb. 26, 1976, at A1.

⁵⁰⁹ Smith, *supra* note 202, at 8.

would elude prosecution, for “[n]othing succeeds like success.”⁵¹⁰ (Sure enough, President Reagan offered Jackson “our gratitude and admiration.”⁵¹¹) And on three separate occasions in the early 1990s, private citizens who extracted mass prisoner releases from Saddam Hussein continued to go about their lives.⁵¹²

These episodes illustrate that when Americans—entirely on their own—advance the administration’s goals despite disregarding the Logan Act, powerful structural forces ensure that their behavior will be condoned. Such episodes have seriously constrained the Act’s practical availability, because no President would want to imply that unconditional hostage releases, American territorial expansion, and humanitarian exploits were accomplished criminally.

c. Secretly Recruiting Private Citizens. When the Kennedy administration quietly enlisted a trio of prominent Americans to negotiate for the release of imprisoned Bay of Pigs participants, the plan backfired. Opponents clamored for clarification as to the committee’s exact status—had it arisen organically, or was it working for the President?⁵¹³ These questions resurfaced a year later, when corporate lawyer James Donovan was discreetly sent to negotiate with Castro at Kennedy’s behest.⁵¹⁴

From a good-governance perspective, this scrutiny is exactly what Presidents wish to avoid. Administrations often cannot negotiate directly with certain regimes. So they adopt an “official hands off, unofficial hands on”⁵¹⁵ stance, whereby emissaries must be sufficiently distant from the White House to maintain a façade of intergovernmental silence, but close enough

⁵¹⁰ James J. Kilpatrick, *It Is Still a Bad Idea*, TIMES-PICAYUNE (New Orleans), Jan. 5, 1984, at 9. A White House official separately reasoned that if Jackson were to obtain the release of Soviet dissident Andrei Sakharov, “it would be such a diplomatic and political coup that the Administration would probably have to swallow its discomfort.” Smith, *supra* note 202.

⁵¹¹ Clines, *supra* note 204, at A11.

⁵¹² See Edwin Chen, *Texans May Have Spurred Hussein to Act*, L.A. TIMES, Dec. 9, 1990, at A1, A8 (stating that two prominent Texans convinced Hussein to release around 3000 hostages held in Iraq and Kuwait); *Muhammad Ali Talks About Peace Mission to Free Hostages*, JET, Dec. 24, 1990, at 5 (reporting that Muhammad Ali “triumphantly flew back to the U.S. with 15 hostages by his side”); see also Ron Brown, *Jackson, Jesse*, in ENCYCLOPEDIA OF AMERICAN RELIGION AND POLITICS 223, 224 (Paul A. Djupe & Laura R. Olson eds., 2014) (explaining that Jesse Jackson “won the release of hundreds of foreign nationals and U.S. citizens being held in Kuwait” by Hussein).

⁵¹³ See *supra* note 191 and accompanying text.

⁵¹⁴ See 108 CONG. REC. 23,100 (1962) (statement of Rep. Pelly (R-Wash.)) (“[T]he Secretary of State should make immediately available . . . a full explanation of what is going on.”); *id.* at 23,526–27 (statement of Rep. Gross (R-Iowa)) (“What authority has he been delegated by the U.S. Government? . . . I do not understand the situation at all.”); *Donovan Role Probe Sought*, TIMES-PICAYUNE (New Orleans), June 12, 1963, at 34 (quoting a contingent of House Republicans who demanded to know whether Donovan was “acting with the authority of the United States or was . . . a private citizen acting in violation of the Logan Act”); *Ransom to Castro May Be Illegal, Judge Says*, L.A. TIMES, Feb. 10, 1963, at F11 (quoting a federal judge who remarked that “[w]e must determine whether this is a voluntary effort or a government effort”).

⁵¹⁵ *Cuban Ransom Paid*, TIMES-PICAYUNE (New Orleans), June 29, 1963, at 10.

to project an ability to bind the administration. Presidents have three unsavory options when pressed to clarify the status of negotiators secretly acting at their behest: (1) ignoring the demands and absorbing any political fallout, (2) admitting that the administration has in fact commenced talks with despised despots, or (3) denying that its recruits enjoy any governmental authority, which would simultaneously expose eager patriots to accusations of criminality⁵¹⁶ and undermine their perceived power in the eyes of foreign negotiators.

Prosecuting *any* Logan Act violators, in any situation, would greatly compound this problem. If the Act were a living force, journalists might devote significant resources to exposing unofficial envoys' exact legal authority. Presidents could be forced to disavow their back-channel liaisons or else acknowledge having sponsored them, which would vitiate their usefulness as unofficial agents. Professor Pozen has astutely detected this very dynamic in the surprisingly minimal enforcement of federal anti-leaking laws. For various reasons, it is sometimes in the Executive's interest to disseminate classified information to the press. These clandestine releases are, by definition, legally unproblematic.⁵¹⁷ But an authorized leak's pedigree will rarely be obvious. "[V]igorous enforcement of the leak laws would cripple the administration's ability to plant" information at optimal levels,⁵¹⁸ because "[t]o untangle the illicit from the licit disclosures is to invite critical scrutiny of the administration's tactics."⁵¹⁹ So too here—since actors' identification with the White House largely shapes their criminal liability, those ties would be meticulously probed in a world with routine Logan Act enforcement. Total nonenforcement solves the problem by "discourag[ing] reporters from looking into questions of authorization too closely."⁵²⁰

The regularity of public-private diplomacy magnifies the stakes of inviting such scrutiny. As it turns out, the executive branch's practice of quietly encouraging—or at least indulging—private diplomacy is about as old as the Republic itself. George Logan's seminal 1798 peace mission to Paris was facilitated by a letter of credence from Vice President Jefferson.⁵²¹ When Logan sailed to England in 1810 hoping to avert war, he carried a number of

⁵¹⁶ President Kennedy, for example, referred to his hand-picked Tractors-for-Freedom Committee as a "wholly private effort." *Tractors-for-Freedom Statement*, *supra* note 192, at 393. When Committee member Milton Eisenhower read Kennedy's statement, his "heart fell. . . . I now realized, in chilling clarity, that the President intended to maintain the fiction that all aspects of this case . . . were private. What, then, about the Logan Act?" Milton S. Eisenhower, *Now I Began to Face the Awful Truth*, WASH. (D.C.) NEWS, Nov. 18, 1963, reprinted in 109 CONG. REC. 22,632 (1963).

⁵¹⁷ See Pozen, *supra* note 28, at 570 (explaining that disclosures of classified information are "lawful, or at least effectively insulated from legal penalty," if "traceable to the President or consistent with the executive order on classification").

⁵¹⁸ *Id.* at 562.

⁵¹⁹ *Id.* at 572. From the public's perspective, it is "no simple task to apply the concept of authorization to this domain." *Id.* at 567.

⁵²⁰ *Id.* at 609.

⁵²¹ TOLLES, *supra* note 117, at 155.

letters in President Madison's handwriting. Although they did not purport to empower Logan, the mere fact that he transported messages originating in the White House was meant to instill a "*belief* that he was authorized to negotiate with England."⁵²² Madison was denounced for his "double dealing" in supposedly countenancing a secret peace mission by someone "without any authority from [his] government."⁵²³ As a result, Logan—like many who followed him—was "neither a minister extraordinary, nor minister incognito."⁵²⁴

Edward House, a Wilson confidante who set out for the Paris peace talks as World War I ended, also enjoyed "no public commission so far as the country kn[ew]."⁵²⁵ Predictably, his "precise position" became a matter of intense public interest: was he an "agent of the President," even though he had never been formally accredited?⁵²⁶ In 1939, the State Department gave "unofficial sanction" to a Washington lawyer's negotiations with the Mexican government on behalf of American oil companies.⁵²⁷ Months before Pearl Harbor, President Roosevelt encouraged two Catholic missionaries already in contact with the Japanese government to obtain in writing its (rumored) proposed withdrawal from the Axis Pact.⁵²⁸ And in 1958, the State Department assured the lawyer-celebrity Adlai Stevenson that he would not be prosecuted for "negotiat[ing] for royalties" with the Soviet government on behalf of the American Authors League.⁵²⁹

During the Cuban Missile Crisis—with civilization on the line—the White House deployed ABC News correspondent John Scali as an intergovernmental go-between.⁵³⁰ In 1970, a congressional committee determined that recent private trips to Hanoi had occurred "with the knowledge, consent and support of the Government of the United States."⁵³¹ The lead American peace negotiator allegedly green-lighted a U.S. senator's similar trip because it "might turn out to be a helpful effort . . . in getting a better understanding of the other side."⁵³² In 1971, Secretary of State William Rogers tried to silence Logan Act chatter concerning Bob Hope's trip to Hanoi by assuring

⁵²² *Dr. Logan*, FED. REPUBLICAN (Balt.), Mar. 9, 1810, at 1 (emphasis added).

⁵²³ *Id.* at 2.

⁵²⁴ *Id.*

⁵²⁵ *What Is the Status of House?*, PHILA. INQUIRER, Oct. 28, 1918, at 10.

⁵²⁶ *Id.*; see also Arthur D. Howden Smith, *This Trip Abroad Was No Peace Mission*, SUN (Balt.), Apr. 27, 1918, at 6 (reporting that "an agitation" had erupted over the Logan Act's applicability to House).

⁵²⁷ 84 CONG. REC. 10,413 (1939) (statement of Sen. Bridges (R-N.H.)) (quoting newspaper columnist Marquis W. Childs).

⁵²⁸ JERALD A. COMBS, *THE HISTORY OF AMERICAN FOREIGN POLICY FROM 1895*, at 161 (4th ed. 2012).

⁵²⁹ Allan B. Ecker, *The Sound of Silence: Adlai E. Stevenson, the Universal Copyright Convention, and the Russians*, 35 LEGAL STUD. F. 1, 1–2 (2011); *Stevenson in London*, N.Y. TIMES, June 17, 1958, at 3.

⁵³⁰ ROGER HILSMAN, *THE CUBAN MISSILE CRISIS: THE STRUGGLE OVER POLICY* 121–22 (1996).

⁵³¹ *Douglas Report*, *supra* note 145, at 145.

⁵³² 115 CONG. REC. 18,207 (1969) (statement of Sen. McGovern (D-S.D.)).

reporters that “he worked with our people in the area.”⁵³³ The State Department even used Ramsey Clark as a courier to transmit hundreds of letters to POWs during his controversial 1972 trip to Hanoi.⁵³⁴

This strategy has persisted to the present. President Carter enlisted Muhammad Ali to lobby foreign governments to boycott the 1980 Olympics.⁵³⁵ Jesse Jackson insisted that despite President Reagan’s exasperation, the State Department had “fully cooperated” with his Cuban prisoner-release expedition.⁵³⁶ Ex-President Carter flew to Pyongyang in 1994 with the administration’s blessing, but “without any clear instructions or official endorsement.”⁵³⁷ In fact, Clinton embraced this model throughout his presidency.⁵³⁸ Once out of office, his own informal visit to Pyongyang “had huge behind-the-scenes help from the State Department.”⁵³⁹ And the Defense and State Departments often “provide[] extensive logistical support” to congressional delegations by arranging their overseas itineraries.⁵⁴⁰

The frequency and necessity of unofficial-official missions virtually ensure that the Logan Act will never be enforced in its current form. No President would prosecute someone whose diplomatic talks her administration had privately encouraged, or at least knowingly condoned. (Imagine the sympathy potential defendants could score on this point.) And to indict anyone at all would invite prompt investigation of everyone communicating with a foreign government who had not been publicly accredited by the Executive. The enhanced legal stakes might simultaneously reveal the true genesis of emergency missions and unmask administrations’ inability to solve serious foreign-policy challenges on their own.

4. *Perceived Constraint*

a. “*Use It or Lose It*”: *The Weight of Custom*. Shrewd observers frequently detect a causal link between past inaction and present leniency. The combined force of having been so frequently and notoriously violated has imbued the Logan Act with a certain “use it or lose it” quality. Why, only now, should a defunct legislative policy be stirred from its slumber? Could any present-day violation really be more demonstrable, more blameworthy, or more destructive than any other in American history?

⁵³³ Berger, *supra* note 176, at A3.

⁵³⁴ Sanford J. Ungar, *U.S. Sees No Law Violation by Clark, Salinger Overseas*, WASH. POST, Aug. 23, 1972, at A6.

⁵³⁵ See NICHOLAS EVAN SARANTAKES, *DROPPING THE TORCH: JIMMY CARTER, THE OLYMPIC BOYCOTT, AND THE COLD WAR* 115–18 (2011).

⁵³⁶ Jackson, *Reagan Split on Mission to Cuba*, PITTSBURGH PRESS, July 5, 1984, at A8.

⁵³⁷ SIGAL, *supra* note 488, at 152.

⁵³⁸ See Raum, *supra* note 502 (“The Clinton administration often invites citizens to go to trouble spots to help nudge along diplomacy.”).

⁵³⁹ John Barry, *Did Clinton’s and Webb’s Trips Legitimize Despots?*, NEWSWEEK (Aug. 20, 2009, 8:00 PM), <http://www.newsweek.com/did-clintons-and-webbs-trips-legitimize-despots-78645> [<https://perma.cc/UXF9-MGNK>].

⁵⁴⁰ Scoville, *supra* note 122, at 352.

Administrations have in fact viewed past Logan Act enforcement practices as highly significant. Rather than operating as a gloss on the Executive's constitutional authority to undertake prosecutions, this species of historical practice informs the *prudence* of holding citizen diplomats to account. Presidents are constrained in this realm not because of transparent, rule-like precommitments, or because they have somehow lost the power to indict offenders, but because the uniformity of past enforcement practices so relentlessly ordains continued forbearance. Future administrations—and special counsels investigating them—cannot simply “start enforcing [the Act] again.”⁵⁴¹

Examples of this perception abound. In commenting on a possible Logan Act indictment in 1953, the Department of Justice thought it significant that “no one has ever been prosecuted under it.”⁵⁴² Again in 1965, a DOJ spokesman pointed out that the Act “had never been enforced” in its long lifetime.⁵⁴³ State Department officials telegraphed their outlook in 1967 with the observation that “so far as they could recall the [law] ha[d] never been invoked.”⁵⁴⁴ A few years later, a State Department lawyer remarked that “[t]here has never been a prosecution and there probably never will be.”⁵⁴⁵ An Assistant Secretary of State echoed this stance in 1976 in explaining why no prosecution was warranted: “In this connection, it should be noted that no one has ever been prosecuted under the Logan Act.”⁵⁴⁶

Asked in 1980 what should be done to remedy possible violations, Secretary of State Cyrus Vance said only that “[t]he Logan Act has never been adhered to, as far as I know.”⁵⁴⁷ Executive-branch lawyers opining on two possible prosecutions in the 1980s also thought it relevant that the law had “rarely been invoked.”⁵⁴⁸ And Obama administration officials acknowledged that securing a Logan Act conviction against Michael Flynn would be “daunting,” because that law “has never been prosecuted.”⁵⁴⁹ Those decisionmakers were keenly aware that “there is no case history to help guide authorities on when to proceed or how to secure a conviction.”⁵⁵⁰

Because of Presidents' regard for past practices, commentators have ventured that the Logan Act can never again function as enforceable law,

⁵⁴¹ Love & Garg, *supra* note 23, at 1239.

⁵⁴² *O'Konski Would Serve Time*, *supra* note 170, at 1.

⁵⁴³ *Rights Group for Peace Army*, *TIMES-PICAYUNE* (New Orleans), Aug. 14, 1965, at 6; see also Fred P. Graham, 3 on *Hanoi Mission Could Face Court*, *N.Y. TIMES*, Dec. 29, 1965, at 3 (“Justice Department lawyers said today that they had no knowledge of any prosecutions under the Logan Act. They said . . . it was virtually impossible to enforce.”).

⁵⁴⁴ *No U.S. Aide Due at Talks*, *SUN* (Balt.), May 23, 1967, at A8.

⁵⁴⁵ Ungar, *supra* note 142, at A24. Lawyer Charles Ingersoll foretold as much in 1861, predicting that a Logan Act prosecution “probably never will be” attempted. *INGERSOLL*, *supra* note 416, at 233.

⁵⁴⁶ McCloskey, *supra* note 146, at 76.

⁵⁴⁷ *Vance Statement*, *supra* note 178, at 36.

⁵⁴⁸ Taubman, *supra* note 343, at A20; *Rarely Used Statute*, *supra* note 52, at A11.

⁵⁴⁹ Miller et al., *supra* note 6.

⁵⁵⁰ *Id.*

despite its formal retention. In 1967, one congressional supporter of the Act recognized that “the law is unenforceable.”⁵⁵¹ Senator McGovern was thought to be “in no peril of prosecution” in 1969, given the Act’s “unbroken history” of repose.⁵⁵² Another congressman declared the Act not “realistically enforceable” three years later, since “[t]here has never been a successful prosecution” under it.⁵⁵³ A *New York Times* columnist writing in 1983 sensed that “[t]he act is considered virtually unenforceable now.”⁵⁵⁴ Others believed that prosecutions at such a late juncture would be “a very, very tricky and difficult proposition,”⁵⁵⁵ for “disuse of the statute is self-perpetuating.”⁵⁵⁶

A Logan Act indictment would be all but unfathomable in our political and legal culture. It is hard to imagine a less Burkean executive decision; enforcement would be an assault on the sedimentary wisdom that has come to regard Logan Act prosecutions—all proposed prosecutions—as unnecessary or imprudent. At least some recent administrations have accorded this negative precedent significant independent weight. As a result, merely because the Act has never been enforced, it is “becoming less and less likely that the law will ever be used again.”⁵⁵⁷

b. Evidentiary Obstacles. Although some potential Logan Act violations have emanated from “open letter[s],”⁵⁵⁸ others have unfolded in seclusion, experienced by as few as two human beings. One of these people will necessarily be the officer or agent of a (perhaps unfriendly) foreign government—not an optimal conduit of intelligence for American prosecutors. In cases not disposed of through plea agreements, foreign heads of state and other high-ranking ministers would often be indispensable trial witnesses. Even assuming that such figures could be induced to participate in American criminal proceedings, the spectacle of foreign monarchs testifying in federal

⁵⁵¹ 113 CONG. REC. 13,424 (1967) (statement of Rep. Ashbrook (R-Ohio)).

⁵⁵² O’Neill, *supra* note 56, at PER4.

⁵⁵³ 118 CONG. REC. 33,192 (1972) (statement of Rep. Preyer (D-N.C.)); *see also id.* at 33,194 (statement of Rep. Sikes (D-Fla.)) (“There is no enforceable existing law on this point now before us.”); *id.* at 33,195 (statement of Rep. Montgomery (D-Miss.)) (deeming the Logan Act “unenforceable”).

⁵⁵⁴ Flora Lewis, *Left Hand, Right Hand*, N.Y. TIMES, Dec. 16, 1983, at A35.

⁵⁵⁵ *Interrelationship Between U.S. Tax Policy and U.S. Tax Energy Policy: Hearing Before a Subcomm. of the H. Comm. on Gov’t Operations*, 96th Cong. 81 (1979) (quoting corporate attorney Jack A. Blum) [hereinafter *Blum Statement*].

⁵⁵⁶ Opinion, *Get Carter!*, ISR. NAT’L NEWS, Dec. 30, 2003. For similar statements along these lines, see 115 CONG. REC. 32,583 (1969) (statement of Rep. Ichord (D-Mo.)) (declaring that “[t]he Logan Act may be inadequate to provide an enforceable bas[is] for prosecuti[on] . . . [i]nasmuch as not one single prosecution has been initiated”); 130 CONG. REC. 9751 (1984) (statement of Rep. Gingrich (R-Ga.)) (accepting that Logan Act prosecutions are “not conceivable”); 153 CONG. REC. 9042 (2007) (statement of Rep. Burton (R-Ind.)) (“I am not under any illusions that there is going to be . . . any prosecution.”); Ungar, *supra* note 151, at A24 (perceiving that the Act “seemingly cannot be enforced”); Moorhead Kennedy, *Implications of Hostage Deal Are Disturbing*, TAMPA BAY TIMES, Apr. 30, 1991, at 19A (questioning “[w]hether . . . the Logan Act is still enforceable”).

⁵⁵⁷ Diamond, *supra* note 361 (paraphrasing Professor Peter Spiro).

⁵⁵⁸ *See, e.g., supra* notes 113 and 409.

court could backfire fantastically. (Some witnesses might leap at the opportunity to disparage the United States in its own court system, or to extol defendants' efforts to evade proper diplomatic channels.) And Logan Act defendants—facing no more than three years in prison, and having already exasperated the Executive once—would not be especially likely to cooperate. So the humiliation of losing a case on sufficiency-of-the-evidence grounds could well outweigh any desire to punish presidential pretenders.

Observers and administration officials have traced declined prosecutions to evidentiary barriers of this sort. One newspaper editor reported playfully on Senator Borah's closed-door meeting with the British Ambassador: "Borah may have talked about the freedom of the seas or he may have talked about the diplomatic immunity of mint juleps."⁵⁵⁹ In the 1960s, anonymous Justice Department lawyers deemed "the problem of proving the defendant's intent so difficult" as to make the Logan Act "virtually impossible to enforce."⁵⁶⁰ Many prosecutions would be stymied by "the difficulty of producing foreign witnesses in a United States court," after all.⁵⁶¹ One DOJ official responded along these lines to a Logan Act complaint a few years later: since "all the details of the discussions" remained a mystery, "one can only speculate as to what transpired."⁵⁶²

When Attorney General Kleindienst shot down a requested prosecution in 1972, he remarked that "[i]t wouldn't be an easy case to try. The United States marshal can't go over there and get the premier of North Vietnam to come over and tell the truth."⁵⁶³ So no prosecution would proceed without "a fundamental, strong case."⁵⁶⁴ In 1984, lawyers interviewed for a *New York Times* piece speculated that the Logan Act had lain dormant "primarily because it would be difficult to prove an intent to violate the statute."⁵⁶⁵ And regarding Michael Flynn's clandestine calls with the Russian Ambassador, several Obama administration officials "did not see evidence . . . that Flynn had an 'intent' to convey an explicit promise to take action after the inauguration."⁵⁶⁶ The Executive is thus constrained from pursuing a range of poten-

⁵⁵⁹ *Beneficial Faux Pas*, *supra* note 315, at 8.

⁵⁶⁰ Graham, *supra* note 543, at 3.

⁵⁶¹ Grose, *supra* note 240, at 6.

⁵⁶² Mardian Letter, *supra* note 158, at 25,650.

⁵⁶³ *Logan Act Prosecutions*, *supra* note 399, at A8.

⁵⁶⁴ *Id.*; *see also* 118 CONG. REC. 33,196 (1972) (statement of Rep. Mendel Davis (D-S.C.)) ("No witness can be expected to step forward from North Vietnam to prove the necessary elements of . . . the Logan Act The Department of Justice indicates that the evidentiary difficulties are insurmountable.").

⁵⁶⁵ *Rarely Used Statute*, *supra* note 52, at A11.

⁵⁶⁶ Sari Horwitz & Adam Entous, *Flynn in FBI Interview Denied Discussing Sanctions with Russian Ambassador*, WASH. POST (Feb. 16, 2017), https://www.washingtonpost.com/world/national-security/flynn-in-fbi-interview-denied-discussing-sanctions-with-russian-ambassador/2017/02/16/e3e1e16a-f3d5-11e6-8d72-263470bf0401_story.html [perma.cc/3VUX-49MJ]. To be sure, a prosecution would require only sufficient indicia of attempted persuasion, not evidence of a quid pro quo.

tial Logan Act violations because of evidentiary challenges stemming from the practicalities of unauthorized diplomacy.

c. *Constitutional Concerns.* The White House has gone to extraordinary lengths to avoid opining on the merits of requested Logan Act prosecutions. A simple pronouncement of unconstitutionality would relieve much of this pressure. Yet no administration has ever publicly stated that the Act is facially unconstitutional—or that particular applications would transgress constitutional norms—despite wholly plausible bases for doing so.⁵⁶⁷ The closest any administration has come was in 1972, when an attorney in the State Department’s Office of the Legal Adviser—one who “asked not to be identified”—claimed to a newspaper reporter that State Department lawyers had long viewed the Act as “so vague as to be unconstitutional.”⁵⁶⁸ But a DOJ official authorized to advocate for the Logan Act’s repeal later wrote that “we have undertaken no exhaustive analysis of the constitutional questions since our position . . . is based on policy considerations.”⁵⁶⁹

The only other executive-branch statement on the Act’s constitutionality that I have located took no definitive position. An unnamed DOJ spokesman noted rather tritely in 1966 that any prosecution “must take into consideration constitutional guarantees of free speech and travel.”⁵⁷⁰ To be sure, Attorney General Ramsey Clark—later to endure many Logan Act accusations himself—privately berated a junior attorney, Nathan Lewin, for recommending charges under the Act during the Vietnam War: “You couldn’t have honestly believed that we should prosecute Stokely Carmichael for traveling to Hanoi. That would have been unconstitutional.”⁵⁷¹ If Lewin’s recollection is accurate, it is difficult to characterize Clark’s comment as questioning the Logan Act’s constitutionality, as opposed to its selection as a tool for prosecuting Carmichael or the constitutionality of prosecuting him on some other basis. (The Act, of course, does not forbid Americans from traveling to for-

⁵⁶⁷ For assertions that the Logan Act is likely unconstitutional on First Amendment or due-process grounds (or both), see 126 CONG. REC. 10,112 (1980) (statement of Rep. Beilenson (D-Cal.)); *id.* at 18,639 (statement of Rep. Weiss (D-N.Y.)); 130 CONG. REC. 12,212 (1984) (statement of Rep. George Brown, Jr. (D-Cal.)); Kevin M. Kearney, Note, *Private Citizens in Foreign Affairs: A Constitutional Analysis*, 36 EMORY L.J. 285, 346–47 (1987); Roth, *supra* note 71, at 271; Simpson, *supra* note 138, at 380–83; Vagts, *supra* note 9, at 300; Noah Feldman, *Logan Act Is Too Vague to Prosecute Flynn. Or Anyone.*, BLOOMBERG (Feb. 15, 2017, 1:48 PM), <https://www.bloomberg.com/view/articles/2017-02-15/logan-act-is-too-vague-to-prosecute-flynn-or-anyone> [<http://perma.cc/QZ2U-X9Q3>]. Other commentators have cogently argued that at least some prosecutions could survive a motion to dismiss. See generally Drew Tedford, Note, *Silent No More: The Logan Act as a Constitutionally Enforceable Tool in Foreign Policy*, 32 HOUS. J. INT’L L. 733 (2010); Hemel & Posner, *supra* note 114; Timothy Zick, *Why You Should Doubt Reports that the First Amendment Would Protect Gen. Flynn from Prosecution Under the Logan Act*, JUST SECURITY (Feb. 28, 2017), <https://www.justsecurity.org/38210/reports-amendment-protect-gen-flynn-prosecution-logan-act-wrong> [<http://perma.cc/QQ2L-VBY5>].

⁵⁶⁸ Ungar, *supra* note 142, at A24.

⁵⁶⁹ Hauptly Letter, *supra* note 207, at 3278.

⁵⁷⁰ Grose, *supra* note 240, at 6.

⁵⁷¹ Lewin, *supra* note 331, at 17.

eign countries.) In any case, Lewin's decision to memorialize a workplace remark thirteen years later is a far cry from openly impugning the Act's constitutionality as a justification for nonenforcement.

Because relatively little internal legal analysis has leaked, it is unclear whether any administrations have refused to bring Logan Act prosecutions because of constitutional concerns. (Certainly none of them publicly defended Logan Act nonenforcement for that reason.) But it seems fair to draw negative inferences from the fact that other justifications have been explicitly stated. To take just one recent example, Obama officials shared key details of their internal deliberations with *Washington Post* reporters during the Flynn affair. They were daunted by the Logan Act's history of disuse; they feared transforming Flynn into a martyr; they cited evidentiary difficulties; and they worried about overdetering healthy transitional contacts.⁵⁷² But they evidently harbored no constitutional qualms—or at least any they ventured to share.

In sum, there is little basis to suggest that the executive branch has failed to enforce the Logan Act because of modern constitutional developments. The Act's gradual desertion long predated those transformations, and administrations that opine on other obstacles almost never invoke free-speech or vagueness concerns. As explained above, Logan Act nonenforcement far more often reflects the banal Washingtonian impulses of politics, perception, and pragmatism. The absence of an expressed constitutional basis for that practice tees up a fascinating and underexplored question: can episodic nonenforcement eventually violate the Take Care Clause because of its cumulative effects?

IV. PARTING IMPLICATIONS

This Article has argued that nonenforcement by accretion is even more problematic from a separation-of-powers standpoint than deliberate, transparent, and programmatic but *partial* nonenforcement of federal statutes in response to resource limitations. The Logan Act in particular is almost as old as the Republic itself. Likely violations have been legion, and the harms that its congressional proponents feared have indeed come to pass. Presidents have been exhorted to enforce that law as they would any other. Irked by their inaction, the Senate has even formally resolved that Logan Act violations be prosecuted. Yet the Executive has declined all enforcement opportunities for 219 years and counting.

Something profoundly strange has happened to a duly enacted federal statute. But is that something unconstitutional? And what, if anything, can be done about it? In sketching tentative answers to these questions, this Part unsettles the conventional distinction—usually deemed conclusive—between nonenforcement stemming from policy disagreements and that

⁵⁷² See Miller et al., *supra* note 6; Horwitz & Entous, *supra* note 566.

anchored in constitutional objections. Part IV also offers a dim prognosis for curing the systemic pathology described above. Almost by definition, nonenforcement by accretion involves statutes in desperate need of reform, but whose repeal will rarely be a legislative priority. As the Logan Act's pitiful decay demonstrates, wholesale nonenforcement thwarts legislative accountability by forestalling a critical stimulus of democratic responsiveness—the lightning rod of an actual prosecution.

A. *Is Logan Act Nonenforcement Unconstitutional?*

Nonenforcement on constitutional grounds is fairly uncontroversial, especially when a statute is perceived to intrude on executive power.⁵⁷³ Administrations may also validly forgo individual prosecutions to preserve limited resources, disregard difficult-to-prove offenses, or save the sting of a federal prosecution for truly reprehensible behavior. But Presidents may not refuse to enforce a federal statute simply because they would prefer that it not exist.⁵⁷⁴ Most nonenforcement imperatives identified above stem from a type of policy objection—a desire to forestall unsavory consequences deemed likely to follow from prosecutions. Still, these motives have operated on an individualized and reactive basis, rather than as a justification for a broader scheme of nonenforcement. I will assume for purposes of this Article that a single declined prosecution—divorced from an assurance of categorical forbearance—cannot violate the Take Care Clause.

That still does not answer whether an unconnected series of policy-driven nonenforcement decisions could raise Article II problems. In the context of nonenforcement by accretion, it would not be easy to identify whether a statute had been neglected *because of* some consideration. Individual administrations have advanced—or withheld—their own justifications for declining Logan Act prosecutions. With many sets of intentions to plumb, it is an open question whether those justifications may be aggregated in considering the constitutionality of nonenforcement as a whole. Some degree of divergence in rationales across administrations would presumably defeat the project of characterizing nonenforcement in monolithic terms. It is difficult to pin down even situation-specific motives in the Logan Act context, because the vast majority of potential prosecutions have been bypassed without mention of constitutional misgivings, evidentiary difficulties, or policy disagreements. But even if one could crisply categorize administrations' reasons for declining potential prosecutions, the import of that evidence would be deeply contestable.

For now, I will even assume—contrary to the evidence—that a general preference for neglecting Logan Act prosecutions has had nothing to do with the law's chronic disuse. How, one might ask, could cumulative nonenforce-

⁵⁷³ See *supra* note 39 and accompanying text.

⁵⁷⁴ See *supra* notes 40–45 and accompanying text.

ment raise Article II concerns if each instance was entirely proper? So what if every administration has failed to perform an act required of none of them in particular? But the Take Care Clause must be understood as imposing a generation-spanning institutional obligation to effectuate what Congress has enacted. Article II's use of a singular pronoun ("he shall")⁵⁷⁵ should not obscure the Clause's manifest purpose in our constitutional system—to ensure the execution of federal law, regardless of prevailing norms concerning turnover in office. (Were it otherwise, the presidency as an institution could evade another "[h]e shall" obligation: "from time to time to give the Congress Information of the State of the Union.")⁵⁷⁶ The accumulation of isolated inaction can thus violate the Take Care Clause no less than deliberate pronouncements.⁵⁷⁷ It should not be controversial that Article II requires the executive branch to secure each of "the Laws"⁵⁷⁸ some minimal degree of efficacy. Nor should there be any serious question about whether the complete absence of Logan Act prosecutions has satisfied that standard. The Act has been neglected so frequently that its enforcement is now unthinkable.

As explained above, moreover, no administration has taken a concrete position on the Logan Act's constitutionality. To label it unconstitutional would eviscerate any remaining deterrent force the Act still enjoys. And there would be little reason to profess its validity without a legal challenge to the statute, which seems unlikely to arise without a prosecution (or a "credible threat" of one).⁵⁷⁹ Even if one or more administrations have viewed the Logan Act as an intrusion on individual liberties—as many students of the Act do—it is difficult to excuse nonenforcement as constitutionally inspired without some outward evidence to that effect.⁵⁸⁰ The Executive would ordinarily have an interest in salvaging Executive-protective legislation, after all.

One might think that, from the Executive's perspective, most disagreements with the Logan Act's substance could actually double as constitutional objections. Perhaps administrations feel that levying prosecutions would impermissibly hamstring presidential power by hindering their achievement of

⁵⁷⁵ U.S. CONST. art. II, § 3.

⁵⁷⁶ *Id.* This clause prescribed no specific time intervals; the Constitution would probably not be offended by presidential submissions every five years, such that not every occupant drafted a State of the Union message. But if Congress had gone without this "Information" for as long as the Logan Act has been neglected, the Executive would have unquestionably failed in its constitutional responsibility.

⁵⁷⁷ *Cf.* Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 28 (2016) ("[W]hile the oath [of office] constrains individuals, the more general demands of the Constitution constrain Congress as an institution.").

⁵⁷⁸ U.S. CONST. art. II, § 3.

⁵⁷⁹ *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2342 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). It is also possible to imagine an Administrative Procedure Act challenge to a travel restriction imposed to forestall an anticipated Logan Act violation.

⁵⁸⁰ *See* Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 837 (2013) ("The Obama Administration has made no claim, however, that the immigration statutes as applied are unconstitutional.").

strategic ends. We should normally expect greater levels of enforcement “when the President’s own authority is at stake”⁵⁸¹—when a statute is designed to safeguard executive power by preventing its usurpation. Here, the opposite has occurred. Administrations have rejected this robust reinforcement as either undesirable or unnecessary to effectuate the Act’s underlying principle. They have superintended outward communications on their own terms; under their preferred regime, meddlers receive no more than rhetorical discipline. The executive branch seems to have concluded that diplomacy runs more smoothly when it needn’t worry about imprisoning those who get in the way.

But can it really be said that the Logan Act “interfere[s] with the President’s discharge of a constitutional responsibility”⁵⁸²? That would require pretzel-like logic: deterring archetypal violations *facilitates* Presidents’ unimpeded discharge of their responsibilities. To be sure, routine enforcement of the Act would make it harder for the White House to informally nudge private citizens to mediate stalemates. Those arrangements are often effective only if intermediaries are untainted by an association with the administration. In a world of orderly enforcement, their very outreach would suggest conformity with the Logan Act—and thus authorization by one’s despised counterpart. Enforcement would also complicate the task of consummating Trist-like triumphs achieved totally autonomously.

But Presidents lose none of “the executive Power”⁵⁸³ when private citizens are disabled from doing things that Presidents later embrace. And even if ad hoc recruits can exercise official authority—delegated Article II authority—when their instructions are entirely secret, the Logan Act would not usurp executive power merely by indirectly pressuring Presidents to spill the beans. Core Article II undertakings can be hampered for any number of reasons that are perfectly constitutional. Embassies cannot be built without congressional appropriations;⁵⁸⁴ existing treaties with one nation may frustrate relations with another. So too may costs be imposed on the practice of secretly accrediting limited-purpose emissaries, the better to secure elusive diplomatic outcomes. In any case, no administration (as far as I can tell) has ever argued that the Executive-enhancing Logan Act is an unconstitutional usurpation of executive power.

Wholesale nonenforcement of the Logan Act very likely offends Article II’s injunction that the President “take Care that the Laws be faithfully executed.”⁵⁸⁵ But regardless of one’s view on this precise question, the constitutionality of incremental nonenforcement cannot be neatly analyzed within conventional frames—that is, by identifying and assessing the motives un-

⁵⁸¹ Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 122 (2000).

⁵⁸² Delahunty & Yoo, *supra* note 580, at 838.

⁵⁸³ U.S. CONST. art. II, § 1, cl. 1.

⁵⁸⁴ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087 (2015).

⁵⁸⁵ U.S. CONST. art. II, § 3.

derlying presidential pronouncements. Much work remains to be done on the constitutional implications of *cumulatively* usurpative nonenforcement decisions. This Article has sought to cast initial light on the mechanics of that understudied process.

B. Remedies and the Rule of Law

The Logan Act almost certainly would not have been enacted for the first time long after the Federalist hysteria subsided.⁵⁸⁶ Yet observers have vigorously championed its enforcement as a law of the United States like any other. Unlike the cognate Alien and Sedition Acts, the Logan Act contained no sunset provision.⁵⁸⁷ It was destined to remain on the books, “with all the validity of an act passed yesterday,”⁵⁸⁸ until affirmatively repealed. That time has not yet come. Perhaps it never will. This subpart ponders what it might take for the Logan Act to disappear from the U.S. Code,⁵⁸⁹ and what its haggard condition portends for the rule of law.

The Act has been denounced as “inquisitorial” and “unworthy of the civilization of our day and generation.”⁵⁹⁰ Others have called it “foolish,”⁵⁹¹ “silly,”⁵⁹² “stupid,”⁵⁹³ “anachronistic,”⁵⁹⁴ “archaic,”⁵⁹⁵ “obsolete,”⁵⁹⁶ “useless,”⁵⁹⁷ “absurd[],”⁵⁹⁸ a “monstrosity,”⁵⁹⁹ and “an embarrassment to the very idea of an enlightened Federal criminal code.”⁶⁰⁰ These descriptors are

⁵⁸⁶ See 42 CONG. REC. 1531 (1908) (statement of Sen. Bacon (D-Ga.)) (“[I]t strikes me as being a section that I would not be willing to give my consent to as a part of the law of the United States.”); *Fish Would Punish*, *supra* note 223, at 20 (quoting Representative Hamilton Fish: “I do not say that I would vote to put such a law as the Logan [A]ct on the statute books, for I have strong ideas on the freedom of speech.”); Lawrence, *supra* note 58, at 4 (“This is one of the laws that, if passed for the first time today, would be greeted with cries of ‘thought control’ and ‘conformity.’”).

⁵⁸⁷ Kearney, *supra* note 567, at 302.

⁵⁸⁸ Samuel Danzinger, Opinion, *But Isn't Mr. Roosevelt More than a Private Citizen Now?*, SUN (Balt.), Feb. 5, 1933, at 6.

⁵⁸⁹ See 130 CONG. REC. H4351 (daily ed. May 22, 1984) (Rep. George Brown, Jr. (D-Cal.)) (“Why the Logan Act remains on the statute books is a mystery I have never been able to unravel.”).

⁵⁹⁰ 28 CONG. REC. 492 (1896) (statement of Sen. Gray (D-Del.)); see also 42 CONG. REC. 1532 (1908) (statement of Sen. Bacon (D-Ga.)) (deeming the law “grossly unjust and liable to work great hardship”).

⁵⁹¹ *The Logan Law*, *supra* note 54, at 398.

⁵⁹² Danzinger, *supra* note 588, at 6.

⁵⁹³ *Id.*

⁵⁹⁴ 126 CONG. REC. 10,113 (1980) (statement of Rep. Beilenson (D-Cal.)); Roberto Taber, Opinion, *Isolation of Americans Seen*, N.Y. TIMES, May 25, 1960, at 38; Dershowitz & Goldstein, *supra* note 258, at A26.

⁵⁹⁵ 123 CONG. REC. 13,067 (1977) (statement of Sen. Kennedy (D-Mass.)); 124 CONG. REC. 13,264 (1978) (statement of Rep. Simon (D-Ill.)).

⁵⁹⁶ 124 CONG. REC. 1267 (1978) (statement of Sen. Nelson (D-Wis.)).

⁵⁹⁷ Lawrence, *supra* note 58, at 4.

⁵⁹⁸ Dershowitz & Goldstein, *supra* note 258, at A26.

⁵⁹⁹ William Worthy, *A Legal Abomination*, AFRO-AMER. (Balt.), May 27, 1978, at 5.

⁶⁰⁰ 123 CONG. REC. 13,067 (1977) (statement of Sen. Kennedy (D-Mass.)).

largely overwrought. By its terms, the Logan Act does not suppress ordinary democratic dialogue. It instead prohibits efforts to partner with foreign sovereigns to frustrate particular manifestations of American foreign policy. A functioning Congress, reflecting on its failed experiment, might amend the Act to help ensure that such actors no longer go unpunished. But as things stand, the Logan Act's much-mocked verbiage carries so much nonenforcement baggage that the law's underlying virtues have been left to the imagination. A majority of Congress is unlikely to rediscover them any time soon. Accepting for present purposes that our good-for-little Logan Act should cease to exist, how could that result practically be accomplished?

A congressional solution seems unlikely. Ours is "an era of unprecedented congressional paralysis,"⁶⁰¹ and legislatures typically reach peak passivity in responding to outmoded criminal laws.⁶⁰² Congress cannot be expected to take up the Logan Act's repeal without a concrete manifestation of the status quo's intolerability—say, a prosecution.⁶⁰³ But the absence of any such impetus is precisely why the law arguably needs repealing. And even if Congress could summon the requisite energy, it might abstain on other grounds, fearing that decriminalization would encourage amateur diplomacy.⁶⁰⁴

Courts are also poorly positioned to solve the impasse. The Act probably cannot be struck down on constitutional grounds without a prosecution (or a credible threat of one).⁶⁰⁵ As Part III.D. explained, Presidents' overlapping incentives to condone Logan Act violations render any prosecution unimaginable. Nor are federal courts likely to invoke the somewhat-mythical doctrine of "desuetude" to abrogate outmoded, lifeless statutes.⁶⁰⁶ For as the Supreme Court has counseled, "The failure of the executive branch to enforce a law does not result in its modification or repeal."⁶⁰⁷ And even if some private citizen or group of legislators had standing to challenge nonen-

⁶⁰¹ Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 4 (2014).

⁶⁰² See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 591 (2001).

⁶⁰³ See Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 63 (1961) ("When the law is consistently not enforced, the chance of mustering opposition sufficient to move the legislature is reduced to the vanishing point.").

⁶⁰⁴ See Ungar, *supra* note 151, at B5 (sensing that the Act cannot "be easily repealed, lest the federal government appear to be encouraging private ventures in foreign policy"). Perhaps this is what Senator John Morgan meant when he explained that the Act had "often been attempted to be removed, but . . . no Congress has ever been found that would touch it." 33 CONG. REC. 6026 (1900) (statement of Sen. Morgan (D-Ala.)).

⁶⁰⁵ See *supra* note 579 and accompanying text.

⁶⁰⁶ See Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006) (reporting that, as of 2006, "[d]esuetude . . . enjoy[ed] recognition in the courts of West Virginia and nowhere else").

⁶⁰⁷ *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113–14 (1953); 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.").

forcement by accretion, effective relief would seem “impossible to construct.”⁶⁰⁸ The Supreme Court’s most direct statement on nonenforcement—from the administrative-law context—specifies no remedy for a failure of execution. It also presumes the existence of a deliberate, transparent program of inaction.⁶⁰⁹ Moreover, because the Executive cannot be compelled to initiate any individual prosecution, the extraordinary remedy of mandamus would be improper.⁶¹⁰

There are but two realistic routes to outright repeal: an abrogation provision buried in some other bill, or the Act’s nonappearance in a general revision of the federal criminal law. The latter tactic has been tried before. During a 1978 debate over a proposed recodification of Title 18 of the U.S. Code, Senator James Allen groused that the Logan Act seemed to have vanished—“an important omission.”⁶¹¹ Senator Ted Kennedy assured Allen that only “archaic” provisions had been dropped—such crimes as “seducing a female passenger aboard a ship.”⁶¹² Allen shot back, “[t]he Senator thinks that ought to be permitted?”⁶¹³ Allen’s incentive-mongering prevailed: he felt that the Logan Act worked as “a deterrent,” even if (or perhaps because) it had yielded no prosecutions.⁶¹⁴ Kennedy caved, accepting the Act’s inclusion as the cost of avoiding a filibuster.⁶¹⁵ And so the Logan Act remained, even though “almost nobody else want[ed] [it] around anymore.”⁶¹⁶

If Allen correctly surmised that the Logan Act “warn[s] off the more timorous,”⁶¹⁷ that mode of deterrence is deeply unfortunate. Administrations that brandish the Act attempt to coerce private behavior by invoking something that is effectively not law—and that they have no plans to resurrect. Their admonitions prey on popular ignorance of historical enforcement practices and exploit model citizens’ law-abiding tendencies. Anyone remotely familiar with the Act’s extinction understands that violations carry no legal consequences. Equal treatment, official evenhandedness, fairness, consistency, transparency, predictability—these hallmarks of the rule of law are now best served by total nonenforcement of a law of the United States. On the other hand, it cannot bring honor to a legal system for one of its statutes

⁶⁰⁸ Strauss, *supra* note 581, at 113.

⁶⁰⁹ See Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985) (“Nor do we have a situation where . . . the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”).

⁶¹⁰ See Engquist v. Or. Dep’t of Agric., 553 U.S. 591, 603 (2008) (explaining that prosecutions “by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments”); ICC v. Bhd. of Locomotive Eng’rs, 482 U.S. 270, 283 (1987) (observing that “the refusal to prosecute cannot be the subject of judicial review”). The right to any particular Logan Act prosecution is thus not “clear and indisputable,” a prerequisite for mandamus relief. *Am. Hosp. Ass’n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016).

⁶¹¹ 124 CONG. REC. 1367 (1978) (statement of Sen. Allen (D-Ala.)).

⁶¹² *Id.* (statement of Sen. Kennedy (D-Mass.)).

⁶¹³ *Id.* (statement of Sen. Allen (D-Ala.)).

⁶¹⁴ *Id.* at 1369.

⁶¹⁵ *The Logan Act Revived*, WASH. POST, Feb. 3, 1978, at A18.

⁶¹⁶ Ron Hendren, *Keeps Logan Act*, ANDERSON HERALD (Ind.), Feb. 8, 1978, at 4.

⁶¹⁷ Vagts, *supra* note 9, at 302.

to be disrespected through “flagrant and fairly frequent unpunished violations.”⁶¹⁸ The ironic upshot of nonenforcement by accretion is that its essential fairness—the prolonged absence of unjust departures—breeds disrespect for the criminal law.

Wholesale nonenforcement of the Logan Act almost certainly accords with the preferences of modern majorities. But for whatever reason, there is no political appetite for repealing a prohibition whose full enforcement would be intolerable. In his pathbreaking scholarship on executive enforcement discretion, Professor Zachary Price offers a normative critique of categorical nonenforcement. He contends that executive inaction relieves the pressure on Congress to conform laws to contemporary preferences. Whereas sustained nonenforcement “effectively let[s] Congress off the hook” for passing overbroad criminal laws,⁶¹⁹ limiting such discretion “stand[s] the best chance of giving us a sensible, responsive set of laws in the long run.”⁶²⁰

The Logan Act’s slow demise demonstrates Price’s theory in action. Compliance with the Take Care Clause turns out to be a crucial step in conforming statutory law with modern realities. Congress has very little incentive to repeal or revamp the Act, and any number of reasons not to—legislative opportunity costs, the desire to deter unwanted behavior, and the need to avoid appearing to endorse diplomatic anarchy. So an institution escapes accountability for its misguided enactment, and a much-scorned statute avoids the chopping block. It is manifestly untrue in this instance that nonenforcement has been a “prime engine[] of social change.”⁶²¹ Rather, the Logan Act’s prolonged stupor cuts strongly in favor of President Grant’s contrary thesis: “I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution.”⁶²²

These insights apply all the more forcefully to nonenforcement by accretion. Programmatic nonenforcement decisions can at least engender political deliberation (and constitutional challenges) when articulated openly.⁶²³ Incremental nonenforcement, by contrast, stems from a series of unplanned declinations that may never be publicly justified. Because none of those individual decisions enjoys constitutional salience, the Article II stakes will remain invisible without a methodical inquiry into broader patterns of neglect. Put another way, incremental inaction is self-perpetuating across institutions: repeated executive abstentions ensure legislative stagnation, which encourages further disuse of an obsolete tool that Congress refuses to touch.

⁶¹⁸ *Id.*

⁶¹⁹ Price, *supra* note 20, at 759.

⁶²⁰ Price, *supra* note 37, at 1123.

⁶²¹ Scalia, *supra* note 35, at 897.

⁶²² Ulysses S. Grant, First Inaugural Address (Mar. 4, 1869), <http://www.presidency.ucsb.edu/ws/?pid=25820> [<http://perma.cc/3QFZ-DKW6>].

⁶²³ Osofsky, *supra* note 45, at 85, 94; *see also* Sant’Ambrogio, *supra* note 44, at 386 (“If it is transparent, the Executive’s [in]action invites public debate and a congressional response.”).

Efforts to channel contemporary preferences through responsive nonenforcement decisions are thus far more likely to thwart social and political change than to accelerate it.

No administration has committed the retrograde act needed to galvanize legislative progress: an actual Logan Act prosecution. Nor, at this point, would such a decision be remotely sensible. Logan Act saber-rattling is pure bullying, a kind of cynical deception that capitalizes on assumptions of regularity in the operation of governmental institutions. The Act ceased to function as a criminal statute long ago; its ineffectuality has generated a “virtual certainty of immunity from punishment.”⁶²⁴ From that expectation has blossomed a bipartisan truce concerning the legal ramifications of conferring with foreign governments. An actual prosecution would unleash non-delusional, and deeply pernicious, accusations of criminality throughout all corners of our political culture.⁶²⁵ Barring any appetite for a textual makeover, the statute ought to be “lost or misdirected”⁶²⁶ in the next criminal-reform package.

V. CONCLUSION

As the legal community wrestles with seemingly novel methods of streamlining prosecutorial discretion, it should not overlook an even greater menace to legislative policymaking supremacy. This Article has shown that laws can go unexecuted—and congressional will can be wholly thwarted—with no glaring signs of impropriety. Individually permissible exercises of enforcement discretion may well lead to systemically intolerable outcomes. The Executive has effectively annulled a duly enacted statute simply by tottering along in silence. As between an open statement of enforcement priorities and the unexplained erasure of an entire federal statute, no student of American constitutionalism could sensibly prefer the latter. Popular indifference to the Logan Act’s lot only exacerbates the underlying structural misfortune.

Probably no example of nonenforcement by accretion will be as vivid as the Executive’s total failure to implement an oft-paraded law enacted during the Adams administration. Still, future scholarship in this field should discern which statutes seem destined to meet a similar fate—which ill-starred enactments have begun their descent into black dwarfdom. Perhaps some can be reignited before the process proves irreversible.⁶²⁷ But once a long-dormant federal statute becomes unenforceable as a matter of sociologi-

⁶²⁴ Price, *supra* note 21, at 1018.

⁶²⁵ See Rice, *supra* note 120.

⁶²⁶ Scalia, *supra* note 35, at 884 (quoting *Calvert Cliffs Coordinating Comm’n v. Atomic Energy Comm’n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971)).

⁶²⁷ Federal civil-rights enforcement ultimately rebounded after a lengthy period of neglect during the Jim Crow era, for example. See Price, *supra* note 21, at 1018.

cal fact, history has shown no easy way to dislodge the resulting interbranch stalemate. Both the repeal and the revival of comatose criminal statutes have proven to be a “very tricky and difficult proposition.”⁶²⁸

⁶²⁸ *Blum Statement*, *supra* note 555, at 81.

