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Timothy Zick

William & Mary Law School, tzick@wm.edu

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Why You Should Doubt Reports that the First Amendment Would Protect Gen. Flynn from Prosecution under the Logan Act

By *Tim Zick*

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The Logan Act, a 1799 federal law that makes it a federal felony for a private person to engage in international diplomacy in a way that undermines U.S. foreign policy, has recently been plucked from the dustbin of history. As widely reported, Michael Flynn, President Trump’s national security adviser, resigned amid controversy over his phone calls with the Russian ambassador to the United States. It has been reported that the two discussed U.S. sanctions imposed on Russia for its alleged interference in the 2016 presidential election. Flynn allegedly told the Russian ambassador not to worry about the sanctions, since there would soon be a new sheriff in town. The conversations appear to fall within the letter of the Logan Act, which applies to anyone who “directly or indirectly . . . carries on any correspondence or intercourse with any foreign government . . . with intent to influence [it] . . . in relation to any disputes or controversies with the U.S. or to defeat the measures of the U.S.” The Logan Act has been described as a “paper tiger.” No one has ever been successfully prosecuted under the Act, in part owing to doubts about its constitutionality. Specifically, many claim that prosecuting Flynn under the Logan Act would violate the First Amendment. As it turns out, it’s not so clear under the Supreme Court’s case law that communications to a foreign government or agent are fully protected under that constitutional provision – although I will argue that they certainly should be.

By the standards applicable in 1799, the Logan Act almost surely would not have violated the First Amendment. Back then, the concept of freedom of speech was not nearly as robust as it is today. Indeed, some prominent judges and commentators interpreted the First Amendment to prohibit only prior restraints on speech – meaning that governments were free to punish speech after the fact. To give you a sense of just how anemic speech rights once were, federal courts upheld the Sedition Act of 1798, enacted by the same Congress that passed the Logan Act, which criminalized speech critical of the U.S. government and public officials. (President Jefferson later pardoned those convicted during his administration.)

Of course, this is 2017, not 1799. The Supreme Court has not generally interpreted the First Amendment with reference to its eighteenth century meaning – for many reasons, but in part because what it actually meant to those who ratified it is not very clear. Today, the First Amendment is understood to provide robust free speech protections. Some of the strongest protections apply to speech critical of government and communications that address matters of public concern – like Flynn’s phone calls. Under modern free speech rules, laws that target speech based on its content – in the case of the Logan Act, communications about international diplomacy – are subject to a rigorous form of judicial

review called “strict scrutiny.” That standard requires the government to have a compelling interest in restricting speech and adopt the least restrictive means of serving its interest. The standard has been described as “strict in theory, but fatal in fact.” And so it has been, in nearly all cases involving content-based laws.

So Flynn would seem to have a slam dunk First Amendment defense. In the abstract, the government may have a compelling interest in ensuring that private citizens do not actually interfere with international diplomacy. But a law criminalizing a broad range of communications with foreign governments and their agents is not narrowly tailored to preventing actual interference with diplomacy. By its terms, the Logan Act seems to prohibit a U.S. citizen from sending a letter or email to Mexican officials encouraging them to reject new trade terms offered by the Trump administration. That hardly seems like a tailored way to address private meddling with international diplomacy.

Before Flynn and his lawyers can rest easy, though, there’s something else to consider. The analysis above assumes that courts would actually apply traditional First Amendment standards to Flynn’s communications. But that’s not necessarily the case.

Under modern free speech doctrine, the scope of a U.S. citizen’s right to communicate with foreign persons, powers, and audiences is not fully settled. Throughout American history, Congress and the Executive Branch have acted as if the First Amendment does not fully apply to communications directed to foreign nationals or foreign audiences. Thus, the U.S. government has imposed and enforced a variety of content-based limits on the import and export of films, artwork, propaganda, and other materials, excluded aliens on ideological grounds, and restricted citizens’ travel to foreign nations. The Logan Act belongs to this family of speech restrictions, which has deep roots in fears about foreign influence of U.S. citizens and institutions. The laws are suggestive of a provincial concept of the First Amendment – it ceases to apply, or at least fades considerably, at the water’s edge.

Few Supreme Court cases have considered speech, press, or associational rights that involve foreign aliens or foreign audiences. Although the Court has assumed the First Amendment *applies* in some non-domestic contexts, it has tended to apply a very deferential form of review in such cases. The Court has never squarely addressed how communications directed to foreign persons or powers jibe with traditional First Amendment principles and justifications. Absent any clear guidance, some federal courts reviewing export laws, travel restrictions, and regulations of Internet speech have expressed doubts regarding whether the First Amendment applies the same way in those contexts as it does when one domestic citizen communicates with another. Constitutional scholars have also expressed differing views on this matter, with some questioning whether speech directed solely to foreign persons or audiences is entitled to full First Amendment protection. The Logan Act applies in this murky realm of expression – to international diplomacy communications, whether made within or outside the United States, which are directed solely to foreign governments and their agents.

Holder v. Humanitarian Law Project, a case decided in 2010, illustrates how the Supreme Court applies the First Amendment differently when foreign audiences are involved. In *HLP*, a group of U.S. citizens wanted to communicate with members of international organizations the U.S. government had designated “foreign terrorist organizations.” Specifically, the U.S. citizens wanted to teach members of these organizations how to resolve their disputes peacefully and to provide them with instruction in principles of international law. The U.S. government threatened to prosecute the groups under a federal law that prohibits American citizens from providing “material support” to terrorists. Even though it determined that the law targeted certain communications based on their content, the Court concluded that it was narrowly tailored to serve compelling interests in national security and foreign relations. The Court added that in its view, exchanges with foreign nationals were not “all to the good”; indeed, they raised the danger of foreign influence, which the framers were particularly concerned about.

To give you a sense of just how rare *HLP*’s result is, it is one of only *two* decisions in the Court’s history where a majority of justices has upheld a content-based law under the First Amendment. The decision was a significant departure in another respect as well. The First Amendment’s “incitement” doctrine prohibits government from restricting speech that advocates unlawful activity unless that advocacy is *likely* to lead to *imminent* harm. That’s a really difficult standard to meet. Even speech that spreads terrorist ideologies or generally advocates terrorist activities can find shelter under the First Amendment’s incitement standard. Although the incitement standard presumably would have applied had the speakers and groups all been domestic, in *HLP* the Court did not apply it to the material

support law. It also allowed the federal government to criminalize association with foreign persons without any proof that the U.S. citizens intended to facilitate their criminal activities – a form of guilt-by-association that the First Amendment prohibits.

HLP, which is in many respects a modern-day provincial decision, casts some doubt on the conclusion that the Logan Act clearly violates the First Amendment. The Act regulates speech in a borderland that has not been clearly defined. At the very least, *HLP* suggests that we should not assume U.S. courts will apply ordinary First Amendment standards to speech and association involving foreign governments and foreign affairs.

But they certainly should. In *HLP*, the Court missed an important opportunity to explain why communicating and engaging with foreign actors and audiences are central concerns of a twenty-first century First Amendment.

The First Amendment's marketplace of ideas has never stopped at the water's edge. Speech directed to foreign audiences, associations that cross international borders, and information-gathering that occurs beyond U.S. borders are as important to American self-governance as purely domestic speech, local associations, and in-country newsgathering. The provincial First Amendment is a relic that does not suit the world we occupy, which features cheap communication across borders, greater commingling between citizens and foreign nationals, and forms of virtual association that were unfathomable when the First Amendment was ratified.

The Flynn case would be an odd one in which to finally jettison the provincial First Amendment. Think about it: An official associated with a nationalist administration would directly benefit from a more globalist or cosmopolitan interpretation of the First Amendment. That might be a salutary lesson for a young administration led by a president who views foreigners and foreign influences with suspicion, and who as a candidate suggested that the U.S. should "shut down" parts of the Internet. More to the point, it would be exactly the right result. The First Amendment ought to be interpreted to *encourage* citizen engagement with international affairs, not to permit government to turn such activity into a felony offense.

Image: [George Frey/Getty](#)

Tags: [First Amendment](#), [freedom of expression](#), [Russia](#), [Trump Administration](#)

ABOUT THE AUTHOR

Tim Zick is the Mills E. Godwin, Jr. Professor of Law and the Cabell Research Professor of Law at William & Mary School of Law. He is the author of *The Cosmopolitan First Amendment: Protecting Transborder Expressive and Religious Liberties* (Cambridge University Press, 2014).

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