

Strategizing the Two-Level Negotiation: How a Level I Negotiator Deals with a Level II Agitator

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I. INTRODUCTION

On March 9, 2015, forty-seven senators, led by Senator Tom Cotton, published an open letter to the leaders of the Islamic Republic of

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Iran to “bring [Iranian] attention to . . . features of [the] Constitution.”¹ In writing this letter, the senators sought to alter the progressing nuclear negotiations between the United States and the Republic of Iran.² Such a letter may have been unprecedented in its approach, but legislators and those away from the negotiation table have constantly sought to influence the results from behind the table.

Much has been written, both theory and application, on the benefits and costs of this “two-level game.” In a two-level game, the first level involves negotiation at the table between two nations; Level I negotiators are representatives of their nations. The second level involves convincing the domestic populace to accept the deal. The Level II negotiator is behind the table but is critical for any deal to be approved.

As of yet, not much has been written on how Level I negotiators — those at the table — use Level II disagreement from behind the table to make a deal. With the congressional reactions to Iran and Cuba providing just two examples in 2015, congressional leaders constantly influence presidential negotiations. The challenge of ensuring a lasting negotiation will only rise as congressional skepticism of presidential action increases.

This Article looks at theory and practice to answer the question: how do Level I actors negotiate in the face of active Level II disapproval?

The answer depends heavily on the context of the negotiation, but at least four strategies emerge. First, a Level I negotiator can preempt disagreement with a Level II agitator by restricting the action set of the Level II agitator; the Logan Act of 1799 exemplifies this strategy. Second, the Level I negotiator can appease the Level II agitator by actively integrating it into the Level I process. The approach of President Ronald Reagan during the Central American negotiations around the Nicaraguan contras in 1987 illustrates this strategy. Third, a Level I negotiator can bifurcate her actions, staying steady on her positions at the Level I table while changing rhetoric to

1. Senator Tom Cotton, *et al.*, *An Open Letter to the Leaders of the Islamic Republic of Iran*, (March 9, 2015) <http://www.nytimes.com/interactive/2015/03/09/world/middleeast/document-the-letter-senate-republicans-addressed-to-the-leaders-of-iran.html>.

2. Peter Baker, *G.O.P. Senators' Letter to Iran About Nuclear Deal Angers White House*, N.Y. TIMES (Mar. 9, 2015), <http://www.nytimes.com/2015/03/10/world/asia/white-house-faults-gop-senators-letter-to-irans-leaders.html>.

please the Level II audience. Prime Minister Jawaharlal Nehru's approach to China between 1950 and 1972 shows this approach. Finally, a Level I negotiator can stay steadfast in her beliefs despite the disagreement from the Level II agitator. The Iran case study of 2015 demonstrates this strategy.

This Article does not seek to identify only one approach as successful or others as unsuccessful. Instead, it seeks to describe the history of these cases, the facts that led to these choices being made, and the implications of those choices within that negotiation. With this knowledge, this Article strives to provide guidance to future Level I and Level II negotiators in potential strategies both at and behind the table. Ultimately, the decision about a strategy will be fact-based and may involve a combination of all four strategies at different times during a complex negotiation.

The Article proceeds as follows. In Section II, I outline previous theoretical analyses addressing two-level negotiations. This Article builds on this past research by identifying ways in which an active Level II disapproval contributes to and deviates from the theory previously laid out. In Section III, I look at the passage of the Logan Act to demonstrate how a Level I negotiator can attempt to preempt Level II interference. In Section IV, I go through three case studies demonstrating how different Level I negotiators have approached Level II disapproval. In Section V, I conclude that the Level I negotiator must work with facts on the ground to determine the set of strategies that will be most effective in negotiating a deal.

II. A THEORETICAL GUIDE TO THE TWO-LEVEL NEGOTIATION

Many international negotiations between nations involve two sets of negotiations: one between the executives representing their nations to create a deal, and the other between the executive and her domestic populace, represented by the legislature, to approve the deal.³ The former involves Level I negotiators; that is, negotiations on the terms binding the nations are Level I negotiations. The latter involves Level II negotiators; that is, Level II negotiations occur between the executive and the domestic populace to market the deal internally. Level I negotiations are at the table, whereas Level II negotiations are behind the table.⁴

3. See, e.g., Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 427-30 (1988) (discussing the cases of the Bonn summit, U.S.-Japan economic conflicts of the late 1970s, and the U.S. energy policy in the late 1970s).

4. *Id.* at 434.

While much of the focus of international negotiations tends to be on the terms negotiated at the table (the Level I negotiation,) the Level II negotiation can be just as challenging a process. As stated by Robert Strauss of the Tokyo Round trade negotiations: "I spent as much time negotiating with domestic constituents (both industry and labor) and members of the U.S. Congress as I did negotiating with our foreign trading partners."⁵

The dual nature of the negotiation leads to complication. Rational moves on one board may in fact be counterproductive on the other board. Yet, while some deviation in rhetoric may be acceptable, drastic differences will undermine trust between the central figure and her counterparts on both boards. The more one uses prevarication to sell the deal, the less likely the deal is to succeed.⁶ On top of this, the knowledge that any key player can walk away from the negotiation at any time or be evicted by the domestic authority adds additional complexity.⁷

Many international negotiations, especially treaty negotiations, provide a third level of complexity. If Level I negotiations involve bargaining between the negotiators that lead to a tentative agreement, and Level II negotiations involve the domestic discussion to determine whether to ratify the agreement, the domestic constituency retains a great deal of power over the negotiations; the legislature could ultimately approve or disapprove the deal.⁸ Any successful agreement involving two nations must fall within four win-sets: those of the two Level I actors and those of the two Level II actors. The larger each win-set is, the more likely they are to overlap.⁹ In addition, the relative size of the Level II win-sets will affect the distribution of the gains from the bargain; demonstration of a smaller Level II win-set by one nation can force the other nation to cater to these domestic realities.

Win-set size can create opportunities. For example, an executive can send her domestic counterpart to discuss political problems and validate the limited size of the Level II win-set. "Having one's hands tied can be a useful tool in exacting concessions."¹⁰ However, this

5. *Id.* at 433 (citing Robert S. Strauss, *Foreword* to JOAN E. TWIGGS, *THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS: A CASE STUDY IN BUILDING DOMESTIC SUPPORT FOR DIPLOMACY* (1987)).

6. *Id.*

7. *Id.*

8. *Id.* at 436.

9. *Id.* at 438.

10. Fredrick W. Mayer, *Managing Domestic Differences in International Negotiations: The Strategic Use of Internal Side-Payments*, 46 INT'L ORG. 793, 796 (1992).

strategy can also backfire, as misrepresentation of one's win-set can result in the loss of pie-enhancing creative solutions that improve positions of both Level I actors.¹¹

A number of constraints dictate the methodology and effect of the Level I-Level II interaction, especially when disagreement marks the relationship. A negotiator can be better or worse off under domestic constraints. At times, greater constraints can be a bargaining advantage depending on the distribution of political power between the Level II negotiator and the Level I negotiator.¹²

A Level I negotiator may even gain strength by giving veto power to its Level II actor.¹³ The utility of such a strategy "depends on the kinds of information available to the foreign country as well as the alignment of preferences" between the two levels.¹⁴ When the counterparty is unaware of the positions of Level I, and Level I and Level II disagree about policy, the Level I actor is less likely to bind itself because such a veto may give a lot of weight to the Level II actor's contrary policy position. However, veto power may be distributed to the Level II actor to allow the Level I negotiator to transmit more information to the counterparty and therefore receive more in return in the Level I negotiation.¹⁵ A Level I counterparty that is primarily interested in making a deal will be more likely to give concessions when recognizing that the Level I actor is bound by a Level II veto.

When the Level I and Level II negotiators are at a disagreement or impasse, a Level I negotiator can use side-payments (appeasements or payments to the Level II agent outside of the scope of the negotiation) to appease the Level II constituency. A loss by the Level II party can be offset by a Level I concession, either in a subsequent domestic negotiation or from the gains of the international negotiation. As such, the win-set for the Level II negotiator expands.¹⁶

Two-level games demonstrate the Zartman observation; all negotiation involves "the controlled exchange of partial information."¹⁷

11. Putnam, *supra* note 3, at 453.

12. Jongryn Mo, *The Logic of Two-Level Games with Endogenous Domestic Coalitions*, 38 J. OF CONFLICT RESOL. 402, 416 (1994).

13. Putnam, *supra* note 3, at 448.

14. Jongryn Mo, *Domestic Institutions and International Bargaining: The Role of Agent Veto in Two-Level Games*, 89 AM. POL. SCI. REV., 914, 914 (1995) [hereinafter *Domestic Institutions*].

15. *Id.* at 921.

16. Mayer, *supra* note 10, at 806.

17. Putnam, *supra* note 3, at 453 (citing I. WILLIAM ZARTMAN, *THE 50% SOLUTION* 14 (1976)).

Naturally, there may be a benefit to bringing the Level II win-set to the knowledge of the Level I counterparty. However, there can be costs to bringing a domestic constraint to the Level I negotiation early. An unexpected legislative demonstration of contempt towards a deal can limit the win-set on the Level I table and create significant issues for the Level I negotiator. It can threaten the negotiation, undermine the Level I negotiator's ability to negotiate effectively, and constrain creative solutions. While some tend to assume implicitly that the Level I and Level II negotiator are on the same (or a relatively similar) page regarding negotiations, a Level II negotiator may instead seek to undermine the Level I negotiator and demonstrate the narrowness of the win-set early to dissuade negotiations. This results in what we call a Level II agitator problem.

There are at least two reasons that the Level II agitator problem may arise. The first is to undermine the Level I actor and destroy the negotiations. One would expect this to occur most often in the case where a Level II actor does not have ratification powers or is not involved in the negotiation but does not want it to occur at all.¹⁸ The second is to show the limited size of her win-set. This display to the Level I compatriot highlights the need to compromise with the Level II actor for any deal to go through.

The Level I negotiator has a number of options in approaching a Level II agitator. Prior to a particular negotiation, a Level I negotiator can attempt to restrict the influence that any Level II agitator can have on the negotiation. However, should this proactive step not have been taken, a Level I negotiator has a range of options in dealing with a specific Level II agitator, including: (1) folding the Level II agitator into the Level I negotiation; (2) bifurcating her approach and changing rhetoric when moving from the Level I table to the Level II arena to appease the domestic audience; or (3) holding steadfast, either to use the international momentum of a deal to push through the Level II process or to force expansion of the Level II agitator's win-set.

As yet, there is limited discussion of how a vocal disagreement by the Level II agitator can affect the negotiation process and how a Level I negotiator seeks to limit this type of disagreement during a negotiation. The March 9, 2015 letter by forty-seven senators directly to the Iranian government¹⁹ and the Logan Act²⁰ exemplify these interactions, respectively. It is likely such disapproval will become

18. See *Domestic Institutions*, *supra* note 14, at 919.

19. Cotton, *supra* note 1.

more commonplace in the United States as Congress and the president continue to disagree on matters of foreign policy. In this current era of contention between Congress and the president, historical negotiations will shed light on the possible strategies between Level I and Level II actors in international negotiations.

III. THE LOGAN ACT: AN EXAMPLE OF THE LEVEL I BLOCK

The growing importance of Level II agitators directly influencing Level I negotiations — as per the recent case of Iran in March, 2015 — mandates a look at this relationship in the past. The most appropriate place to start is to understand how, legally, Level I actors have limited the influence of Level II actors. This is especially surprising given the advantages that a Level II veto can provide a Level I negotiator.²¹ The first subsection discusses the Logan Act, a way for Level II actors to preempt the establishment of relationships and influence during a negotiation.²² The second subsection applies this history to the theory discussed above.²³

A. *History and Purpose of the Logan Act*

The concise full text of the Logan Act is 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.²⁴

20. 18 U.S.C. § 953 (2012).

21. See *Domestic Institutions*, *supra* note 14, at 918–19.

22. I limit my analysis of the Logan Act as an example of when Level I negotiators seek to restrict Level II actors from influencing the negotiation. This Section explains why and how presidents have sought to restrict influence in the past, not when the Act should be used to restrict influence.

23. Although this subsection focuses on the United States, the implications of this influence-restriction theory are applicable internationally.

24. 18 U.S.C. § 953 (1994).

Congress passed this short act in 1799, after George Logan's mission to France.

After the French Revolution of 1789, difficulties arose between the Federalists in the United States and the French government. The French government was upset that the Americans had not helped the French revolutionaries and had ratified the Jay Treaty with Great Britain.²⁵ France's response involved plundering American merchant ships, and as a result, President John Adams sent emissaries to negotiate a settlement. The mission failed and led to strong anti-France sentiment in the United States to the point of Congress preparing for war.²⁶ Logan, a private citizen, attempted to negotiate a settlement on his own. His arrival led to a French relaxation of tensions, lifting the embargo and freeing the American ships and seamen. Upon his arrival home, however, Americans looked upon Logan disapprovingly. President Adams asked that Congress take action to stop the "temerity and impertinence of individuals affecting to interfere in public affairs between France and the United States."²⁷ The president's clear intention, based on the history precipitating the Logan Act, was to stop the initiation of Level II diplomacy.

President Thomas Jefferson's administration hinted at the potential of the Logan Act to restrict political behavior. The year 1803 found the only grand jury indictment under the Logan Act. It targeted a Kentucky farmer writing an article advocating for the western portion of the United States to separate from the United States and ally to France, but the prosecutor took no further action after the indictment.²⁸

Two other potential charges under the Logan Act resulted from the United States' relationship with Spain, but neither rose to the level of indictment. In 1802, Spain and the United States negotiated Spain's responsibility for seizing and condemning certain American vessels.²⁹ During negotiations, the Spanish government procured an opinion from five American lawyers, running contrary to the contentions of the United States. While Congress made a suggestion to the

25. MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL33265, CONDUCTING FOREIGN RELATIONS WITHOUT AUTHORITY: THE LOGAN ACT 1-2 (2006), available at <http://fas.org/sfp/crs/misc/RL33265.pdf>.

26. *Id.* For a full history, see Frederick B. Tolles, *Unofficial Ambassador: George Logan's Mission to France, 1798*, 7 WM. & MARY Q. 1, 1-25 (1950).

27. SEITZINGER, *supra* note 25.

28. Detlev F. Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?* 60 AM. J. INT'L L. 268, 274 (1966) (citing Charles Warren, *ODD BYWAYS IN AMERICAN HISTORY* 168-175 (1942)).

29. *Id.*

Attorney General to move the matter forward and indict based on violations of the Logan Act, the Attorney General took no such action.³⁰

The final recorded violation in the early years of the Act occurred in 1808. Thomas Pickering frequently advised a special British envoy, taking the Federalist position in a dispute between the United States and Great Britain. While this was a clear-cut violation, he was not prosecuted.³¹

Claims of Logan Act violations continued through the Civil War, and emerged again during World War I, with a Congress and president seeking neutrality when others did not feel neutrality was appropriate. To no avail, various presidential administrations clamored for Logan Act prosecutions because individuals advocated contrary policy to that of the administration, including calls for prosecution of Senator Harding at the end of World War I³² and calls for prosecution of Henry Wallace and scientist Leo Szilard at the end of World War II.³³

Judicial opinions, while not explicitly on point, have also demonstrated the purpose of the Logan Act.³⁴ In *Burke v. Monumental Division, No. 52*, the District of Maryland used the Logan Act as an analogy to a party's position in a case charging a union member with betraying the interests of his union during a negotiation of a labor dispute.³⁵ Similarly, the State Department has stated that "the clear intent of [the Logan Act] is to prohibit unauthorized persons from intervening in disputes between the United States and foreign governments."³⁶

B. *Limitations and the Two-Level Game*

What does this history tell us about the Logan Act and its ability to restrict Level II actors? The creation of the Act emerged out of a private citizen's interference (as defined by the Level I negotiators) in the complex negotiation with France. Similarly, the subsequent histories with Spain and France demonstrate how the Jefferson Administration — Level I negotiators — used the Logan Act to restrict

30. *Id.*

31. LINDELL T. BATES, UNAUTHORIZED DIPLOMATIC INTERCOURSE BY AMERICAN CITIZENS WITH FOREIGN POWERS AS A CRIMINAL OFFENSE UNDER THE LAWS OF THE UNITED STATES, 6-7 (1915).

32. Vagts, *supra* note 28, at 275.

33. *Id.* at 276.

34. A number of judicial opinions are given in SEITZINGER, *supra* note 25.

35. 286 F. 949, 952 (D.Md. 1922).

36. DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 750 (1975).

infringement on their at-the-table strategy. Even the aforementioned judicial and State Department opinions demonstrate the importance of having the power to maintain separation between the two spheres. In *Burke*, the judge saw the Logan Act as exemplifying a Level II agent (in that case, a union member) undermining the Level I process (the labor negotiations with a railroad).

The Logan Act, then, is a particular method used by Level I negotiators trying to insulate themselves from the Level II process as necessary. While it has not always functioned as a deterrent, the fact that such a law has not yet been abrogated, and is still used to pressure Level II actors, demonstrates the importance of this tool for Level I negotiators to separate the two negotiations.

IV. TWO-LEVEL NEGOTIATION IN PRACTICE

Use of the Logan Act demonstrates action by a Level I negotiator to anticipate intrusion by Level II actors and attempt to limit it. What happens, though, when Level II antagonists do attempt to directly influence an ongoing negotiation? This Section answers that question by turning to two historical case studies and the recent Iran nuclear negotiation.

A. *Folding in Level II with Level I: The Case of Central America*

In December 1981, the United States began supporting the revolutionary Nicaraguan contras seeking to overthrow the Sandinista regime.³⁷ Support ranged from congressionally appropriated funds to essential services and supervision of the contras.³⁸ However, support for the contras declined domestically, and in 1984, Congress passed the Boland Amendment seeking to cut off funds to the contras. Despite the Amendment, President Reagan and his staff continued to feel strongly about the contras and continued supporting their effort.³⁹ Throughout 1986, the United States began selling arms to Iran, to both release American hostages and to receive money to divert to the contras.⁴⁰ Such actions were kept hidden from Congress until November 22, 1986, when the Department of Justice recovered

37. *The Iran-Contra Report; Key Sections of Document: The Making of a Political Crisis*, N.Y. TIMES (Nov. 19, 1987), <http://www.nytimes.com/1987/11/19/world/the-iran-contra-report-key-sections-of-document-the-making-of-a-political-crisis.html?pagewanted=all>.

38. *Id.*

39. *Id.*

40. *Id.*

a memorandum detailing the diversion.⁴¹ On November 26, 1986, the Tower Commission was appointed to investigate the Iran-Contra Affair.⁴²

The investigation led to significant political upheaval in 1987, with revelations of the Iran-Contra affair still reverberating through Congress. However, by August 1987, five Central American countries succeeded in drafting a regional peace plan. A sudden turnaround, from aiding a rebellion to peace, took seven months of behind-the-scenes negotiations, pressed for by Level II actors in Congress.⁴³

The peace plan began with Representative Jim Slattery (D-Kans.). In January, 1987, he met with contra leadership to understand the possibilities of negotiation.⁴⁴ As Representative Slattery and U.S. executive officials met with leadership across Central America, a peace proposal began to form. Representative Slattery and 110 congressional colleagues urged President Reagan to back a ninety-day ceasefire and halt U.S. aid to the contras, with talks immediately thereafter.⁴⁵ The administration did not draft an answer for several months; meanwhile the contras agreed to begin the peace process around the Arias Plan, promoted by President Óscar Arias of Costa Rica.⁴⁶

As negotiations around the Arias Plan commenced, the Reagan Administration sought to build support for its own Nicaraguan policy on Capitol Hill. Speaker of the House Jim Wright (D-Tex.) began to work with the Chief of Staff Howard Baker, Secretary of State George Shultz, and National Security Advisor Frank Carlucci.⁴⁷ These negotiations pursued a bipartisan proposal in Washington, D.C., and, for a successful plan, Speaker Wright consulted with Central American leaders to feel out requirements for a deal.⁴⁸ Despite the hasty nature of its drafting, Speaker Wright got the president's approval of his plan and in so doing, was able to bypass many hardliners within the Reagan Administration.⁴⁹

The Reagan Administration's policy before and after the Wright Plan shifted significantly. The Wright Plan refocused the initiative

41. *Id.*

42. *Id.*

43. Linda Robinson, *Peace in Central America?*, 66 FOREIGN AFF. 591, 591 (1988).

44. *Id.* at 593.

45. *Id.*

46. *Id.* at 594–95.

47. *Id.* at 598.

48. *Id.*

49. *Id.* at 596–97.

on drawdown of involvement with the contras instead of escalation, and it changed the narrative from a military to a diplomatic track.⁵⁰

However, the Wright Plan created confusion with Central American leaders and the Reagan Administration's diplomats. Speaker Wright presented the plan very late in the negotiations between the United States and the Central American nations, and the Central American leaders treated it as merely a negotiation between Nicaragua and the United States instead of a regional draft agreement. This led to the five Central American nations signing the Arias Plan (which then became the Guatemala accord) without taking into account United States concerns, assuming those would be dealt with separately.⁵¹

While presentation of the Arias Plan invited skepticism in the United States, the negotiation momentum led to the U.S.'s signature of the Guatemala accord. In addition, the United States' approval of the Wright Plan intensified pressure on the United States to accept the agreement of the other five negotiators at the Level I table.⁵² While many believed Reagan would not accept the Sandinistas remaining in power, as called for by the Arias Plan, he stated "I welcome this commitment to peace and democracy by the five Central American presidents, and I hope it will lead to peace in Central America and democracy in Nicaragua."⁵³ Bringing in Senator Wright to the negotiation early on began to change the Administration's opinion.

As the peace process continued, Congress stalled on its aid to the contras. The Reagan Administration was stuck approving both the Wright proposal, which the Central American countries no longer wanted to discuss, and the Arias Plan. The administration decided to wait to see if the Arias Plan would fall apart by the deadline of November 5.⁵⁴ Despite pressures to find a ceasefire, delays pushed back the November 5 deadline, and no immediate agreement was reached. Nicaragua further escalated the war against the contras until a Christmas truce in December of 1987.⁵⁵

As the Arias Plan's final deadline of January 15, 1988 approached, all sides pressed for a deal. However, during the meeting,

50. *Id.* at 597.

51. *Id.*

52. *Id.* at 600.

53. *Id.*

54. *Id.* at 601.

55. *Id.*

Nicaragua arrested several leaders of the contras, resulting in a breakdown of the talks.⁵⁶

The 1987 negotiations demonstrate a risk of a Level II actor influencing Level I negotiations. On November 11, President Ortega of Nicaragua charged that the United States reneged on its proposal to negotiate with the Nicaraguan government. President Reagan disagreed with this contention, stating instead that serious negotiations between the Sandinistas and the contras were a necessary condition of any deal.⁵⁷ Speaker Wright sought to find a resolution, meeting with President Ortega to resolve the conflict. An irate Reagan administration expressed concern that Speaker Wright created confusion with such a visit, but Speaker Wright remained steadfast, eventually getting both sides to agree that negotiations would be “guided primarily by Central Americans.”⁵⁸

Such confusion exemplifies the peace process as a whole. The administration was keen to stay in the background of the peace process, while Congress and Speaker Wright in particular sought to move aggressively towards peace. The funding power of Congress further complicated the difference in position between the administration and Speaker Wright; the administration was unsure which actions by Congress demonstrated a Congressional redline for any aid that Reagan would want as opposed to merely a Congressional preference.

The administration’s approach here was twofold: it brought Speaker Wright into the Level I negotiation (in drafting the Wright Plan,) while also stressing the political dangers of defunding the contras. While Congress had substantial backing by the domestic public, it too felt political pressure and continually caved to contra and Reagan Administration demands. The Wright Plan did allow for an immediate peace accord, but the lack of a coordinated strategy led to confusion and ultimately failure. As the deadline for the Arias Plan approached, the negotiation broke down because the Administration was unwilling to negotiate without initiated progress between the Sandinistas and the contras.

This case demonstrates the possibilities and risks of bringing in a Level II negotiator into the Level I fold. Reagan foresaw that an external force would allow it the opportunity to soften its stance, as it did with the Wright Plan’s diplomatic focus in contrast to the hardline position of some in the Reagan Administration. However,

56. *Id.* at 611.

57. *Id.*

58. *Id.* at 612.

the inability to fully integrate Level I and Level II interests led to a confusion amongst the Central American leaders, Reagan's Level I counterparties. As a result, the negotiation process eventually broke down. In this way, the negotiations with five Central American nations stemming from Iran-Contra show how an integrated strategy between a Level I and disagreeable Level II actor can present negotiation opportunities and significant challenges.

B. *The Bifurcated Middle Ground: The Case of the China-India Relationship*

The example of Indian negotiations with China between the recognition of the new Chinese regime in the early 1950s through 1972, demonstrate a different strategy for a Level I actor to deal with Level II agitator. Here, the Level I negotiator, Prime Minister Jawaharlal Nehru, bifurcated his negotiating message between the Level I and Level II audiences during a contentious period that included the Sino-Indian Border War in October, 1962.

From the beginning of his tenure, the Lok Sabha (the lower house of the Indian Parliament) approached Prime Minister Nehru's China policy with caution, specifically regarding actions in Tibet.⁵⁹ Many, including those in Nehru's own ruling Congress Party, criticized Nehru's perceived ignorance towards the Chinese government's aggressive tendencies. They saw Nehru's actions as appeasement in sacrificing India's buffer state.⁶⁰ Initially, the national popularity of Nehru's policies as well as the large majorities of the Congress Party in the Lok Sabha insulated him from the influence of these dissenting voices. Nehru continued his policies and signed the Sino-Indian Agreement of 1954, ushering in a period of good will and cooperation between the Asian giants.⁶¹

However, while Nehru trumpeted the pact between the Chinese and the Indians, the Lok Sabha began escalating the differences between the nations in floor debates, pointing out Chinese intrusions on Indian territories.⁶² Questions surfaced regarding Nehru's sacrificing of Indian interests in Tibet to appease China.

The Lok Sabha's disgust with the prime minister's foreign policy reached a boiling point with the Tibetan Rebellion of 1959, and this drastically changed the dynamic between the Level I (Nehru) and

59. NANCY JETLEY, *INDIA-CHINA RELATIONS, 1947-1977*, 294 (1979).

60. *Id.*

61. *Id.*

62. *Id.* at 295.

Level II (Lok Sabha) actors. Nehru was subjected to “pressure by almost all sections of the House to redefine its policy towards China in the new context.”⁶³ While recognizing the danger in antagonizing the rising neighbor, Nehru adapted his policy to his domestic audience, describing Tibet as “a national uprising” and stating that Chinese expansionism leveled against India exemplified the “language of the Cold War.”⁶⁴

Nehru’s domestic troubles grew with the publication of a White Paper in 1959 demonstrating continuous Chinese intrusions on Indian territory since 1954. The non-Communist opposition emerged as a powerful group in the Lok Sabha, seen as foreseeing the Chinese rising threat.⁶⁵ Nehru’s government was under attack and weakening: the central tenet of its foreign policy was friendship with China, and it was seen as withholding information from the public.⁶⁶

The results were dangerous for Nehru. The Lok Sabha required Nehru’s administration to bring every document relating to China to the House, and each was debated endlessly.⁶⁷ The opposition faction constantly challenged Nehru’s position of peaceful settlement, calling it a policy of appeasement.⁶⁸ Parliament criticized every subsequent meeting with China, from Nehru’s meeting with Zhou En-Lai in 1960, to an agreement allowing Indian and Chinese officials to share data, to Nehru’s readiness to meet with the Chinese Prime Minister to discuss reduction in tensions on the border.⁶⁹

Nehru went undeterred at the Level I table; he continued to seek a peaceful settlement of the border issue by opening a meaningful dialogue.⁷⁰ With the Chinese attack on the border on October 20, 1962, Nehru looked the weaker. Member after member of the Lok Sabha stood criticizing Nehru’s policy of appeasement and his general foreign policy of nonalignment with the major superpowers.⁷¹

In an act of commitment, however, Nehru stood firm on his policies. While openly admitting the failure to not anticipate the Chinese

63. *Id.* at 296.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 297.

68. *Id.*

69. *Id.*

70. *Id.* at 299.

71. *Id.*

attack, he internally clung firmly to his China policy and nonalignment generally, while understanding the need for stronger military might. On his own, he accepted the unilateral ceasefire by China.⁷²

Subsequent Lok Sabha demands to return all the land taken by China during the Border War became more and more out-of-step with Chinese willingness to negotiate. It became clear that China's stance remained firm, and that India had little to gain by pressing the issue.⁷³ Nehru maintained his line with China, and with a new Chinese threat during the Indo-Pakistan War of 1965, Nehru stated he would fight any fresh Chinese onslaught while maintaining relations with China.⁷⁴ With China's 1967 expulsion of two Indian diplomats, the non-Communist opposition again demanded a change in the Chinese relationship, but again the Government maintained its line, and kept relations with China.⁷⁵

The change in prime minister to Indira Gandhi brought a changed narrative around the Lok Sabha's skepticism of the government. Indira Gandhi reopened dialogue with China without any preconditions, a move that would have been unthinkable for Nehru, who the non-Communist opposition deeply distrusted. By 1976, the government's decision to resume diplomatic relations with China was welcomed by all in the Lok Sabha.⁷⁶ After 1972, there became an understanding that negotiation, and not military threat, would be the tack used with China. Even then, however, political realities made open-ended negotiation untenable, with an understanding that relations with China would only normalize when the border question had been solved to the mutual satisfaction of the two nations.

Such a story of Level II actors (the Lok Sabha) influencing the Level I negotiator (Nehru) demonstrates the strategy of bifurcating messages. The Lok Sabha hampered Nehru's negotiations with China by continually unleashing harsh rhetoric. Its requirement for Nehru to publish correspondence from 1959 to 1962 restricted Chinese correspondents' abilities to be discreet. It undermined a supportive atmosphere to begin meaningful negotiations (especially with an opposition calling for military responses). The push to have the Nehru government adopt a stance that neither reflected the military realities nor contributed to successful negotiations undermined Nehru's efforts.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 300.

Nehru implemented two methods for dealing with this disapproval from the Level II Lok Sabha. The first was to hold firm on his policies. With an understanding of his position in the Level I negotiation, the inability for military responses, and his general popularity within the nation and the parliament, he maintained his line on China, even in the face of an attack from the Lok Sabha. Second, he bifurcated his response. While demonstrating his government's commitment to building the Chinese relationship at the Level I table, he bolstered his credibility with the Level II audience by shifting his policy slightly, repeatedly stating his toughness with China after the Tibetan Rebellion.

In the end, Nehru was able to usher in a successful period for the relationship between China and India. He brokered peace, limited damage with the overwhelming military power on his border, and transitioned the relationship to a leader who had more hardline foreign policy strategy in the eyes of the public. He was able to withstand the distrust of the opposition and plant seeds for further Chinese-Indian cooperation after his leadership ended. The Lok Sabha pushed Nehru to understand the needs of military might, a necessity that became all too clear during the Sino-Indian Border War of October 20, 1962.

The China-India case study demonstrates a middle ground: a Level I negotiator attempting to appease the domestic populace while staying firm on his foreign policy priorities.

C. *Expanding the Win-Set with a Hard Line: The Case of Early 2015 Iran Negotiations*

On September 27, 2013, President Barack Obama took the historic step of opening dialogue with Iran with a call to Iranian President Hassan Rouhani. Committed to a negotiation on the Iranian nuclear program, Obama sought a signed deal to address nuclear and security concerns. This call was the highest level of dialogue between the two nations since 1979⁷⁷ and demonstrated the progress that negotiations had made leading up to that time. As the talks continued,

77. Arms Control Ass'n, *Timeline of Nuclear Diplomacy with Iran*, <http://www.armscontrol.org/factsheet/Timeline-of-Nuclear-Diplomacy-With-Iran> (last updated Oct. 2015).

International Atomic Energy Agency reports found that Iran complied with much of the interim deal in place, while still falling short on information requirements of past activities.⁷⁸

As negotiations continued in 2015, the Obama Administration showed signs of optimism regarding the likelihood of a deal. Testifying before the Senate Foreign Relations Committee on January 21, 2015, U.S. Deputy Secretary of State Antony Blinken said: “We assess that we still have a credible chance of reaching a deal that is in the best interest of America’s security, as well as the security of our allies.”⁷⁹ A report by the director general of the International Atomic Energy Agency confirmed Iran’s commitment to the interim deal.⁸⁰

On March 3, 2015, Prime Minister of Israel Benjamin Netanyahu delivered a speech to Congress, claiming that any deal with Iran would result in Iran obtaining nuclear weapons.⁸¹ Contrary to general diplomatic norms, Congress, but not the president, invited the prime minister. Six days following the visit, Senator Tom Cotton (R-Ark.) and forty-six other senators signed an open letter to the Parliament of Iran, warning that any deal would need to be approved by the Senate or it would be subject to revision by the next president.⁸²

A change in rhetoric from both Iran and the United States occurred after the congressional actions described above.⁸³ Prior to Prime Minister Netanyahu’s address to Congress, President Obama affirmed his commitment to congressional requirements, stating that Iran must halt key nuclear work for at least a decade. After the speech, President Obama noted the progress of the talks.⁸⁴ While still recognizing his willingness to walk away from the talks, the president sought to reassure the American populace of the progress being

78. See “Status of Iran’s Nuclear Programme in relation to the Joint Plan of Action” GOV/INF/2014/I (Jan. 20, 2014); “Implementation of the NPT Safeguards Agreement and relevant provisions of the Security Council resolutions in the Islamic Republic of Iran” GOV/2014/10 (Feb. 20, 2014).

79. *Id.*

80. IAEA, “Implementation of the NPT Safeguards Agreement and relevant provisions of the Security Council resolutions in the Islamic Republic of Iran” GOV/2015/15 (Feb. 19, 2015).

81. See Benjamin Netanyahu, Address to the Joint Session of Congress (March 3, 2015) (transcript available at <http://www.washingtonpost.com/blogs/post-politics/wp/2015/03/03/full-text-netanyahus-address-to-congress/>).

82. Cotton, *supra* note 1.

83. See Maysam Behravesh, *How Netanyahu Saved the Iran Nuclear Talks*, THE DIPLOMAT (Mar. 13, 2015), <http://thediplomat.com/2015/03/how-netanyahu-saved-the-iran-nuclear-talks/>.

84. Richard Cowan, *Obama cites progress in U.S.-Iran nuclear talks*, REUTERS (Mar. 8, 2015), <http://www.reuters.com/article/2015/03/08/us-iran-nuclear-obama-id-USKBN0M40S820150308>.

made. Additionally, he and his administration quickly and heavily criticized the Senate letter, denouncing it as “highly misleading”⁸⁵ and “absolutely incorrect.”⁸⁶

Similarly, on the Iranian side, what seemed like an implausible deal before the Netanyahu address and Senate letter suddenly became plausible after it. On March 3, Iranian Foreign Minister Javad Zarif dismissed the proposal of a ten-year moratorium as “unacceptable” and “excessive,”⁸⁷ but on March 5 stated that Iran was “prepared to accept certain limitations for a certain period of time.”⁸⁸ In response to the Senate’s open letter, the Iranian Foreign Minister demonstrated resilience, labeling it a “propaganda ploy” and that the agreement would not be just between the United States and Iran, but also the United Nations Security Council.⁸⁹

President Obama’s Level I approach to the Senate’s letter was notable for his decision to press ahead and let international attitudes, including those of Iran, move the Level II negotiation. It is possible that the letter expanded the win-set at the Level I table by forcing the negotiating counterparty (Iran) as well as President Obama himself to make further concessions, given their commitment to the deal. Demonstrating confidence and progress before the deadline for the deal would change the political reality for Level II negotiations, a strategy that eventually led to a successful deal.⁹⁰ This style of denouncing the Level II disapproval coalesced commitment at the Level I negotiation between the counterparties, likely helping to facilitate the deal.

V. CONCLUSION

In this Article, I have demonstrated the complexities in Level II actors influencing Level I negotiations. There are many opportunities

85. *Text of Joe Biden’s Statement on Senators’ Letter to Iran Leaders*, WALL ST. J.: WASHINGTON WIRE (Mar. 9, 2015 10:35 PM), <http://blogs.wsj.com/washwire/2015/03/09/text-of-joe-bidens-statement-on-senators-letter-to-irans-leaders/>.

86. Jeremy Diamond, *Kerry, Ayatollah denounce GOP letter to Iran*, CNN POLITICS (Mar. 12, 2015, 11:52 AM), <http://www.cnn.com/2015/03/11/politics/john-kerry-iran-letter-hearing/>.

87. Behraves, *supra* note 83.

88. *Id.*

89. *Id.*

90. President Obama and the Senate subsequently agreed to allow for a congressional vote on the deal after it was signed. Pub.L. 114–17. After both Iran and the United States along with the other P5+1 leaders agreed on a comprehensive nuclear deal, Congress had the opportunity to denounce the agreement. The initiative failed for lack of votes to denounce the deal. H.R. 3461, 114th Cong. (2015).

for Level II to influence Level I, and this can be observed in shows of disapproval from Level II actors against Level I negotiators.

In addition, I described some methods of Level I negotiators to approach these difficulties. First, The Logan Act example demonstrates preempting such an undermining stance from a Level II actor. While prosecutors have yet to use the Act, its influence stays with us even today through judicial, State Department, and political opinions.

Second, the case studies demonstrate different methods that Level I negotiators have used to quell or amplify disagreements in the service of extracting a greater negotiating result. The Central American case demonstrated a Level I negotiator willing to use and integrate with a disagreeable Level II actor. The China-India case study presents a middle ground: a leader who bifurcates his rhetoric in placating the domestic populace while staying firm on his foreign policy priorities. The Iran case demonstrates some benefit to expanding the win-set by maintaining a hard line against the Level II negotiators. While each complex negotiation will involve a mix of these strategies, each individual strategy itself sheds light on effective and ineffective tools for negotiators to use when faced with the two-level game negotiation.