

# DEBATING AGENT OF ACTION COUNTERPLANS (II): ARGUING CONGRESSIONAL DELEGATION

BY  
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Several months ago I wrote about the so-called “Morgan Powers” and executive order counterplans, and offered some advice for researching and debating them. In this essay I focus on the issue of congressional delegation, which references a somewhat complicated literature and one considerably larger than either the Morgan Power or EO positions. The “delegation/non-delegation” debates are alive and well (maybe more than ever) in legal, rational choice, political theory, regulatory, risk analysis, and historical scholarship, and range from highly technical discussions of decisionmaker preferencing models to abstract (and highly quotable) discussions about the implications of delegation for the American democratic project. As such, the delegation/non-delegation position is increasingly popular in some parts of the country as an all-utility generic on the privacy topic, especially winnable when the affirmative takes a clear position about who implements their plan. Because the Congress has historically delegated a vast amount of its decisional war power to the Pentagon and the President, there is some likelihood these issues will be debated again on the new “weapons of mass destruction” policy debate topic.

## What Congressional Delegation is All About, & Why It Matters

The American Constitution specifies which branch of government controls each specified area of authority. This system of separated powers means the Congress is (among other responsibilities) charged with raising and regulating armies, overseeing executive branch activity, controlling public finances (the so-called “power of the purse”), while the President can declare war, enforce laws, negotiate treaties, and veto legislation he finds objectionable. Although the separation of powers doctrine is a hallmark feature of American constitutionalism, much emulated worldwide and undoubtedly a major explanation for this government’s systemic stability, over time the evolution of governmental responsibility has challenged the division of labor enacted by the Framers. The presidency of Franklin Roosevelt saw a vast expansion of the federal government’s bureaucratic

power, a shift in which the Congress has become complicit despite the risk of giving up too much of its rightful authority.

Because the constitution is so explicit in laying out the division of labor, the Congress cannot simply stand aside and permit executive branch bureaucrats and political appointees to assert authority not explicitly granted them. Instead, the Congress must, by act of legislation, explicitly “delegate” its power to the executive and his appointees, since the Constitution plainly gives Congress the right “to make all Laws which shall be necessary and proper for carrying into Execution” their powers.

## Why Delegation Might Be Good.

Although it seems unusual that Congress would voluntarily agree to give up its power to someone else, there are actually many good reasons why it regularly does so. While the Congress is institutionally skilled at providing oversight, it is ill-equipped to create detailed regulatory schemes for circumstances of uncertainty requiring quick and flexible reaction. The Congress moves slowly, and so in the area of warmaking, to take one example, it wouldn’t make sense to confine battlefield commanders to instructions from the world’s slowest debating society.

Congressional delegation is also apparently justified when the institution cannot find a way to take decisive action on critical issues. The best example of this may be the delegation process Congress authorized for dismantling military bases. With the end of the Cold War, base closures were an obvious target of budgetary savings opportunity. But while all agreed in the abstract that “bases should be closed,” no individual member wanted to give up the base in her or his district, or suffer the wrath of a colleague by putting their base out of business. When then-Secretary of Defense Dick Cheney, now the nation’s vice-president, recommended that all the closures occur in Democratic districts (his thinking: if Democrats want a peace dividend, let them pay for it), the reluctance to act was made even greater. The result was policy paralysis, where all could see the right outcome but few had the political courage to embrace it. To break the logjam of legislative inac-

tion and achieve some of the \$5-6 billion in potential savings, Congress “delegated” its authority to decide base locations to an independent commission, agreeing to vote up or down on whatever entire list of closings the commission recommended, without amendment. The bases got closed (the votes have been close to unanimous in subsequent years) and the Congress took final responsibility for the outcome without appearing to single out members for district-by-district retribution.

Delegation can be defended on other pragmatic grounds. One advantage to shifting decisionmaking power to administrators is that it lets Congress off the hook for making major all-or-nothing decisions favoring one party over another. Delegated authority typically permits more nuanced outcomes than are possible with the blunter instrument of specific legislation, and arguably the public interest is better served as a result. And this greater nuance in approach does not entirely exclude Congressional oversight, for after all, regulatory policies are often changed when Congressional overseers hear from angry constituents and demand different implementation.

There is a healthy debate regarding the extent of delegated powers. Some scholars accuse the Congress of having given up too much authority to the president — among these is Louis Fisher, who recently distinguished between delegation and what he derisively called “abdication” (“War and Spending Prerogatives: Stages of Congressional Abdication,” *St. Louis University Public Law Review* [2000]). “Rational choice” scholars, whose theories of congressional behavior start with the assumption members will first and foremost act in ways designed to win reelection, see excessive delegation as the natural consequence of members’ individual behavior, where representatives occasionally (or even inevitably) prefer their own electoral self-interest at the expense of the institution’s prerogatives.

**Delegation and Democracy.** The major argument against delegation is that when the Congress turns its power over to unelected bureaucrats, it does damage to American democracy (this is Fisher’s final concern, but is also widely discussed in the

literature). The noted constitutional scholar Theodore Lowi has called the practice "legisicide" (Lowi, "Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power," *American University Law Review* 36 [1987]: 295). Others, concerned that the original constitutional framework not be subverted in any way, defend the "rule of law," another common theme in this literature.

Whether the democracy concern is well justified or not comes down to several factors. One is the question of whether the public's interests are best served by the Congress or the President. While the Congress is the "people's house," and while members of the House stand for more frequent election and represent more specific constituencies than the President, the U.S. President is also publicly accountable in ways the average member of Congress is not. Some scholars argue the situation is mixed; as one said, "the Presidency may be more capable of fostering public dialogue about certain programs, but may have incentives toward autocracy in other areas of decision making" (Douglas Williams, "Congressional Abdication, Legal Theory, and Deliberative Democracy," *St. Louis University Public Law Review*, 19 [2000]: 76). Which is to say, "it all depends."

Or does it? While one can theoretically compare congressional to executive action, in fact the issue is almost never one where the President of the United States visibly takes over program control on a day to day basis; nor can we usually talk credibly about Senators or Representatives exercising close oversight. Instead, the more accurate comparison is between oversight conducted by congressional staffers and oversight provided by executive branch regulators. Jerry Mashaw has argued that delegation has produced a system where "most public law is legislative in origin but administrative in content" (his 1997 book is *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law*; this quote at p. 106).

For other commentators, the democracy issue comes down to voting behavior. That is, if delegation so obviously undermines public accountability, we should expect to see voters backlashing against members who support vague laws delegating too much authority. Obviously we don't. David Schoenbrod claims this is so only because delegation is a form of electoral hoodwinking, where the Congress seems to be acting but where the mechanics of

their action are shielded from view (see his 1993 book *Power Without Responsibility: How Congress Abuses the People Through Delegation*). Whether he is right or not, it is hard to see how democracy is undermined when voting behavior continues to support pro-delegation members. It is perhaps even harder to imagine the public would pay more attention to public policy debates if the Congress delegated less by writing much more detailed legislation.

The "rule of law" concerns are more difficult to judge, and sometimes advocacy of the separated powers regime can sound more nostalgic than relevant. But a serious claim lurks beneath even the more extreme rhetoric: defenders of separated powers oppose delegation because it basically performs an end-run around a carefully planned process for public deliberation and compromise. And in an age where the government employs literally hundreds of thousands of regulators, it would be impossible for even well-intentioned members of Congress to competently perform their oversight function.

In response, defenders of delegation argue members of Congress are operating exactly as the Framers would have expected. After all, the arguments for Constitutional ratification made in the Federalist Papers explicitly defend the new structure as well-designed precisely because it relies on members of Congress to act in their own self-interest, and on behalf of their constituents' self-interests. If delegation helps to better "bring home the bacon" by producing more flexible policy outcomes, so much the better.

**Delegation & the Courts.** For the most part, instances of Congressional delegation have not raised actionable legal issues, and so the courts have largely allowed delegation to continue without interference. In fact, until Roosevelt's New Deal legislation, delegation was hardly debated at all by the courts, including the Supreme Court. Part of the reason for this is that congressional power was itself narrowly defined; and if the Congress had little power in the first place, delegating it to the executive branch was unlikely to raise problems.

In judging whether delegations have been appropriately enacted or not, the Supreme Court tends to still rely on a three part standard laid out in many cases, including *Industrial Union Department (AFL-CIO) v. American Petroleum Institute* (448 U.S. 607, 1980). There, Justice Rehnquist explained these three functions of the so-

called "non-delegation doctrine": (a) The courts should act (in delegation cases) to ensure the most important decisions are being made by the Congress, (b) When delegation occurs, the Congress must plainly instruct regulators what "intelligible principle" should guide their administrative decisions, and (c) Regulatory action in instances of delegation must be found "reasonable" when held up against this "intelligible principle." In this famous case, pertaining to the regulation of benzene, the Court ruled that OSHA overreached its delegated authority when it issued rules outlawing all benzene use in industrial production.

Beyond these general criteria, federal law and judicial precedent hold agencies accountable in many other ways. The courts routinely require that regulatory bodies implementing delegated power do so "rationally" and "without discrimination." And the Administrative Procedures Act, adopted by Congress, lays out extensive oversight guidance stipulating the need for "substantial evidence" and the avoidance of regulating in an "arbitrary and capricious way." It is also true that when the Congress delegates, it usually layers the grant of power with detailed procedural requirements. In delegating military base closures, for instance, the implementing law got so particular, it even specified how many commission members could have ever been employed by the Pentagon (answer: no more than half). And in one of the most influential nondelegation cases of recent times, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* (467 U.S. 837, 1984), the Supreme Court found that when courts review regulatory decisionmaking, agency action should be presumed legitimate unless it specifically flaunts legislative direction or is otherwise "unreasonable."

Because the Supreme Court has not until recently vigorously enforced a non-delegation doctrine, the reach of federal regulation has become extraordinarily large, literally touching on the consumption patterns of every American, down to the smallest purchase and workplace behavior. In fact, the typical invocation of nondelegation by the courts today usually does not strike laws because the Congress overdelegated, but because agencies fail to interpret statutes in narrow enough ways. As Williams put it, "the maturation of administrative law has thus provided an environment in which courts have made a general peace with broad congressional delegations of author-

ity” (Williams, 2000, p. 97).

### **How the Delegation Literature Suggests Counterplan Ground**

Delegation issues are fairly common on some of the major issues raised by the privacy resolution. The landmark legislation which has finally produced expanded privacy protections for American medical records used a process of delegated authority: the Congress delegated power to craft specific records rules to the President, although the grant of power was conditioned on a failure of the Congress to act within a certain time frame. Unsurprisingly, Congress failed to meet its own deadline, which empowered the Clinton Administration to propose and then approve a strengthening of medical records laws. In another context, the development of the famous “Don’t Ask, Don’t Tell” regulations governing the service of homosexuals in the military, the President attempted to use delegated power but was constrained when the Congress acted decisively to sustain the ban on gay and lesbian service, something akin to delegation-in-reverse.

The most common use of the scholarly delegation debates I’ve reviewed here has been when negative teams counterplan against cases modifying executive agency policies. To take just one example, some debaters are defending an affirmative this year which has the Federal Aviation Administration (FAA) cancel its efforts to “profile” dangerous travelers, a policy which appears to single out Arab-Americans for discriminatory treatment as they move through airport security checks. Getting rid of this program would restore the privacy rights of minority group members who fly (that is, they wouldn’t be unjustifiably searched so frequently). The question is: how will the plan be implemented? If the plan simply has the FAA rescind its own program, the negative might counterplan by having the Congress rewrite the authorizing legislation for the FAA to specifically cancel this program or phase out its funding. The obvious force of such a counterplan is that it lets the negative solve the harms specified by the affirmative (discrimination, etc.), since whether the FAA does it on its own or under Congressional order, the profiling stops. In fact, the counterplan might claim to solve even better than the plan, since an order originating from outside the agency is more likely to be enforced than one initiated within the same chain of command that began the program in the first place. But the counterplan also achieves the advantage of reducing del-

egation, since it essentially has the Congress take back its authority to regulate air travel. By implementing the plan through Congressional action, the counterplan can claim to help restore democracy and the rule of law.

There are circumstances where the delegation counterplan can be run the other way, although this has been less common in privacy debates. Were the affirmative to have the Congress pass a law expanding privacy protections on the Internet, for instance, the negative could counterplan by having the Congress simply pass vague framework legislation to be implemented by the Department of Commerce. That is, the counterplan is an act of delegation. The net benefit story for such a counterplan would be to read pro-delegation evidence, perhaps claiming that administrative flexibility is necessary given the fast-developing world of E-commerce, with a business confidence impact.

As can be easily seen from these examples, and as is true with most of the popular agent-of-action counterplans, a lot depends on how the plan is written and defended. Teams who are called upon to specify the process of implementation, and most are, must decide which side of the delegation debate they want to defend.

### **Some Issues to Remember When Debating Delegation**

I close with three pieces of advice for students debating or defending the delegation literature, all of which focus on strategic and net benefit concerns. A closer reading of the literature will produce many more insights regarding the strengths and weaknesses of these counterplans.

A first issue centers on the benefits of delegation. I recommend that you *think through the likely real world consequences of delegation*. In several of the debates I’ve heard students read, and their opponents unthinkingly accept, net benefit evidence that rolling back delegation would enhance democracy by empowering the Congress relative to the President. As I’ve mentioned, this claim seems reasonable given the prominence of the democracy argument in the literature. But one needs to think through the likely actual consequence of slight delegation retrenchment. One is suggested by Doug Williams, who argues that Congressional specificity in law-drafting would not shift power back to Congress, but only over to the courts. He explains it this way:

We enjoy a common law system in which nice adjustments to legal obligation are made by distinguishing factual predicates. In light of that practice, it is unlikely that a reinvigorated nondelegation doctrine would squeeze discretion out of the system. It is much more likely that the discretion would be shifted from the (usually) highly visible and indirectly accountable (via presidential accountability) agency proceedings to less visible prosecutorial processes and largely unaccountable judicial processes. It is hardly clear that, given the enormous discretion enjoyed by prosecutors and the courts — particularly on matters of remedy — that a vigorous nondelegation doctrine would accomplish any of its recognized purposes. (Williams, 2000, p. 92)

Or, as he puts it a bit later in the essay:

Assume counterfactually that all possible discretion could be eliminated through precisely worded statutory mandates addressed both to administrators and the courts. Would the result comport with basic democratic aspirations? Hardly. The likely result would be ‘wonderfully wooden administrative behavior,’ which, ‘on that ground alone would be highly objectionable.’ (Williams, 2000, p. 100)

If Williams is right either way, the democracy net benefit claim is turned: if strengthened nondelegation shifted power to the courts, the least accountable of the branches, or to straitjacketed regulators now unable to respond with flexibility to local circumstances, we would be worse off than before.

A related point is that debaters on the affirmative, when they are defending delegation, should *carefully scrutinize the marginal net benefit claims made for the counterplan*. Students should nail down the excessive democracy and separation of powers claims they will hear from their opponents. Remember, the current context of American administrative law assumes a broad acceptance of delegation; the nation now works under a vast regime of delegated administrative rulemaking. In such a context, it simply strains credulity to say that one specific instance of nondelegation (namely, the counterplan) will roll back this ocean of accepted delegation, producing democratic renewal. There is no reason to believe single a motion a trend of renewed commitment to the oversight function. Nor is there any reason to believe the courts

will read the counterplan as setting a nondelegation precedent.

Of course, smart counterplan advocates will reply with some version of the now-standard rhetoric: "The counterplan totally captures the benefits of the case, 100%. And so, even if you think the democracy/SOP benefits are slight, they tilt the net benefit calculus our way. Any risk of enhanced democracy justifies voting for the counterplan." But in the context of this constitutional issue, there is no reason to believe the democracy benefits claimed from abstract evidence provide any linear advantage for the counterplan. In a world where literally millions of decisions have been delegated from one branch of government accountable to the voters (Congress) to another also (but perhaps less) accountable branch (the President), the decision not to delegate one plan will make no practical oversight difference whatsoever, and implicate the broader democracy/SOP benefits in the most vanishingly, infinitesimally small way. Debaters need to say so, or they will surely suffer the consequences of the standard "tiebreaker" rhetoric.

It follows from these facts that the burden of proving the particular benefits of delegation in a specific instance fall on the advocates of the counterplan. As Dan Kahan put it, we must "ask not which conception of democracy and corresponding position on delegation are 'best' in the abstract, but which make the most sense in a particular regulatory setting, given the values and interests at stake there," which is to say "whether delegation is desirable is decided locally, not globally" (Kahan, "Democracy Schmemocracy," *Cardozo Law Review* 20 [1999]: 804). Counterplan advocates simply cannot be allowed to pontificate about the general marvels of democracy; the burden is on them to prove that in this particular setting (say, the FAA) non-delegation produces specific policymaking benefits.

*Can the nondelegation debate be avoided simply by writing a vague plan? Emphatically no!* In fact, excessively vague plans are the most vulnerable to delegation challenges, since they arguably embody the most dangerous forms of Congressional abdication. Here is an instance where plan specificity is beneficial: the more specific the plans delegation (that is, the more carefully it instructs the relevant agency regarding its job) or nondelegation, the less vulnerable it is to the charge that it cedes too

much Congressional authority.

The literature on administrative rulemaking and delegation is vast, and fascinating. Beyond the essays I've cited already, I recommend that debaters researching this topic consult the following sources: (1) David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers* (Cambridge: Cambridge Univ. Press, 1999). This book is must reading for those studying the politics of delegation. A valuable "Cliff Notes" version of their position is contained in "The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach," *Cardozo Law Review* 20 (1999); (2) A nice review article covering the issue from a "rational choice" perspective is Jeffrey Segal's "Separation of Powers Games in the Positive Theory of Congress and Courts," *American Political Science Review*, 91 (March 1997); (3) For a good introduction to the question of whether the nondelegation doctrine is dead or not, see Cass Sunstein's "Nondelegation Canons," *University of Chicago Law Review* 67 (Spring 2000). See also Huefner's review of the recent Supreme Court strike-down of the line item veto on grounds related to delegation: Steven Huefner, "The Supreme Court's Avoidance of the Nondelegation Doctrine in *Clinton v. City of New York*: More Than 'A Dime's Worth of Difference,'" *Catholic University Law Review* 49 (Winter 2000); and (4) A strong defense of delegation and of the administrative state is made by the legendary University of Kansas debater Frank Cross (now the Herbert Kelleher Centennial Professor of Business Law at the University of Texas), in David Spence and Frank Cross, "A Public Choice Case for the Administrative State," *Georgetown Law Journal* 89 (November 2000).

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